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*Handbook on the Techniques of Judicial Interactions in the Application of the EU Charter*

## ***FREEDOM OF EXPRESSION AND COUNTERING HATE SPEECH***

IN THE FRAMEWORK OF THE PROJECT “E-LEARNING NATIONAL ACTIVE CHARTER TRAINING (E-NACT)”



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## Part I – Analysis of the legal area

### 1. The basics: what is freedom of expression?

#### *1.1. The concept and features of freedom of expression*

The freedom of expression of each citizen and of the media plays a fundamental role in society is considered one of the pillars of a democratic society and an essential precondition for ensuring the protection of other human rights of individuals.<sup>1</sup> As a matter of fact, the freedom of every citizen to express freely his or her ideas nourishes a dialogue that in the end serves not only to the individual, but also to the society as a whole.

In many European countries, freedom of expression is the cornerstone of the democratic order, meaning that it is not possible to talk about democracy in absence of an effective flow of ideas and comparison among them.<sup>2</sup>

The tight connection between freedom of expression and democracy was affirmed in several occasions by national courts: in Italy the Constitutional Court underlined several times that a democratic society is based on effective freedom of expression.<sup>3</sup> In Germany, the Federal Constitutional Court declared that freedom of expression and freedom of information are human rights enshrined in the Constitution, so that their exercise requires constitutional protection.<sup>4</sup> In Spain, the Constitutional Tribunal emphasized that freedom of expression and information are the basis of the freedom and independence of the media, together with pluralism and other constitutional values.<sup>5</sup>

Even before the entry into force of the Lisbon Treaty and the integration of the Charter of Fundamental Rights of European Union (hereinafter, EU Charter) within EU primary law,<sup>6</sup> the CJEU considered freedom of expression to be one of the core principles of the European legal order.<sup>7</sup> After the recognition of the legally binding status of the EU Charter, EU institutions are even more expected to respect this right when exercising their powers and competences.

As a fundamental right, freedom of expression permits to each of us to express our thoughts and opinions orally, or through any available means; or on the contrary, to remain silent. It also ensures that we are informed of what is going on around the world and our closer vicinity.

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<sup>1</sup> See ECHR, [Handyside v the United Kingdom](#), paras. 48 – 50

<sup>2</sup> Rolla, G. (2010), *La tutela costituzionale dei diritti* (Milano: Giuffrè); Verpeaux, M. (2010), *Freedom of expression: in constitutional and international case law* (Strasbourg: Council of Europe Publishing). In addition to the judgments of the German and Spanish constitutional courts mentioned in this paragraph, see also the judgment of the Belgian Constitutional Court in Case no. 91/2006, judgment of 7.06.2006.

<sup>3</sup> Starting from Italian Constitutional Court decision 105/1972, then through decisions 826/1988, 348/1994 and 466/2002, the Court affirmed that freedom of expression and the right to be informed are two sides of the same coin and both aim to define and thrive a pluralistic environment.

<sup>4</sup> Judgment of 16 June 1981, no. 1 BvL 89/78, in BVerfGE 57, 295

<sup>5</sup> Judgment of the Spanish Constitutional Court 31/2010, 28 June 2010

<sup>6</sup> Mastroianni, R. (2010), 'I diritti fondamentali dopo Lisbona tra conferme europee e malintesi nazionali', *Diritto pubblico comparato ed europeo*, IV, xxi-xxv

<sup>7</sup> For instance in judgment of 22 October 2009, *Kabel Deutschland*, at para. 37: "It should be noted that the maintenance of the pluralism which the legislation in question seeks to guarantee is connected with freedom of expression, as protected by Article 10 of the European Convention on Human Rights and Fundamental Freedoms, which freedom is one of the fundamental rights guaranteed by the Community legal framework".

Academic literature and jurisprudence have identified the following aspects as falling under the scope of freedom of expression, as guaranteed under the ECHR, the EU Charter and national constitutions:

- the right to freely express oneself;
- the right to use any available means to disclose (one's) own thought;
- the right to be informed;
- the right to be silent.<sup>8</sup>

From each of them, we can derive sub-rights and obligations that have an impact on the choice of regulatory tools within several legal areas, and in particular in the media field. For instance, the right to use any available means to disclose one's own thought includes messages transmitted using voice or paper, but also artistic expression, including music, videos, paintings, sculptures, comics, and the like. All these can obviously be broadcasted using Internet, which is now the most common means of communication. In all these cases, the regulation applicable at state level may be different, but the substance of the fundamental right of freedom of expression does not change, applying equally across all media.

From a different perspective, we may distinguish between an active and a passive aspect of freedom of expression.

The active facet of freedom of expression is the 'right to inform', in the sense of providing information (such as in the case of journalism, but not limited to this) through any means of dissemination (technologically neutral).

Moreover, in case of clash between the right to inform and other fundamental rights, such as data protection and reputation, the balance may take into account the importance of the right to inform as a contribution to public debate, in particular in case of media. As a result of the development of the jurisprudence and the impact that this had on legislation, the right to inform was used as a justification to provide a special treatment to media and journalists. As a matter of fact, journalists:

- may be 'exempted' from liability for insult or defamation,
- may process personal data without consent of the individuals, and
- may exercise a right to access to sources against public bodies, which have an obligation to provide information.

However, as will be described in more detail below, the legal framework provided at national level as regards such conflicts differs depending on the interpretation of the freedom of expression in terms of constitutional guarantee and its balance with the other fundamental rights.

The passive facet of freedom of expression is the right to be informed. It is clear that where there is a right to impart information, there is a corresponding right to receive information. Thus, citizens may exercise their right to be informed by those who hold information, such as in case of access to documents held by state authorities. But also, citizens may exercise their right to be informed by those who hold the means of information, such press and media in general. For instance, courts have inferred several obligations for broadcasting media: TV is commonly regarded as a general public service and it has a crucial role in the guarantee of internal state pluralism, thus it should ensure impartial and accurate information and a range of opinions and comments, with stricter obligations for public broadcaster rather than private ones.<sup>9</sup>

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## 1.2. Legal provisions at European level

Owing to its essential role in (and for) a democratic society, freedom of expression has been acknowledged as a human right not only at European and national level, but also at international level.<sup>10</sup> What follows is a brief overview of the main legal sources of freedom of expression.

### European Union

#### Primary law

Before the entry into force of the EU Charter, freedom of expression was not proclaimed nor included in the text of EU primary law. As a matter of fact, neither the Treaty Establishing the European Community (EC Treaty) nor the Treaty on European Union (TEU) explicitly guaranteed a subjective right to freedom of opinion or free speech. The consolidation of the Treaties with the amendments brought in 2007 by Treaty of Lisbon provided some hints regarding the gradual interest of the Union for the protection of human rights as shown by Article 2 TEU.<sup>11</sup>

Only through the reform of Article 6 TEU, with the legal status conferred to the EU Charter, “*the system of fundamental rights protection in Europe is expected to reach apparently the highest formal level of individual rights protection that has ever existed in the European Communities*”.<sup>12</sup> Freedom of expression now receives explicit recognition and protection under the EU Charter which is legally binding on the institutions, bodies, offices and agencies of the Union, as well as on the Member States “*when they are implementing Union law*”.<sup>13</sup> Within the boundaries of its scope of application, the Charter can be enforced before Union and national courts. Considerably important, Article 52(3) CFR stipulates that, when the Charter “*contains rights which correspond to rights guaranteed by the ECHR, the meaning and the scope shall be the same as enshrined in the Convention*”. In other words, the ECHR acts as a minimum level of protection as regards “corresponding rights”.

Interestingly enough, the Explanations to the Charter – which must be taken into due account when interpreting its provisions<sup>14</sup> point out that the meaning and scope of the “corresponding rights” shall be determined also by having regard to the case law of the Strasbourg Court, and that the duty of parallel interpretation laid down by Article 52(3) CFR also encompasses the limitations provided by the ECHR. It becomes official in primary law that the human rights of the ECHR are to be applied among the EU.<sup>15</sup>

Article 11 of the EU Charter grants a clear right to freedom of expression.

#### Art. 11 EU Charter

<sup>10</sup> For a detailed analysis of the international sources that include Freedom of expression as a fundamental right please see the [Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression](#), 2016. See also L. Woods, Article 11, in S. Peers et al., Commentary to the EU Charter, 2014.

<sup>11</sup> Article 2 TEU provides that “*the Union is based on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities*”.

<sup>12</sup> A. B. Capik, Still lost in space – searching for an effective enforcement of Fundamental Right under Lisbon Treaty, in Piontek, E., /Karasiewicz K., Quo vadis Europa?, III, UKIE Warsaw 2009, p.449

<sup>13</sup> Cf. Article 51(1) CFR. According to the most recent case law of the CJEU (see, notably, [Case C-617/10 Akerberg Fransson](#) [2013], this provision shall be read as a codification of the Court’s case law on the scope of application of fundamental rights as general principles of EU law; this means that the Charter applies to all national measures that fall “within the scope of Union law”).

<sup>14</sup> Cf. Article 6(1) TEU and Article 52(7) CFR

<sup>15</sup> Cf. the explanation of Article 52(3) CFR



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

Its wording of its first paragraph is exactly the same as that of Article 10(1) ECHR, including the reference to the rights to ‘impart’ and to ‘receive’ ideas and information. Although the mention of the possibility for the state to require licensing is absent from the EU Charter, it is strictly provided for in the provisions of Article 11(2) that freedom and pluralism of the media shall be respected.

Moreover, the freedom of expression as worded in the CFR does not include any paragraph on enumerated restrictions to the freedom. Nevertheless, as anticipated, the Explanations of the Charter make clear that Article 11 CFR corresponds to Article 10 ECHR, with the consequence that the meaning and scope of this right are those guaranteed by the ECHR.<sup>16</sup>

### Secondary legislation

Freedom of expression is nowadays protected but also promoted at a secondary law level through recent directives, Council decisions and resolutions on specific matters as broadcasting, licensing or internet.

For instance, the [Audiovisual media service Directive 2010/13/EC](#) is a way to regulate television broadcasting, recalling the ‘growing importance’ of audiovisual media for democratic societies, regarding also education and society. Its paragraphs 16 and 48 recall for example the compliance of the Directive to the freedom of expression enshrined in Article 11 EU Charter.

Similarly in the [General Data Protection Regulation n. 2016/679](#), whereas (153) affirms that the reconciliation between data protection framework, defined by the Regulation, and the rule protecting freedom of expression is a task for Member States, allowing for specific exemptions as regards the processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression.<sup>17</sup>

Another example can be given through the [Council Decision 2006/515/EC promoting cultural diversity and expression](#) defined in its Article 4, and recalling Universal Rights. This Council Decision follows up the UNESCO Convention having the same name and permits to approve it on behalf of the Union. It recalls human rights and promotes a diversity of cultural expressions, enlarging again the scope and definition of freedom of expression.

### European Convention of Human Rights

The freedom of expression is enshrined in Article 10 of the ECHR and extensive protection has been developed by the ECtHR in its jurisprudence. The ECHR confers a right to express and hold opinions, ideas and information without suffering from authorities’ interference. Furthermore, it also confers a right for the public to receive these ideas.

### Article 10 ECHR

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<sup>16</sup> See below.

<sup>17</sup> See Article 85 of the Regulation. See in more detail below at para. 4.3

1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.”

Article 10(1) ECHR confers a broad protection to freedom of expression; and it extends to the protection of commercial expression, artistic expression and political expression. This difference of protection will tend to be more favorable to political speech or statement when conflicting with other freedoms or rights. On the one hand, States have negative obligation to abstain from interference towards the exercise of freedom of expression; on the other, there may be positive obligations to protect such right, even against the interference by private persons.<sup>18</sup>

The protection offered through Article 10 ECHR is a wide one, constantly progressing thanks to the prolific ECtHR’s jurisprudence. When there is an interference with the freedom of expression, the ECtHR relies on a three-stage test that the limitation must pass in order to be legitimate under the Convention:

- 1) the interference must be prescribed by law;
- 2) it must pursue a legitimate aim as stated in Article 10;
- 3) it must be necessary in a democratic society, which implies verifying whether the national intervention corresponds to a “pressing social need”.<sup>19</sup>

Once passed these stages, the interference has to pass the proportionality test, which in the field of freedom of expression entails certain particularities. The proportionality test must consider the appropriateness of the measure to achieve its stated aim,<sup>20</sup> the possibility of adopting less intrusive measures by a state.<sup>21</sup> However, the jurisprudence of the ECtHR does not show a perfect consistency as regards the assessment of proportionality, which could lead to different outcomes according to the context and the assessment adjusted on it.<sup>22</sup>

The limitation may be also a result of the interference of an equally protected fundamental right. In this case the ECtHR’s analysis consists in finding the right balance between the freedom of expression and the conflicting freedoms. The interference can be legitimate when is justified by an overriding requirement of public interest<sup>23</sup> or by a legitimate aim such as the protection of the rights of others.<sup>24</sup>

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<sup>18</sup> See ECHR, [Research report - Positive obligations on Member States under Article 10 to protect journalists and prevent impunity](#), 2011.

<sup>19</sup> ECtHR, [Handyside v UK](#), cit., para. 48

<sup>20</sup> ECtHR, [Lingens v Austria](#), cit.

<sup>21</sup> ECtHR, [Mamère v. France](#) (2006).

<sup>22</sup> L. Woods, ‘Freedom of Expression in the European Union’, European Public Law, Volume 12, Issue 3, Kluwer Law International, 2006, p. 376

<sup>23</sup> Decision as to the admissibility by the ECtHR: app. no. 40485/02, [Nordisk Film & TV A/S v. Denmark](#) (2005).

<sup>24</sup> ECtHR, [Hachette Filipacchi Associés \(Paris-Match\) v. France](#) (2007).

The freedom of expression is then often balanced with other rights. This is, first of all, a consequence of the fact that it does not qualify as an ‘absolute right’. Second, the conflicting freedoms are balanced because there is no hierarchy in the ECHR between ‘relative’ rights. Moreover, Article 10(2) ECHR allows States to restrain the scope of the freedom in specific circumstances.

Alongside with the proportionality test, the ECtHR has developed the notion of ‘margin of appreciation’. The ECtHR “*reserves to itself the position of final arbiter*”,<sup>25</sup> however it also restrains itself by using the notion of “margin of appreciation” which is recognised to the States vis-à-vis the assessment of a restriction to the freedom. Through the margin of appreciation, the ECtHR manages the difference between the signatories States.

This margin is wider in areas involving moral choices,<sup>26</sup> and narrower in others such as political speech or criticism of the judiciary.<sup>27</sup> This is a factor that leads to differences as regards the protection provided to the three above mentioned levels. Furthermore, it also confirms the existence of a space for balance activity and legislative and or judicial discretion in the assessment of freedom of expression.

### National level

The freedom of expression principle is the first and main reference that at national level shapes the regulatory strategies regarding the media sector. Although differently framed in each country, freedom of expression is legally protected in almost all European countries.<sup>28</sup>

Most national constitutions include this freedom amongst the general principles associated with citizens’ rights. Its essential content includes the possibility to have and express opinions, either directly or indirectly related to the role of the media in disseminating information and providing the citizen with a range of different views and opinions. Only in a few countries the relevant constitutional provisions make a clear distinction between freedom of expression and freedom of the press and devote specific provisions to the latter (introducing constitutional articles on this point).<sup>29</sup>

The distinction between freedom of the press - traditionally associated with the printed press - and freedom of the media in general is not so neat in constitutional clauses. Owing to historical reasons, the drafting of the constitutional principles in several countries dates back to the period when only the printed press was available to inform the citizens; thus, the formulation of freedom of the press in the respective languages is clearly connected to this origin. In those countries where no constitutional reform addressed freedom of the press, only through the jurisprudence of constitutional courts was the concept extended to the subsequent technological developments, namely broadcasting first and then eventually to new media.<sup>30</sup>

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<sup>25</sup> L. Woods, ‘Freedom of Expression in the European Union’, European Public Law, Volume 12, Issue 3, Kluwer Law International, 2006, p. 377.

<sup>26</sup> ECtHR, [Müller and others v. Switzerland](#) (1988).

<sup>27</sup> ECtHR, [Perna v Italy](#) (2003).

<sup>28</sup> See Centre for Media Pluralism and Media Freedom, [Media Pluralism Monitor](#), 2016, 14.

<sup>29</sup> See i.a. the constitutional clause in Belgium, Romania, and Greece

<sup>30</sup> One exception to this general trend is the Belgian case that shows the conflicting interpretations given by the Constitutional Court and civil courts regarding the extent to which the constitutional principle applies to new technologies. The specific articles of the Belgian constitution refer literally to ‘press’, but in the decisions of the highest civil court freedom of the press and the prohibition of censorship is interpreted restrictively as applying only to the written press, and not to radio or television. On the contrary, the Constitutional Court adopts a more technological neutral approach, shown in particular in the decision regarding the recently adopted legislation on

The presence, or absence, of the distinction between 'old' and 'new' media is not without consequences. For instance, the use of a different medium can affect the balancing exercise of the courts, leading to different outcomes when assessing the proportionality of state measures restricting freedom of expression on the different media.<sup>31</sup>

### *1.3.Limitations*

As mentioned above, freedom of expression is not an absolute right, rather it may be limited in case of conflicting interests. However, its limitations should be based on specific criteria identified by European provisions and jurisprudence.

#### European Union

The EU Charter contains a general clause regarding the possibility to limit rights and freedoms where they are in conflict.

##### Art 52 EU Charter

**1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.**

2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.

**3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.**

4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.

5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.

7. The explanations drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.

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protection of journalistic sources, where it intervened so as to enlarge the scope of application of the law to anyone exercising journalistic activity, regardless of the means of expression and the status they have

<sup>31</sup> See for instance in ECtHR, [Mouvement Raëlien Suisse v Switzerland](#) (2012), para. 54, where the Court expressed the opinion that the impact of information available on a poster displaying a reference to a website address is multiplied, as information can be accessed on the Internet by anyone, including minors. In this case, states can have a legitimate interest in taking measures that may restrict the right to impart information through this medium, and the restriction will be more justified when it does not prevent the expression of beliefs by other means of communication

Art 52 EU Charter is a general clause applicable to all fundamental rights included in the EU Charter, thus also to art 11. A specific correlation exists among EU Charter general clause and art 10 (2) ECHR as regards the legitimate limitations to freedom of expression principle.

Therefore, any limitation to freedom of expression should comply with the following criteria:

- have a legitimate aim, i.e be aimed at general interest recognised by the Union or the need to protect the rights and freedoms of others;
- be necessary to the objective pursued;
- be proportionate to the objective pursued.

The necessity of the measures is evaluated on a case-by-case basis and take into account the relevance of the reasons presented by national authorities in justifying the restrictive measures. In it important to note that in this case, the CJEU (according to the jurisprudence of the ECtHR) provides for a relatively wide margin of appreciation to the national authorities in terms of existence of the so-called “pressing social need”.<sup>32</sup>

The proportionality is evaluated by the CJEU in terms of correspondence between means and ends, again taking into account the margin of appreciation of Member States – though in this case the jurisprudence of the CJEU is not always consistent.<sup>33</sup>

### European Convention of Human Rights

The formulation of Article 10(2) ECHR provides for a clear example where the protection of the fundamental right is coupled with the recognition of the need to balance it with conflicting rights able to restrict its scope.

The ECtHR’ seminal statement on the treatment of Convention rights that happen to be in conflict with the rights of others can be found in the [Chassagnou v France](#) judgment:

*“In the present case the only aim invoked by the Government to justify the interference complained of was “protection of the rights and freedoms of others”. Where these “rights and freedoms” are themselves among those guaranteed by the Convention or its Protocols, it must be accepted that the need to protect them may lead States to restrict other rights or freedoms likewise set forth in the Convention. It is precisely this constant search for a balance between the fundamental rights of each individual which constitutes the foundation of a “democratic society”. The balancing of individual interests that may well be contradictory is a difficult matter, and Contracting States must have a broad margin of appreciation in this respect, since the national authorities are in principle better placed than the European Court to assess whether or not there is a “pressing social need” capable of justifying interference with one of the rights guaranteed by the Convention.”<sup>34</sup>*

It is a different matter where restrictions are imposed on a right or freedom guaranteed by the Convention in order to protect “rights and freedoms” that are not, as such, enunciated therein. In such

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<sup>32</sup> See for instance in CJEU, [Herbert Karner Industrie-Auktionen GmbH v Troostwijk GmbH](#), C-71/02.

*“It is common ground that the discretion enjoyed by the national authorities in determining the balance to be struck between freedom of expression and the abovementioned objectives varies for each of the goals justifying restrictions on that freedom and depends on the nature of the activities in question”,* at par. 51.

<sup>33</sup> L. Woods, Article 11, in S. Peers et al., Commentary to the EU Charter, 2014, 329.

<sup>34</sup> Ibid. para. 113

a case only indisputable imperative reasons can justify interferences with the enjoyment of a Convention right.

In addition to the clause of “respect of reputation and rights of others”, Article 10(2) ECHR lists a high number of other exceptional circumstances that may justify limitations to the exercise of the freedom of expression, namely interests of national security, territorial integrity, public safety, prevention of disorder, prevention of crime, protection of health, protection of morals, protection of reputation, protection of rights of others, preventing the disclosure of information received in confidence, maintaining the authority of the judiciary, maintaining the impartiality of the judiciary.

All the previous circumstances may be qualified as legitimate grounds for restrictions provided that they are prescribed by law and are necessary in a democratic society. Therefore, the information on the restriction must adequately accessible and reasonably foreseeable in its consequences and it must correspond to a “pressing social need”.

In this case the margin of appreciation doctrine adopted by the ECHR shows that there is a different level of discretion afforded to States, depending on the nature of the expression subject to limitations. If in case of political expression, States enjoy a narrow margin of appreciation; in case of public morals, decency and religion, States enjoy a wider margin of appreciation. These differences are based on the fact that there is no consensus at European level on whether and how some matters should be regulated.

In addition to the duties and responsibilities for which the Convention makes explicit provision, there are also jurisprudentially developed duties, such as the journalist’s obligation to act in good faith and to provide accurate and reliable information in accordance with the ethics of journalism.

It should be noted that the right to freedom of expression may also be limited on the basis of Article 17 ECHR, that can be regarded as a safety mechanism, designed to prevent the ECHR from being misused or abused.<sup>35</sup> For instance, the ECtHR applied this Article in order to deny protection under Article 10 ECHR to racist, xenophobic or anti-Semitic speech, as well as statements denying, disputing, minimizing or condoning the Holocaust, or other (neo-)Nazi ideas.<sup>36</sup>

### National level

The same need to balance freedom of expression is acknowledged in the national constitutions of countries. It is useful to distinguish between countries that have an ‘ad hoc’ limitation clause and those that have only a general limitation clause, respectively following the models of the ECHR, or of the EU Charter. In the latter case, constitutions implicitly allocate the burden of striking the balance between competing interests on domestic courts, whether civil or criminal. For instance, the Croatian constitution the limitation clause does not provide any list of issues, rather opting for a case-by-case evaluation.<sup>37</sup>

Instead, in the other countries where an ‘ad hoc’ limitation clause is included, a different set of issues is to be taken into account, depending on the constitutional value protected. Three are the possible

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<sup>35</sup> See below at 2.2.

<sup>36</sup> ECtHR, [Norwood v the United Kingdom](#) (2004).

<sup>37</sup> See article 16 of the Croatian Constitution: “Freedoms and rights may only be curtailed by law in order to protect the freedoms and rights of others, the legal order, and public morals and health. Any restriction of freedoms or rights shall be proportionate to the nature of the need to do so in each individual case.”

options: limitations linked with the rights of other people (1), limitations that protect public values (2), and finally temporary limitations (3).<sup>38</sup>

1. Limitations that are closely linked with the rights of other people: In this category it is possible to find different rights, for instance reputation or the honour of someone else; private and family life; dignity and one's image right. In this respect, defamation and privacy are the most relevant fields where possible conflicts may arise, allocating the task of identifying tools to strike a balance between them to courts, as will be explained below.

2. Limitations that protect public values, values of the state and society: In this category, limitations to freedom of expression are grounded on public order (e.g., "national security," "territorial integrity," "public safety," "prevention of disorder or crime"); alternatively, limitations could be based on the need to protect the basic features of the State; or for defamation of the country and the nation. A parallel set of justifications for limitations to freedom of expression concerns morality: obscene conduct contrary to morality or pornography can justify limits to freedom of expression.

3. A third category refers to temporary limitations upon the declaration of war, military or other state of emergency.

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<sup>38</sup> For an analysis of these three categories in Eastern European countries see Groppi (2005).

## 2. Hate speech

### 2.1. EU legal framework

Although freedom of expression enjoys a wide protection as a fundamental right, not all forms of expression are protected. As mentioned above, limitations may be applied according to specific conditions, and in case of specific content such as “expression which spread incite, promote or justify hatred based on intolerance”.<sup>39</sup> In such cases, the expression of the individual may fall in the category of **hate speech**.

Several piece of legislation address the concept of hate speech but there is not a shared definition across Europe as we will see in this unit. As a matter of fact, the definitions of hate speech provided at international and national levels, focus on different facets of this concept, looking at content and at the manner of speech, but also at the effect and at the consequences of the speech.

Moreover, we will see that hate speech regulation is not limited to a single area, but it is connected to several legal areas, such as media regulation, liability and non-discrimination.

In the EU legal context, the most relevant provisions regarding hate speech are the one embedded in the [Council Framework Decision 2008/913/JHA](#) on combatting certain forms and expressions of racism and xenophobia by means of criminal law. As it emerges from the title, the main focus of the decision is the approximation of MS laws regarding certain offences involving xenophobia and racism, whereas it does not include any references to other types of motivation, such as gender or sexual orientation.

Art 1 (1) provides that:

“Offences concerning racism and xenophobia

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

(a) publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin;

(b) the commission of an act referred to in point (a) by public dissemination or distribution of tracts, pictures or other material;

(c) publicly condoning, denying or grossly trivialising crimes of genocide, crimes against humanity and war crimes as defined in Articles 6, 7 and 8 of the Statute of the International Criminal Court, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group;

(d) publicly condoning, denying or grossly trivialising the crimes defined in Article 6 of the Charter of the International Military Tribunal appended to the London Agreement of 8 August 1945, directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin when the conduct is carried out in a manner likely to incite to violence or hatred against such a group or a member of such a group.

The Framework Decision 2008/913/JHA should have been implemented by MS by November 2010; however, not all the MS have adapted their legal framework to the European provisions, as confirmed also by the European Parliament Study on the [Legal framework on hate speech, blasphemy and its interaction with freedom of expression](#). Moreover, in the countries where the implementation occurred, the legislative intervention followed different approaches according to national approaches to hate

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<sup>39</sup> ECHR, [Erbakan v Turkey](#), par. 56



speech: either through the inclusion of the offence within the criminal code, or through the adoption of a special legislation on the issue. The choice is not without effects, as the procedural provisions applicable to special legislation may be different to those applicable to offences included in the criminal code.<sup>40</sup>

Moreover, the implementation of the Framework decision overlap with the pre-existing national legislation addressing this issue. For instance, in Belgium, hate speech is covered by the Anti-racism act (covering the grounds provided by the Framework decision), the Non-discrimination act, the Criminal code and the Act on condoning, denying or grossly trivialising the crime of genocide. Moreover, the qualification of the offence does not include the definition of hate speech, rather it may range from ‘discrimination’ to ‘insult’ to ‘incitement to hatred and violence’ depending on nature of the speech.<sup>41</sup> In Greece, instead, the reference point is the Law 927/1979 on punishing acts or activities aiming at racial discrimination, which was repeatedly amended so as to include the grounds of sexual orientation, genetic characteristics, gender identity or disability.<sup>42</sup>

Additionally, other EU legal instruments tackle the issue of hate speech in specific areas, such as the [Audiovisual media service directive](#) and the [e-Commerce directive](#). Differently from the Framework decision, in these two directives the prohibition to incitement to hatred is more general, including also as ground of protection also sex.

Art 6 AVMS Directive provides that

“Member States shall ensure by appropriate means that audiovisual media services provided by media service providers under their jurisdiction do not contain any incitement to hatred based on race, sex, religion or nationality.”

Art 3(2) and (4) of e-Commerce directive provide that :

“2. Member States may not, for reasons falling within the coordinated field, restrict the freedom to provide information society services from another Member State.

...

4. Member States may take measures to derogate from paragraph 2 in respect of a given information society service if the following conditions are fulfilled:

(a) the measures shall be:

(i) necessary for one of the following reasons:

- public policy, in particular the prevention, investigation, detection and prosecution of criminal offences, including the protection of minors and the fight against any incitement to hatred on grounds of race, sex, religion or nationality, and violations of human dignity concerning individual persons,

- the protection of public health,

- public security, including the safeguarding of national security and defence,

- the protection of consumers, including investors;

(ii) taken against a given information society service which prejudices the objectives referred to in point (i) or which presents a serious and grave risk of prejudice to those objectives;

(iii) proportionate to those objectives;

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<sup>40</sup> European Parliament, [Legal framework on hate speech, blasphemy and its interaction with freedom of expression](#), France country report, p. 230

<sup>41</sup> European Parliament, [Legal framework on hate speech, blasphemy and its interaction with freedom of expression](#), Belgium country report, p. 152.

<sup>42</sup> European Parliament, [Legal framework on hate speech, blasphemy and its interaction with freedom of expression](#), Greece country report, p. 211

So far, the CJEU have addressed the definition of hate speech in relation to broadcasting across EU Member State only with the [Mesopotamia Broadcast and Roj TV](#) decisions, joined cases C-244/10 and C-245/10 (casesheet n. 1). Whereas no decision addressed the hate speech dimension of art 3(4) of e-commerce directive.

Although in many occasions national courts have addressed the issue of hate speech in media context and in online context, the arguments of parties and courts referred more frequently to ECtHR jurisprudence (see below) or to national legislation (casesheets nn. 4, 5, 6 and 7). This is due, on the one hand, on the more developed, yet not uniform, jurisprudence of the ECtHR on hate speech in media context, and, on the other hand, on the fact that the internal market dimension of the two provisions which do not provide specific guidelines concerning the balancing between freedom of expression and protection of human dignity.

Only recently two preliminary references addressed the hate speech dimension of online dissemination of information, namely the preliminary reference from the Vilnius administrative court addressing the compliance between national legislation and art. 6 of the AVMS Directive (casesheet n. 2) and the preliminary reference of the Austrian Supreme Court regarding the remedies in case of hate speech on an online platform (casesheet n. 3).

More recently, however, the approach of EU institutions regarding hate speech (and more generally also illegal content) moved from the use of hard law to soft law: namely, toward the use of forms of co-regulation where the Commission negotiates a set of rules with the private companies, under the assumption that the latter will have more incentives to comply to agreed rules.<sup>43</sup>

As a matter of fact, on 31 May 2016, the Commission adopted the [Code of conduct on countering illegal hate speech online](#), signed by the biggest players in online market: Facebook, Google, Microsoft and Twitter. The Code of conduct requires that the IT companies signatories to the code adapt their internal procedures to guarantee that “*they review the majority of valid notifications for removal of illegal hate speech in less than 24 hours and remove or disable access to such content, if necessary*”.<sup>44</sup> Moreover, according to the Code of conduct, the IT companies should provide for a removal notification system which allows them to review the removal requests “*against their rules and community guidelines and, where necessary, national laws transposing the Framework Decision 2008/913/JHA*”.

Similarly, the current proposal for a reform of the AVMS directive includes also a specific provision dedicated to hate speech on video-sharing platform, namely art 28a.<sup>45</sup> Also in this case, the Proposed directive encourages the use of co-regulatory measures in order to implement the provision either at national level (at subsection (3)) and at European level (at subsection (7)) with the collaboration of the Commission and ERGA.

#### Art 28a of AVMS Directive

1. Without prejudice to Articles 14 and 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers take appropriate measures to:

(a) protect minors from content which may impair their physical, mental or moral development;

<sup>43</sup> This is not a

<sup>44</sup> Ibid. at p. 2.

<sup>45</sup> See [Proposal for a Directive amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities](#), COM/2016/0287 final - 2016/0151 (COD) at.

**(b) protect all citizens from content containing incitement to violence or hatred directed against a group of persons or a member of such a group defined by reference to sex, race, colour, religion, descent or national or ethnic origin.**

2. What constitutes an appropriate measure for the purposes of paragraph 1 shall be determined in light of the nature of the content in question, the harm it may cause, the characteristics of the category of persons to be protected as well as the rights and legitimate interests at stake, including those of the video-sharing platform providers and the users having created and/or uploaded the content as well as the public interest.

Those measures shall consist of, as appropriate:

(a) defining and applying in the terms and conditions of the video-sharing platform providers the concepts of incitement to violence or hatred as referred to in point (b) of paragraph 1 and of content which may impair the physical, mental or moral development of minors, in accordance with Articles 6 and 12 respectively;

(b) establishing and operating mechanisms for users of video-sharing platforms to report or flag to the video-sharing platform provider concerned the content referred to in paragraph 1 stored on its platform;

(c) establishing and operating age verification systems for users of video-sharing platforms with respect to content which may impair the physical, mental or moral development of minors;

(d) establishing and operating systems allowing users of video-sharing platforms to rate the content referred to in paragraph 1;

(e) providing for parental control systems with respect to content which may impair the physical, mental or moral development of minors;

(f) establishing and operating systems through which providers of video-sharing platforms explain to users of video-sharing platforms what effect has been given to the reporting and flagging referred to in point (b).

**3. For the purposes of the implementation of the measures referred to in paragraphs 1 and 2, Member States shall encourage co-regulation as provided for in Article 4(7).**

4. Member States shall establish the necessary mechanisms to assess the appropriateness of the measures referred to in paragraphs 2 and 3 taken by video-sharing platform providers. Member States shall entrust this task to the authorities designated in accordance with Article 30.

5. Member States shall not impose on video-sharing platform providers measures that are stricter than the measures referred to in paragraph 1 and 2. Member States shall not be precluded from imposing stricter measures with respect to illegal content. When adopting such measures, they shall respect the conditions set by applicable Union law, such as, where appropriate, those set in Articles 14 and 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU.

6. Member States shall ensure that complaint and redress mechanisms are available for the settlement of disputes between users and video-sharing platform providers relating to the application of the appropriate measures referred to in paragraphs 1 and 2.

**7. The Commission and ERGA shall encourage video-sharing platform providers to exchange best practices on co-regulatory systems across the Union. Where appropriate, the Commission shall facilitate the development of Union codes of conduct.**

8. Video-sharing platform providers or, where applicable, the organisations representing those providers in this respect shall submit to the Commission draft Union codes of conduct and amendments to existing Union codes of conduct. The Commission may request ERGA to give an opinion on the drafts, amendments or extensions of those codes of conduct. The Commission may give appropriate publicity to those codes of conduct.

Apart from the potential results of the effectiveness of the co-regulatory mechanism,<sup>46</sup> the approach taken by the EU institutions may affect the decisions of national courts as regards the application of hate speech provisions.

In particular, when looking at the abovementioned Code of conduct on illegal hate speech online, the following legal issues may emerge:

- Definition of “illegal” hate speech

The code of conduct builds its definition of hate speech on the one provided in the abovementioned Framework Decision, without adding any more detailed criteria. However, the code of conduct imposes on IT companies to define in their “Rules or Community Guidelines” the prohibition of incitement to violence and hateful conduct. As each IT company have included its own qualification of hate speech, this may lead to additional discrepancies between applicable law (EU and national ones) and contractual obligations applicable to users of the provided IT services.

<b>Facebook definition<sup>47</sup></b>	<b>Youtube definition<sup>48</sup></b>	<b>Twitter definition<sup>49</sup></b>	<b>Code of conduct definition</b>
<p><i>What does Facebook consider to be hate speech?</i></p> <p>Content that attacks people based on their actual or perceived race, ethnicity, national origin, religion, sex, gender or gender identity, sexual orientation, disability or disease is not allowed. We do, however, allow clear attempts at humor or satire that might otherwise be considered a possible threat or attack. This includes content that many people may find to be in bad taste (example: jokes, stand-up comedy,</p>	<p>Hate speech refers to content that promotes violence against or has the primary purpose of inciting hatred against individuals or groups based on certain attributes, such as:</p> <ul style="list-style-type: none"> <li>- race or ethnic origin</li> <li>- religion</li> <li>- disability</li> <li>- gender</li> <li>- age</li> <li>- veteran status</li> <li>- sexual orientation/gender identity.</li> </ul> <p>There is a fine line between what is and what is not considered to be hate speech. For instance, it is generally okay to criticize a nation-state, but if the primary purpose</p>	<p><i>Hateful conduct:</i> You may not promote violence against or directly attack or threaten other people on the basis of race, ethnicity, national origin, sexual orientation, gender, gender identity, religious affiliation, age, disability, or serious disease. We also do not allow accounts whose primary purpose is inciting harm towards others on the basis of these categories.</p>	<p>Illegal hate speech, as defined by the Framework Decision 2008/913/JHA of 28 November 2008 on combating certain forms and expressions of racism and xenophobia by means of criminal law and national laws transposing it, means all conduct publicly inciting to violence or hatred directed against a group of persons or a member of such a group defined by reference to race, colour, religion, descent or national or ethnic origin.</p>

<sup>46</sup> The third monitoring report on the application of the code shows increasing level of compliance by the IT companies to the code, both in terms of time of reply and in terms of processing of notifications, see at [http://ec.europa.eu/newsroom/just/item-detail.cfm?item\\_id=612086](http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612086).

<sup>47</sup> [https://www.facebook.com/help/135402139904490?helpref=uf\\_permalink](https://www.facebook.com/help/135402139904490?helpref=uf_permalink)

<sup>48</sup> <https://support.google.com/youtube/answer/2801939?hl=en>

<sup>49</sup> <https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy>

popular song lyrics, etc.).	of the content is to incite hatred against a group of people solely based on their ethnicity, or if the content promotes violence based on any of these core attributes, like religion, it violates our policy.		
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As emerges from the previous table, the definitions provided by the IT companies and the one of the Code of conduct do not completely converge, rather the definitions provided by IT companies widen the scope of the prohibition to sex, gender, sexual orientation, disability or disease, age, veteran status, etc. This may be interpreted as the achievement of a higher level of protection; however, the inclusion of hate speech prohibition within the Rules or Community Guideline become *de facto* rules of behaviour for users of such services.<sup>50</sup> In this sense, the IT companies, ex officio or upon notification, are allowed to verify the content of the expression published on their platforms, leading to a privatisation of enforcement as regards those conduct that are not covered by the Framework directive.

Which legal consequences entails the use of the hate speech concept adopted by the IT companies? Is there a conflict between the former and the one adopted in the Framework decision? In the affirmative case, which are the possible judicial interaction techniques to be used to solve the conflict?

- Procedural guarantees

As a consequence of the previous analysis, the issue of procedural guarantees of users emerges. A first question is related to the availability of internal mechanisms that allow users to be notified to be heard and to review or appeal against the decision of the IT companies. In this case, the Code of conduct does not provide for any specific requirement neither in terms of judicial procedures, nor through alternative dispute resolution mechanisms, thus it is left to the IT companies to introduce an appeal mechanism. Currently, among the signatories to the code, only Google do provide such a mechanism, which only allows the user to present an appeal against the decision to take down his/her uploaded content.<sup>51</sup> In all the other cases, the contractual rules included in the User agreements regarding the conflicts between users and the relevant IT company apply. According to the agreements currently in force, the users may be subject to the jurisdiction of U.S. courts or to EU courts where consumer protection regulation apply.<sup>52</sup>

Taking the example of a consumer resident in a MS who had his/her profile blocked upon a decision of the IT company on the basis of an allegedly hate speech content, the national court may have the difficult task of evaluating the contractual obligations of the IT company as well as the available remedies in case of erroneous evaluation of the content as hate speech.

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50 W. Benedek and M.C. Kettmann, Freedom of expression and the Internet, Council of Europe Publishing, 2013, 101.

51 See Appeal Community Guidelines actions, available at <https://support.google.com/youtube/answer/185111>

52 See for instance art 15 of Facebook Terms of service, available at <https://www.facebook.com/legal/terms>.

Can the courts take into account the Code of conduct as a soft law source?  
Would it be possible to evaluate the behaviour of the IT company also in the light of compliance to the Code?

## 2.2. ECtHR jurisprudence

Given the fragmentation of the EU legal framework, when tackling hate speech cases, national courts may find more detailed standards in the jurisprudence of the ECtHR on this issue.

The decisions of the ECtHR can be distinguished according to the approach taken by the court, namely a ‘broader’ approach and a ‘narrower’ approach.<sup>53</sup> The broader approach analyse the facts of the case through the lens of art 17 ECHR, which prohibits the abuse of rights; whereas the narrower approach analyse the facts of the case through the lens of art 10 (2) evaluating the restrictions imposed to the protection of freedom of expression, which implies a detailed balancing exercise between freedom of expression and the legitimate objectives that are leading to its limitations.

Along the narrow approach, the jurisprudence of the ECtHR established a set of identification criteria that qualify hate speech including the context and the intention of the speech, the status of the perpetrator, and the form and impact of the speech, showing in each decision the difficulty of drawing the boundary between an expression that may “offend, shock or disturb”, which is protected under art 10 ECHR, and hate speech.

Among the most relevant cases is [Féret v Belgium](#) (2009), where the ECtHR addressed the case of a Belgian member of Parliament and chairman of the political party Front National, who distributed during the election campaign leaflets that, according to Belgian courts, could amount to incitement to racial discrimination. The ECtHR did not find any violation of art 10 ECHR as the limitation imposed by Belgian law were justified by the interests of preventing disorder given that the resonance of political slogans during electoral context are higher.

Similarly, in [Jersild v Denmark](#) (1994) the ECHR evaluated the limitation to freedom of expression in case of journalistic activity which allowed the reporting of racist remarks. In this case, a journalist was convicted for a documentary including a footage dedicated to a racist group active in Denmark. Such conviction, according to the ECtHR, however was in violation of art 10 ECHR as the behaviour of the journalist could not be qualified as aimed at propagating racist views and ideas, but at informing the public about a social issue. As such the national laws would “*seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so*”.

However, a step towards a more detailed balancing exercise between freedom of expression and its limitations can be found in [Perinçek v Switzerland](#) (2015). In this case, the Grand Chamber of ECtHR decided the case concerning the criminal conviction of a Turkish politician who affirmed that the mass deportations and massacres suffered by the Armenians in the Ottoman Empire in 1915 and the following years had not amounted to genocide. According to the ECtHR the decisions of the Swiss courts were breaching art 10 ECHR: the Court addressed first the balance between the right to freedom of expression vis-à-vis the right to respect for private life of the Armenians, protected under art 8 ECHR, and secondly the proportionality between the means used to protect each right. The Court

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<sup>53</sup> F. Tulken,

then affirmed that it had not been necessary, in a democratic society, to subject the applicant to a criminal penalty in order to protect the rights of the Armenian community at stake in the case.

The narrow approach is also acknowledged and applied in their reasonings by national courts, such as the casesheets regarding the decision of the Italian Tribunal of Milan (casesheet n. 4) and the decisions of the Belgian Constitutional Court (Casesheet n. 5).

The broader approach is applied in the recent caselaw to affirm the inadmissibility of claims where the claimant is not entitled to the protection of art 10 ECHR as his/her expressions move clearly against the Convention's underlying values.

For instance in [M'Bala M'Bala v. France](#) (2015), concerning the conviction of Dieudonné M'Bala M'Bala for his show in Paris for public insults directed at a person or group of persons on account of their origin or of belonging to a given ethnic community, nation, race or religion, specifically in this case persons of Jewish origin or faith. The ECtHR affirmed that the factual circumstances could not allow to qualify the show neither as satirical or provocative, but rather "*a demonstration of hatred and anti-Semitism and support for Holocaust denial*". According to this, the ECtHR concluded that the applicant had sought to deflect Article 10 from its real purpose by using his right to freedom of expression for ends which were incompatible with the letter and spirit of the Convention, thus his claim is deemed inadmissible according to art 17 ECHR.

Similarly, in [Belkacem v. Belgium](#) (2017), the ECtHR addressed the case of the conviction of the leader of the organisation "Sharia4Belgium" for incitement to discrimination, hatred and violence on account of remarks he made in YouTube videos concerning non-Muslim groups and Sharia. The Court declared the application inadmissible, affirming that the content of the videos available online had a markedly hateful content and that the applicant sought to stir up hatred, discrimination and violence towards all non-Muslims. Accordingly, the Court held that, in accordance with Article 17 (prohibition of abuse of rights) of the Convention, the applicant could not claim the protection of Article 10.

Although the jurisprudence of the ECtHR is so rich and detailed, the national court may have still issues in interpreting and applying it to the national framework as the Spanish Constitutional court decision shows (casesheet n. 6).

## *Distinction btw hate speech and other concepts*

### Hate Speech and Hate Crime

Hate crimes are criminal offences which are motivated by bias or by a prejudice against a defined group of people. The two essential elements in order to qualify a hate crime are the following:

- The act is a criminal offence under national law;
- The act was motivated by the bias/prejudice.

Thus, any offence ranging from threat to murder to any property damage may fall into the category, if the offence was committed with the bias motivation.

Although the bias or the prejudice is defined as “*preconceived negative opinions, stereotypical assumptions, intolerance or hatred directed to a particular group that shares a common characteristic, such as race, ethnicity, language, religion, nationality, sexual orientation, gender or any other fundamental characteristic*”,<sup>54</sup> the fact that in the factual circumstances the victim is not part of the group is not an element that may shift the qualification.

Accordingly, the difference between hate crime and hate speech lies on the fact the hate speech lacks of the criminal offence basis. However, where an incitement to criminal offences occurs, and a bias motive exists, then also the expression may be qualified as hate crime. Moreover, hate speech may constitute evidence of committed hate crime.

### Hate Speech and Discrimination

Discrimination refers to those cases where a comparable situation results in a differentiated treatment for individuals (or groups) without an objective justification. The discrimination usually provides for a worse treatment and may be based on different grounds such as age, sex, race, ethnic origin, sexual orientation, etc. Many among those grounds are overlapping with those related to hate speech. Thus, it may be possible that hate speech includes an incitement to discrimination against specific groups or individuals.<sup>55</sup>

### Hate Speech and Defamation

Defamation refers to the cases where a individual presents or disseminates, before a third party, false facts harming the honour and reputation of another person, with the intention of harming his/her honour and reputation, while knowing or has been obliged to know and may know that the facts are false. In this sense, defamation is based on the discredit the person may suffer in relation to society. Depending on the national legal framework, defamation can be a civil or criminal offence (or both) and can cover the honour and reputation not only of natural persons, but also of legal entities and groups. humiliation

Hate speech is also related to the harm occurred to individual's or group's dignity under similar yet not completely overlapping grounds; however, in this case the content of the statements is based on the inherent identity characteristics of the victim and not on the false or inaccurate facts.

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<sup>54</sup> See OSCE/ODIHR materials available at <http://hatecrime.osce.org/what-hate-crime>

<sup>55</sup> ECHR, [Aksu v. Turkey](#)



### 3. Main legal and judicial bodies

Freedom of expression guarantees have an impact in several areas of law, and accordingly its interpretation and implementation are allocated along different enforcement regimes, including civil criminal and administrative ones. The choice of the enforcement regime, moreover, is adapted to the national context which may address the same offence under a general or specific regime.

For instance, in case of defamation by press, the legal framework provided at national level depends on the interpretation of freedom of expression in terms of constitutional guarantee and its balance with the reputation of the others. This different approach may lead to the qualification of the offence under criminal law, with potentially civil damages awarded, or exclusively under civil law. Accordingly, also remedies available may differ and may range from limitation to personal freedom through imprisonment to pecuniary sanctions.<sup>56</sup>

Moreover, other bodies may play an important role in implementing freedom of expression principle. In particular, administrative and regulatory bodies may directly act in an adjudicatory manner in areas such as data protection, media, competition and discrimination, with the possibility of overlapping competences.

For instance, media and communication authorities are in charge of supervising the implementation of broadcasting legislation. Thus, they have the power to award of broadcasting licences, to monitor whether broadcasters are fulfilling their legal obligations, and to impose sanctions if they fail to carry out those obligations. In particular, media and communication authorities are in charge of ensuring that audiovisual media services do not contain any incitement to hatred based on race, sex, religion or nationality. In this case the sanctions adopted should balance the prohibition of hate speech vis-à-vis the freedom of expression and media freedom.<sup>57</sup>

Similarly, data protection authorities supervise, through investigative and corrective powers, the application of the data protection law. Within this remit they have the task of deciding the cases where data subjects claim a unlawful processing of their data showing a conflict between data protection and freedom of expression, such as in case of processing of data by journalists, or dissemination of personal data as a corollary to right to be informed.<sup>58</sup>

In case of hate speech, other regulatory bodies may have specific competence in deciding complaints from victims of hate speech, as well as carry out investigations into such cases. For instance, national human right bodies, such as equality bodies, may have the power to decide cases related to discrimination in relation to one, some, or all of the grounds covered by EU law – gender, race and ethnicity, age, sexual orientation, religion or belief and disability.<sup>59</sup> Accordingly, they may address cases where hate speech includes an incitement to discrimination against specific groups or individuals.

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<sup>56</sup> OSCE, [Defamation and Insult Laws in the OSCE Region: A Comparative Study](#), 2017

<sup>57</sup> See Caseshet n. 2.

<sup>58</sup> See Caseshet n. 13.

<sup>59</sup> Art 19, [Responding to ‘hate speech’: Comparative overview of six EU countries](#), 2018 . On the different powers and remits of National Human Right Bodies, see [M. Moraru, Report on the use of the EU charter on fundamental rights by national human rights bodies and practical guidelines on the strategic use of the EU charter by national human rights bodies](#), WP CJC\_2017.

In all the previous cases, fair trial guarantees impose that decisions taken by independent or regulatory authorities should be subject to judicial review.<sup>60</sup> Therefore, according to national legal framework, civil and administrative courts will interact directly with such independent/regulatory authorities.

In this context, a direct dialogue between European and national courts may be established, whereas indirect dialogue may emerge between independent/regulatory bodies and European courts through judicial review. As the independent/regulatory bodies do not qualify as courts or tribunals according to art 267 TFEU, they may not directly engage the CJEU. When decisions are then appealed before courts, the latter may present a preliminary reference to the CJEU in respect of the scope of judicial review or on the activities of the independent/regulatory bodies. In this case, the CJEU can address both procedural and substantive issues concerning how administrative enforcers balance freedom of expression vis-à-vis conflicting rights.

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<sup>60</sup> [See also ACTIONES Handbook, Module 3.](#)

#### 4. The specificities of the use of the Charter of Fundamental rights at European and National Level

##### 4.1 Media freedom

One of the most distinctive features of the EU legal framework as regards freedom of expression, is the fact that art 11(2) CFR expressly provides for the specific reference to media freedom along with the protection to media pluralism.

According to the explanations to the Charter, the provision was based on the CJEU jurisprudence on television, on the Protocol on the System of Public Broadcasting in the MSs annexed to the EC Treaty, and on Directive 89/552/EC. As a matter of fact, up to 2007 the EU legal framework for media was mainly related to broadcasting legislation, and in particular to the interplay between the media freedom with the freedom to provide (audiovisual) services. However, the jurisprudence of the CJEU, even before the entry into force of the Charter, linked the importance of media freedom to the enhancement of media pluralism as a basis for democracy in the EU. In this sense, then the decisions in C-260/89, [ERT](#) case is to be interpreted as one of the first attempts where the CJEU interpreted the EU legal provisions in the light of fundamental rights.

As a matter of fact, press and media freedom have a double objective: on the one hand they seek to protect the content delivered the press; on the other they seek to ensure that legal or administrative requirements do not hamper the exercise of press and media activities (for instance, in case of excessive licensing requirements, denial of access to information, etc.).

Under the first perspective, press and media freedom provides journalists and media outlets with a right to inform and express opinion which is safeguarded as the role of journalists and media outlets is fundamental for the democratic process as they are the should impart information and ideas on issues and areas of public interest.<sup>61</sup> This does not mean, however, that press freedom has automatic prevalence over other conflicting interests, which might be data protection, the right to privacy, reputation, criminal justice, or others. Rather, any conflicting interest must be balanced allowing the unfolding as far as possible of both press freedom and other conflicting rights and legitimate interests, albeit taking into account the significance of freedom of expression and press freedom for democracy.

Under the second perspective the decision in [Centro Europa 7](#) provides for an interesting case where both the CJEU and the ECtHR affirmed the connection between media freedom, media pluralism and freedom of expression. The case started in 2000 when Centro Europa 7 a small broadcasting company complained before Italian courts for the fact that although having won the open bid for national television concessions, it did not received an operating frequency. In 2008, upon a preliminary reference of the Supreme administrative court, the CJEU affirmed that licensing system should be based on objective, transparent, non-discriminatory and proportionate criteria.

After a subsequent national proceeding, Centro Europa 7 lodges a claim before the ECtHR, where the court found a violation of art 10 ECHR establishing that pluralism is of utmost importance in freedom of expression. The ECtHR in particular acknowledged that the state's legislative measures did not satisfy the obligation to guarantee effective pluralism: "*To ensure true pluralism in the audio-*

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<sup>61</sup> The role of the press as "public watchdog" was first emphasised by ECtHR in [Lingens v. Austria](#). Note that national courts as well as the ECtHR afford stronger protection to press freedom where matters of public interest, other than political issues, are publicly debated.

*visual sector in a democratic society, it is not sufficient to provide for the existence of several channels or the theoretical possibility for potential operators to access the audiovisual market. It is necessary in addition [...] to guarantee diversity of overall programme content, reflecting as far as possible the variety of opinions encountered in the society at which the programmes are aimed”.*<sup>62</sup>

#### **4.2. Defamation and libel**

Among the legitimate grounds for the limitations to freedom of expression, there is the protection of rights and freedoms of others. One of these individual rights is the right to respect for private and family life, which is also protected by national and supranational legal sources, such as art. 7 CFR and correspondingly art. 8 ECHR. Similarly, also to right to privacy and/or family life may allow for limitations based on the protection of rights of others.

Due to their different objectives, the exercise of freedom of expression might conflict with the right to privacy and/or family life in several occasions. Freedom of expression allows the dissemination and publication of information and facts related to the private lives of individuals when this information is serving a public interest and/or debate; however, it may be possible that such dissemination may undermine a person’s reputation, leading to a claim for defamation.

As a matter of fact, the purpose of provisions on defamation is to protect the individuals’ reputation from damages caused by the dissemination of false and offensive information or opinions about them to third parties. Equally, such provisions may aim at protecting specific state symbols (such as the national flag or anthem). They may be both criminal and civil and may relate both to oral defamation (slander) and written defamation (libel). Expressions used in the Member States’ legislation to describe the offence that here we refer as “defamation” include “insult”, “abuse”, “affront to honour and dignity”, and “calumny”. In theory, there is a difference between defamation (the inaccurate assertion of facts) and insult (hurtful, rude and/or untruthful words). However, the distinction is not always clear-cut in practice, and legislation on defamation is often applied to insult because it is not clearly worded or not properly interpreted.

Given the limited competence of EU in this field, the point of reference as regards the interpretation and balancing between freedom of expression and right to reputation is the ECtHR jurisprudence, which provides for useful guidelines.

According to ECtHR, reputation of an individual is protected by art 8 ECHR.<sup>63</sup> However, in order to trigger the application of Art 8 ECHR safeguards, “*the attack on personal honour and reputation must attain a certain level of gravity and in a manner causing prejudice to personal enjoyment of the right to respect for private life*”, ([A v Norway](#)).<sup>64</sup> Thus, it is possible that the balancing exercise between freedom of expression and right to private life may not occur, if the statement of facts that do not account as seriously offensive nature so as to trigger the application of art 8 ECHR.

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<sup>62</sup> [Centro Europa 7 v Italy](#), par. 130.

<sup>63</sup> ECHR, [Axel Springer AG v. Germany](#) [GC], § 83; [Chauvy and Others v. France](#), § 70; [Pfeifer v. Austria](#), § 35; [Petrina v. Romania](#), § 28; [Polanco Torres and Movilla Polanco v. Spain](#), § 40

<sup>64</sup> See para. 64. Note that previously in [Pfeifer v Austria](#), the ECtHR expressed a different approach, affirming that “*a person’s reputation even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope of his or her “private life”.* Article 8 therefore applies.” (ibid. para 35).

In case art 8 ECHR applies, the balancing between freedom of expression and right to respect for private life should enjoy the same margin of appreciation. The relevant criteria defined by the case-law are as follows:

- contribution to a debate of public interest;
- the degree of notoriety of the person affected;
- the subject of the news report;
- the prior conduct of the person concerned;
- the content, form and consequences of the publication, and,
- the circumstances in which the photographs were taken (where appropriate),
- the penalty imposed.<sup>65</sup>

For instance, in [Sousa Goucha v. Portugal](#), the margin of appreciation adopted by the ECtHR was wider, as the case concerned the defamatory speeches against a well-known celebrity after his public announcement concerning his sexual orientation. Although the defamatory statements were presented as a parody, the ECtHR evaluated the context in which they were expressed did not account as a debate on a matter of public interest, thus they were overcoming the limits of what is acceptable under art 10 ECHR.<sup>66</sup>

As regards the liability regime, the ECtHR addressed in detail the nature and severity of the sanctions imposed by national legislation in order to evaluate the proportionality of the interference with freedom of expression. In cases involving criminal and civil sanctions concerning journalists the analysis includes an additional step, where attention is paid to the effects of the sanctions on the individual applicant and on the journalistic activity as a whole. In particular, since the decision in the case of [Cumpăna and Mazăre v Romania](#), the Court introduced the so called “chilling effect” principle into the proportionality analysis of the sanction. This element addresses the fear of being sentenced to imprisonment for reporting on matters of public interest, which triggers a “chilling effect” on journalistic freedom of expression.

As regards criminal liability, in unequivocal defamation cases (i.e. cases regarding remarks not containing any hate speech or incitement to violence), the Court has stressed that the mere fact that a sanction is of a criminal nature has in itself a disproportionate chilling effect.<sup>67</sup>

A criminal sanction with restriction of liberty is a fortiori a grave restriction of freedom of expression. Accordingly, the Court has never recognised that imposing a prison sentence is well-founded or acceptable in defamation cases.<sup>68</sup>

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<sup>65</sup> (ibid., §§ 90-93; [Von Hannover v. Germany](#) (no. 2) [GC], §§ 108-113; [Axel Springer AG v. Germany](#) [GC], §§ 89-95). See ECHR, [Guide on Article 8 of the European Convention on Human Rights - Right to respect for private and family life](#), 2017 and JUDCOOP Handbook on Freedom of expression, on file by the author.

<sup>66</sup> Para 51.

<sup>67</sup> See, for example, ECtHR, [Cumpăna and Mazăre v Romania](#), and [Azevedo v Portugal](#), both cit. See also the results of the project “Strengthening Journalists' Rights, Protections and Skills: Understanding Defamation Laws versus Press Freedom”, and the report [Out of balance - Defamation Law in the European Union: A Comparative Overview for Journalists, Civil Society and Policymakers](#), January 2015.

<sup>68</sup> See ECtHR, [Mahmudov v Azerbaijan](#) (2008), and app. no. 40984/07 [Fatullayev v Azerbaijan](#) (2010). Similarly, in ECtHR [Marchenko v Ukraine](#) (2009) the imposition of suspended prison sentences on non-journalists was held to violate Article 10.

Similarly, proportionality of sanction should be addressed also in case of civil compensation. In this type of cases, the ECtHR leaves a wider margin of appreciation to national courts, affirming that it “accepts that national laws concerning the calculation of damages for injury to reputation must make allowance for an open-ended variety of factual situations. A considerable degree of flexibility may be called for to enable juries to assess damages tailored to the facts of the particular case.” As a matter of fact, the Court held that there must be a “reasonable relationship of proportionality”<sup>69</sup> between an award of damages and the injury to the reputation suffered. However, more recent case law shows a convergence between the analysis of criminal sanctions (excluding prison sentences) and civil sanctions. In both cases the proportionality analysis has been broadened through the individualisation of damages and costs orders: in determining proportionality between damages awarded and the offence, the Court weights up the injury to reputation with the impact of all the orders (damages and costs) the (means of the) defendant.<sup>70</sup>

An important development is related to the liability of (online) press for user-generated content, in particular in case of comments. Although there should be no distinction between offline and online publication, the liability for defamation in online context may be challenged by the different organisation structure in online publication chain and on the level of professionalisation. On the one hand, different actors may emerge: the author of the content, which can be framed as non-professional blogger or as journalist; the online platform or Internet Content provider; and the Internet Service Provider (ISP). Here, the jurisprudence of the national courts addressed two aspects. On the one hand, national courts faced cases where the author of the defamatory statement is a blogger, which publishes his/her opinion through online platforms. In these cases, the courts struggle to identify if and how the blogger can be liable in terms of defamation by press.<sup>71</sup> It is interesting to note that in case of countries where criminal liability is applicable to defamation by press, the extension of the liability regime by analogy is not feasible.<sup>72</sup> On the other hand, the courts may address the liability regime applicable to the ISP. In this latter case, the decisions of the courts can be different depending on the way in which the ISP falls or not into the liability exceptions provided by the European Directive 2000/31/EC on e-commerce, (Articles 12-14).

According to CJEU jurisprudence, hosting providers enjoy an exemption from liability when it complies with the following conditions:

- the neutrality of the role played by the service provider;

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<sup>69</sup> ECtHR, [Tolstoy Miloslavsky v. United Kingdom](#) (1995).

<sup>70</sup> See ECtHR, [Kasabova v Bulgaria](#) (2011). In particular, note that the Bulgarian courts had already sought to apply proportionality analysis in coming to the sums imposed. The Bulgarian courts had imposed an “average penalty, [in view] of the balance of mitigating and aggravating factors”, including the lack of criminal record, intention, and seriousness of the libel. The Bulgarian courts had also waived the criminal liability, and imposed only an administrative fine. It seems that the application of separate proportionality analysis to (i) the damages imposed, and (ii) costs imposed, was not sufficient for the ECtHR, as the Bulgarian courts had failed to take account of the totality of the sums imposed.

<sup>71</sup> In the UK, see [Applause Store Productions Ltd v Raphael](#) [2008] EWHC 1781 (QB); [2008] Info TLR 318 where the court awarded a non-user of the Facebook social networking website and his company damages for libel and breach of privacy, after a former school friend had placed a fake personal profile and group on Facebook); [Cairns v Modi](#) [2012] EWHC 756 (QB); [2012] EWCA Civ1382 (defamatory comments originally made on Twitter); [Tilbrook v Parr](#) [2012] EHC 1946 (QB) (racist allegations on an internet blog).

<sup>72</sup> However, see the recent Tribunal of Livorno, n. 38912, 2/10/12 where a case of defamatory speech published on the social network of Facebook was interpreted by the court as a case of defamation by press.

- the fact that the existence of an economic interest in the relevant content does not preclude hosting status;
- the absence of a specific monitoring or facilitating activity of the hosting platform in the activity of the users of the service.<sup>73</sup>

However, the CJEU has never extended the analysis of the role of the hosting provider in case of defamation and libel.

In [Delfi AS v Estonia](#) case, the ECtHR addressed the liability regime for user-generated comments on an Internet news portal. The news portal was held liable by national courts for the defamatory statements that were posted by its readers/users in the comments areas below a news item dedicated to a ferry company, even though the news portal removed the comments (in six weeks time) after the notification of the ferry company. The ECtHR affirmed that there had been no violation of Art 10 ECHR as the limitation to freedom of expression - provided by the liability regime applicable to news portal - was justified by the rights and interests of others and of society as a whole. In particular, the ECtHR noted that national courts correctly qualified Delfi as a “publisher” of the comments and not as an ISP, which should have expected that “the article might cause negative reactions”, and therefore “was in a position to take technical and manual measures to prevent defamatory comments being made by the public”.

Although the case seemed to imply that news operators are subject to an obligation to prevent the publication of user-generated content that infringes third parties rights, the subsequent decisions in [Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary](#) and in [Pihl v Sweden](#) provides for more detailed guidelines as regards the elements that should be taken into account in order to evaluate the proportionality of the preventive measures to be adopted by the news operators. In particular, in Pihl v Sweden the ECtHR identifies the following relevant elements:

- the type of infringing content (ranging from offensive to hate speech);
- the type of publisher (commercial entity or not-for profit organisation);
- the potential impact of the publication of the comment (size of news portal/blog and width of readership);
- the moderation approach (explicit praxis regarding existing or missing monitoring activity);
- the expeditious reaction upon notification of the infringing content.

The ECtHR emphasised that “*expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet*”. Moreover, the court finetuned the previous jurisprudence so as to take into account the negative effects of a ex ante monitoring obligation affirming that “*liability for third-party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via internet. This effect could be particularly detrimental for a non-commercial website*”.

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<sup>73</sup> See CJEU, Joined cases C-236/08 to C-238/08, [Google France v LVMS](#) (23 March 2010) and CJEU C-294/09, [L’Oreal v eBay](#) (12 July 2011). See at national level the decision of the Hamburg Court of Appeal (Oberlandesgericht, 1 July 2015, 5 U 87/12), where the court affirmed that the platform provided by YouTube cannot fall in the hosting provider category as it provides for recommendations to interested users as well as suggestions for further (presumably) interesting videos.

### 4.3. Conflicts between freedom of expression and data protection

Along with freedom of expression, also data protection is an equally protected right in the European bill of rights as well as by national constitutions. Art 8 CFR provides for the protection of the right to data protection affirming that

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

Art 8 CFR was invoked in several decisions of the CJEU in order to evaluate the compliance of national law against EU law,<sup>74</sup> as well as to evaluate the compliance of European norms to the fundamental principle enshrined in the EU Charter.<sup>75</sup>

Before the entry into force of the EU Charter, however, the European legislator already provided for legislative acts related to data protection, in particular [Directive 95/46/EC on the protection of individuals with regard to the processing of personal data](#) and [Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector](#). More recently, the [Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data](#) was the result of the legislative reform in this area. Both in Directive 95/46 and in the Regulation 2016/679 (hereinafter GDPR), the potential conflict between data protection and freedom of expression was acknowledge and regulated.

As a matter of fact, it is very easy to find an overlap between freedom of expression and data protection. This is due to the fact that, according to art 4 (1) GDPR (and previously art 2 of the Directive 95/46) personal data include “*any information relating to an identified or identifiable natural person*”. This wide definition includes into its scope of application any communication activity that involve the collection of personal data.

As such data protection may result in a conflict with freedom of expression:

- in the active dimension of freedom of expression: where the personal data is processed in order to disseminate, transmit and make available such data; and also
- in the passive dimension of freedom of expression: where the right of the audience to receive information is hindered by the safeguard of personal data.

Under the active perspective, freedom of expression ensures that media in general can carry out their task of reporting as comprehensively as possible on events of public interest. This implies that journalists can conduct research aimed at obtaining, and subsequently publishing, the information necessary for their reporting. This may lead to publish comprehensive personally identifiable data of the person object of the article. In this case, when the person affected becomes the subject of journalistic activities, the principal aim of data protection legislation is then to establish the limits to the admissibility of reporting that identifies individuals.

The GDPR address such potential interaction providing for an exemption in case of processing of personal data for journalistic purpose.

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<sup>74</sup> See casesheet n. 13.

<sup>75</sup> See CJEU, Joined cases 293/12 and C-594/12, [Digital rights Ireland](#) and C-362/14, [Schrems](#).



### **Article 85 Processing and freedom of expression and information**

1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.
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.**
3. Each Member State shall notify to the Commission the provisions of its law which it has adopted pursuant to paragraph 2 and, without delay, any subsequent amendment law or amendment affecting them.

According to art 85 (2) GDPR, any derogation adopted at national level must be the result of a balancing between the basic rights to freedom of expression and to data protection. In the judicial practice, then, two different issues may emerge: (a) if the exemption or derogation may apply to the specific case; (b) if in the specific case the ex ante balancing exercise provided by the national legislator is correct or given the specific facts of the case a different weight must be given to the fundamental rights at stake.

Under (a), the definition of journalistic activity is willingly not provided by the GDPR, which in recital 153 affirms that this concept should be interpreted in a broad manner.<sup>76</sup> This is justified by the fact that new means of communication allows users not only to access information, but also contributing directly to the public debate. Thus, the traditional boundaries of journalistic activity are blurring, and online versions of traditional print newspapers and broadcast radio and TV news are no more the unique forms of communication. ‘Social media’ (including Twitter, Facebook and YouTube and also personal and aggregated blogs) may also be qualified as media outlets or journalist and may claim to be subject to journalistic exemption, due to the fact that they distribute information and express opinions about an unlimited range of public and private issues. Accordingly, a case-by-case analysis of the activities carried out by the social media will be of utmost importance in order for the court to decide whether or not apply the exemption.

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<sup>76</sup> Recital 153 states that “Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights. Member States should adopt such exemptions and derogations on general principles, the rights of the data subject, the controller and the processor, the transfer of personal data to third countries or international organisations, the independent supervisory authorities, cooperation and consistency, and specific data-processing situations. Where such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly”.

Under (b), it is important to note that art 85 GDPR replaces art 9 of Directive 95/46 on the same issue, which was the object of a set of decisions involving national courts and both the CJEU and the ECtHR. The caselaw, triggered by a case dating back to 2003, addressed the width of the interpretation to be provided to the exemption, showing the different balancing exercise provided by the CJEU and the ECtHR (see [casesheet n.14](#)).

Under the passive perspective mentioned above, the potential conflict between freedom of expression and data protection may emerge as a clash between the right to be informed and the so called “right to be forgotten”. This conflict emerges, for instance, when press articles are kept available in extensive news archives on the Internet or when the same press articles are available as first results in search engines. In these cases, the weighting exercise involves the public interest to be informed, the journalist’s right to freedom of expression vis-à-vis the data covered, and the right to be forgotten, through which the individual can correct and re-frame his/her image to society.

Although this concept was not new in some national legal frameworks,<sup>77</sup> the decision of the CJEU C-131/12 [Costeja v Google Spain](#) affected heavily the ways in which national courts balanced the interests of data subjects vis-à-vis data processors and general public, taking into account the different weights that they may have according to the type of data made public, the type of processing, and the time dimension.

The GDPR, differently from the previous Data protection Directive, includes a specific provision on the right to be forgotten where an exemption is provided. However, more specific criteria useful to balance the rights are available in the document provided by Art 29 WP, namely [Guidelines on the implementation of the Court of Justice of the European Union judgment on “Google Spain and Inc v. Agencia Española de Protección de Datos \(AEPD\) and Mario Costeja González” C-131/12](#).

#### **Article 17 Right to erasure (‘right to be forgotten’)**

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

- (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
- (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
- (d) the personal data have been unlawfully processed;
- (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
- (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

#### **3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:**

- (a) for exercising the right of freedom of expression and information;**

<sup>77</sup> See for instance in Italy, where the qualification of this concept was related to dignity and reputation.

- (b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
- (c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);
- (d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or
- (e) for the establishment, exercise or defence of legal claims.

The same issue was also addressed by the ECtHR<sup>78</sup> in the case [Times Newspapers Ltd \(Nos. 1 and 2\) v. the United Kingdom](#), where the court stated that holding news archives is of great interest for society, but is nevertheless a secondary role of the press.<sup>79</sup> As such, this aspect of freedom of the press has less weight when performing the balancing activity than in cases where its more famous function as a watchdog is at stake. Thus, it may be possible to allocate a responsibility on news archives as regards the accuracy of the published articles, requiring an active intervention of the press, without infringing art 10 ECHR. More recently, the decision in [Węgrzynowski and Smolczewski v. Poland](#) allow the ECtHR to confirm that national legislation imposing enhanced accuracy requirement may be deemed proportionate interferences in the freedom of expression where right to privacy is to be safeguarded.

#### 4.4. Conflicts between freedom of expression and copyright

Freedom of expression has both an active part, meaning of imparting information and ideas of all kinds and on all ways possible of communication, and a passive part, meaning freedom to seek, find and receive information. Traditionally, press, media and publishing companies were the main actors in the dissemination of information. Citizens, on the other hand, were the receivers of such information.

With the development of the new technologies of communication which have blurred the boundaries of imparting and spreading information, it was necessary to find new means of protecting cultural expressions. Copyright, trademark, and patent law, known as intellectual property rights, have developed as such means. Nevertheless, while intellectual property rights support the development

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<sup>78</sup> The ECHR does not explicitly protect personal data. However, many cases that concern personal data are also covered by the right to privacy. See P. de Hert and S. Gutwirth, 'Data Protection in the Case Law of Strasbourg and Luxemburg: Constitutionalisation in Action' in S. Gutwirth et al. (eds), *Reinventing data protection?* (Springer 2009).

<sup>79</sup> See para 45: "*The Court agrees at the outset with the applicant's submissions as to the substantial contribution made by Internet archives to preserving and making available news and information. Such archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free. The Court therefore considers that, while the primary function of the press in a democracy is to act as a "public watchdog", it has a valuable secondary role in maintaining and making available to the public archives containing news which has previously been reported. However, the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.*"

of the active part of freedom of expression, their goal of protecting ideas could restrain the passive part of freedom of expression.

The conflict between freedom of expression and copyright lies within the basic purposes the two rights: on the one hand, freedom of expression warrants the freedom to hold opinions and to receive and impart information and ideas; on the other hand, copyright grants owners a limited monopoly with respect to the communication of their works. Although copyright addresses mainly the original literary or artistic form in which ideas and/or information appear,<sup>80</sup> the boundary between the form of expression and the underlying idea is not always clear-cut in practice.<sup>81</sup> As a matter of fact, original works may indeed be used, without the consent of the author, for purposes closely linked to freedom of expression demands, such as limitations and exceptions for quotation, news reporting, archival purposes, scholarly uses, library and museum uses, communication of public debates and, in some countries, public access to documents from public entities or government information.<sup>82</sup>

Historically, the protection provided through copyright was based on the efforts of government to regulate and control the output of printers, applying an implicit censor on the information distributed to the public. For instance, the privileges and monopolies were awarded by British as a censorship regime;<sup>83</sup> only at the beginning of the eighteenth century was the link between copyright and censorship broken, moving copyright protection from a content control to a control over technology (i.e. printing press).<sup>84</sup>

Progressively, copyright law and policy has been developed so as to strike a balance among three different actors, namely the author (who spends time and energy to produce the work), vis-à-vis the intermediary (who invests in the duplication and distribution of the work), and the public at large (who receive the social benefit from the distribution of the work). On the one hand, copyright protects the author in relation to his or her creative act of production, attributing him/her moral rights (e.g. the right to be identified as the creator of a work, the right to have the integrity of a work preserved, etc.). On the other hand, copyright allows the author to earn a return for his or her work, that could also provide an incentive to further production.<sup>85</sup> As long as the author is sufficiently remunerated the intermediary can exploit the work, through licensing contracts, and the public can profit from its availability on the market.

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<sup>80</sup> The idea/expression (or in Europe, the form/content) dichotomy implies that ideas, theories and facts as such remain in the public domain; only 'original' expression/form with 'personal character' is copyright protected. In the US copyright is codified in 1976 Copyright Act §102, and also in Europe in the [EU directive on legal protection of computer programs 2009/24/EC](#) (Art 1(2)).

<sup>81</sup> Moreover, in some cases the dissemination of the idea cannot exclude the exact reproduction of the expression, see below.

<sup>82</sup> The [Infosoc directive, 2001/29/EC](#), which offers a closed, though eventually not mandatory (with one exception), list of limitations. It is interesting to find the reverse situation in US copyright law, where economic rights are narrowly defined whereas exemptions, like fair use, leave ample space for various uses.

<sup>83</sup> "Only members of the company could legally produce books. The only books they would print were approved by the Crown. The company was authorized to confiscate unsanctioned books. It was a sweet deal for the publishers. They got exclusivity - monopoly power to print and distribute specific works- the functional and foundation to copyright. The only price they paid was relinquishing the freedom to print disagreeable or dissenting texts", Easton (2011: 533), citing from Baidhyathan (2001).

<sup>84</sup> Lee (2007: 196), analysing the UK Statute of Anne of 1706. The author emphasises the start of a historical period in which controls over content were effectuated through control over the technology (printing presses).

<sup>85</sup> MacQueen, et al. (2010) where the distinction between the Anglo-American or Common law approach and the Continental Europe or Civil law approach is widely described.

This framework is applicable to any type of content, including also news content. In this specific case, copyright protection enables journalists and media outlets in general to safeguard their investment in the production process, allowing them not only to recover the cost of gathering and transmitting the information, but also to control the possible re-use of such information by third parties. Technological developments ask for a reframing of copyright protection. Nowadays, several new intermediaries have entered into the production chain shifting both revenues and control over news content distribution, hampering the economic viability of traditional news content producers.

A previous approach adopted by courts viewed copyright regulation as already reflecting the balance between freedom of expression and property rights.<sup>86</sup> This was based on the internalisation of a set of criteria in copyright legislation, namely the concept of originality of the work, the distinction between idea and form of expression, the limits posed on economic rights,<sup>87</sup> and on the predefined length of time for copyright protection,<sup>88</sup> the existence of several exceptions.<sup>89</sup>

Recently European courts have started to interpret copyright law taking into account an additional, i.e. external,<sup>90</sup> limit, which would require further ad hoc restrictions to copyright protection when conflicting with freedom of expression.

It is important to note that the reasoning was based on the jurisprudence of the ECtHR in case [Fressoz v France](#),<sup>91</sup> which acknowledged that freedom of expression would be relevant in those cases where it is impossible to convey the information or the idea without making substantial use of the author's expression, and the exceptions provided for in the legislation do not allow such activity.

In terms of scope of legal norms, there is an important distinction between the EU and ECHR system in regard to balancing of these two rights. Under the ECHR system, the right to property is considered to fall under Article 1 of the First Protocol to the Convention (which also covers intellectual property).<sup>92</sup> Under EU law, secondary law regulates copyright and related rights, providing a more detailed legal framework than under the ECHR. Moreover, with the entry into force the EU Charter, cases started to be approached also in light of Article 17(2) EU Charter. Article 17 EU Charter is the equivalent of Article 1 of the First Protocol to the Convention, but its second paragraph explicitly mentions IP rights.

## Art. 17 Right to property

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<sup>86</sup> The most cited examples are the 1985 case “copyright as an engine of free speech” and the 2003 case of *Eldred v. Ashcroft*. The U.S. Supreme Court highlighted several important “built-in-First Amendment accommodations” in copyright law.

<sup>87</sup> The economic rights protected under copyright normally include the rights of reproduction, adaptation, distribution and communication to the public (in all media), but not the reception or private use of a work.

<sup>88</sup> In the European Union the term of protection has been harmonised; copyright normally expires 70 years after the death of the author. See Article 1(1), Directive 2006/116/EC on the term of protection of copyright and certain related rights.

<sup>89</sup> See that this proportionality of the copyright protection is also assessed where a collective society is in charge of managed the rights of its members, claiming the fees for the This reasoning was clearly addressed by the French Courts, in *Cassation re Civ.*, 14 janvier 2010, pourvoi n° 08-16.022, Bull. 2010, I, n° 9; *Cassation 1re Civ.*, 14 janvier 2010, pourvoi n° 08-16.023, 1re Civ., 14 janvier 2010, pourvoi n° 08-16.024, where the balance between freedom of expression (pursuant Article 10 ECHR) and copyright protection was based on the CJEU' s judgement in Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE)* (2006).

<sup>90</sup> See the distinction provided by *Birnhack* (2003) between external and internal mechanism of conflict solving.

<sup>91</sup> ECtHR: app. no. 29183/95, *Fressoz and Roire v France* (1999).

<sup>92</sup> ECtHR, [Melnichuk v Ukraine](#) (2005).

1. Everyone has the right to own, use, dispose of and bequeath his or her lawfully acquired possessions. No one may be deprived of his or her possessions, except in the public interest and in the cases and under the conditions provided for by law, subject to fair compensation being paid in good time for their loss. The use of property may be regulated by law in so far as is necessary for the general interest.
2. Intellectual property shall be protected.

According to the CJEU in the most known decisions [Scarlet Extended](#) and [Netlog](#) “*the protection of the fundamental right to property, which includes the rights linked to intellectual property, must be balanced against the protection of other fundamental rights*”, including the right of freedom of expression and information guaranteed by Article 11 of the EU Charter.

The CJEU then in **UPC Telekabel Wien** provided a set of more detailed guidelines for courts and private parties in order to identify the “fair balance” between intermediary’s freedom to conduct its business and other fundamental rights such as freedom of expression. The measure adopted by an intermediary to block access to copyright infringing content must be ‘strictly targeted, in the sense that they must serve to bring an end to a third party’s infringement, without thereby affecting internet users from accessing lawful information’.

In order to ensure this ‘fair balance’, the measures adopted must:

- (i) not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and
- (ii) have the effect of preventing unauthorised access to the protected subject matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right.

These guidelines are then useful for judges in providing a set of balancing benchmarks that may help in evaluating the facts and circumstances of each case.

At national level, constitutional and civil courts have addressed the this balancing exercise showing different approaches. In France, courts were less open to allow freedom of expression defences in copyright cases, as clearly exemplified in case *Utrillo*, where the Court of Cassation did not acknowledge freedom of expression defence to the case of display protected works of art briefly during television broadcasts.<sup>93</sup>

In Germany, instead, constitutional and civil courts acknowledged that, when special circumstances occur, news items, critical analysis and political speech can be subject to a different copyright regime, namely they can be provided to the public as un-authorized broadcasting. For instance, the decision of the German Constitutional Court in *Germania 3* case affirmed that the incorporation of large extracts of literary works (of Bertold Brecht) into the defendant’s own literary work was protected by

the German Basic Law. The exception to copyright for quotation was interpreted in light of artistic freedom pursuant art. 5(3) of German Basic law.<sup>94</sup>

## Part II - Selected cases

### Methodological remarks

The case sheets that follow are based on the cases that have been provided by the national experts that participated to the e-NACT working group on Freedom of expression.

The selection has been made in line with the following criteria:

1. **Problem-based:** the national jurisprudence reflects in so far as possible the problems, questions, and ambiguities that national judiciary face in relation in the use of the Charter in the field of consumer protection.
2. **EU relevance:** the national jurisprudence identifies in so far as possible issues of EU-wide relevance, that touch upon the application (or omission of application) of the Charter in connection with the application of EU primary and secondary sources in the application of freedom of expression principle.
3. **EU Charter of Fundamental Rights:** Priority is given to cases that cite the Charter of EU Fundamental rights. Additionally, cases that may have cited the Charter but omitted to do so (i.e. where the Charter was applicable) as well as the possible motives for doing or not doing so may be highlighted.
4. **EU Charter of Fundamental Rights level of protection:** particular attention is paid to national jurisprudence where the EU Charter was used to ensure higher standard of protection of freedom of expression compared to the protection ensured by the EU secondary legislation.
5. **Relation between EU Charter of Fundamental rights and ECHR:** Has the EU Charter been used to confer more extensive protection of fundamental rights than that offered under the ECHR or viceversa?
6. **Judicial Dialogue:** a special emphasis is placed on national jurisprudence that used one or more of the following judicial interaction techniques: preliminary reference procedure under Art. 267 TFEU, direct reference to the case law of CJEU or ECtHR, references to the jurisprudence of foreign national courts, disapplication of national legislation implementing EU secondary legislation.
7. **Divergent positions of national judiciary:** national jurisprudence highlighting divergent positions of national courts is considered: lower level courts vs. high courts/constitutional courts/other specialised national courts.
8. **CJEU case law connection:** national jurisprudence highlighting the difference or common approach to legal issues also faced by the CJEU.



## Selected sets of cases

On the basis of the decisions provided by national experts, the case sheets that will follow address the most interesting cases where the (lack of) use of the EU Charter and of judicial dialogue techniques may provide interesting insights for further developments of the jurisprudence at national level.

The selected cases include both cases where the EU Charter is expressly mentioned in the courts reasoning, highlighting if and how its inclusion may be interpreted as an added value; and also cases where the courts did not mention directly the EU Charter, but the issues addressed are similar, providing the basis for comparison.

Each case sheet will present a decision cycle, including not only the CJEU decision but the preliminary ruling and the follow up decision of the same court, as well as the decision directly connected with the case that show the dynamics of the judicial dialogue at national and supranational level.

Where available, the case sheet includes a section addressing the impact of the CJEU decision on national jurisprudence, taking into account the cases where the CJEU decision is referred to in cases decided by foreign courts (than the one that presented the preliminary ruling). Moreover, given the importance and relevance of the independent/regulatory bodies in the application of the freedom of expression principle, the casesheets will also include cases decided by national authorities, such as Data protection authorities, Media and communication authorities, National Human rights bodies.

## Hate speech

Casesheet n. 1 – CJEU, Mesopotamia Broadcast A/S METV (C-244/10) and Roj TV A/S (C-245/10) v Bundesrepublik Deutschland

Casesheet n. 2 – CJEU, Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija, Case C-622/17, pending

Casesheet n. 3 – Glawischnig-Piesczek v Facebook

Casesheet n. 4 – Italy, First instance court Milan, decision 13716/15, 17 December 2015

Casesheet n. 5 – Belgium, Constitutional Court, n°31/2018, March, 15th 2018

Casesheet n. 6 – Spain, Constitutional Court, n° 177/2015, 22 July 2015

Casesheet n. 7 – Portugal, Supreme Court of Justice, 48/12.2YREVR.S1, 5 June 2012 59

## Media Freedom

Casesheet n. 8 – Greece, Council of State, Case 1901/2014 (Supreme Administrative Court) 62

## Defamation and libel

Casesheet n. 9 – Slovakia, Constitutional Court II. ÚS 152/08, 15 December 2009

Casesheet n. 10 – Romania, High Court of Cassation and Justice, decision no. 359/2014 of 28 January 2014

Casesheet n. 11 – Italy, Tribunal of Rovereto, 19 November 2015

Casesheet n. 12 – Romania, High Court of Cassation and Justice, decision no. 3216/2014, 19 november 2014

## **Conflicts between freedom of expression and data protection**

Casesheet n. 13 – CJEU, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07.

Casesheet n. 14 – CJEU, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12

*Casesheet n. 1 – CJEU, Mesopotamia Broadcast A/S METV (C-244/10) and Roj TV A/S (C-245/10) v Bundesrepublik Deutschland*

**Reference case**

CJEU, Judgment of the Court (Third Chamber) of 22 September 2011, [Mesopotamia Broadcast A/S METV \(C-244/10\) and Roj TV A/S \(C-245/10\) v Bundesrepublik Deutschland](#), Joined cases C-244/10 and C-245/10.

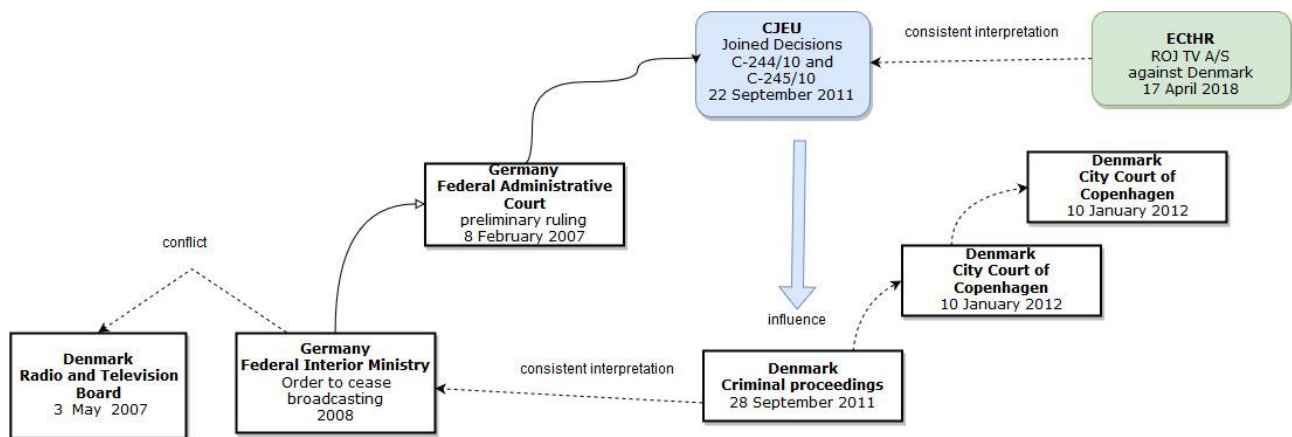
ECtHR, [Roj TV v Denmark](#)

*Core issues*

Which is the definition of “incitement to hatred” adopted at EU level?

Which are the powers of Communication authorities in case of programmes containing incitement to hatred?

**Graphical description**



**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction/Technique
<ul style="list-style-type: none"> <li>•Denmark</li> <li>•Germany</li> </ul>	<ul style="list-style-type: none"> <li>• freedom of expression</li> <li>• hate speech</li> </ul>	<ul style="list-style-type: none"> <li>• Directive 89/552/EEC</li> </ul>	<ul style="list-style-type: none"> <li>• first instance court</li> <li>• Supreme court</li> <li>• CJEU</li> <li>• ECHR</li> </ul>	<ul style="list-style-type: none"> <li>• preliminary reference</li> <li>• consistent interpretation</li> </ul>

**Case(s) description**

a. Facts

The Danish company Mesopotamia Broadcast is the holder of several television licences in Denmark. It operates the television channel Roj TV, which is also a Danish company. Roj TV broadcasts programmes via satellite, mainly in Kurdish, throughout Europe and the Middle East. It commissions programmes from, among others, a company established in Germany.

Several complaints of government authorities in Turkey were lodged before the Danish Radio and Television Board in 2006 and in 2007, which eventually resulted in the decisions of the Danish Radio and Television Board of compliance of the Roj TV's programmes with Directive 89/552/EEC. The Danish Radio and Television Board observed that the applicant company's programmes did not incite hatred on grounds of race, sex, religion or nationality and that it merely broadcast information and opinions, and that the violent images broadcast reflected the real violence in Turkey and the Kurdish areas.

In the meantime, in 2008 the German Federal Interior Ministry started a parallel procedure which instead resulted in prohibition on Roj TV from carrying out its activities in Germany.

The decision of the German authority was based on the evaluation that Roj TV's programmes were at variance with the 'principles of international understanding' as defined by German constitutional law. The ground for the prohibition rested on the fact that Roj TV's programmes called for the resolution of differences between Kurds and Turks by violent means, including in Germany, and supported the efforts of the PKK (the Kurdistan Workers' Party, which is classified as a terrorist organisation by the European Union) to recruit young Kurds as guerrilla fighters against the Republic of Turkey.

The two companies brought an action before the German courts seeking to have that prohibition set aside, relying on the fact that, according to the directive, only Denmark could control their activities.

The German Federal Administrative Court faced with the case, decided to stay the proceedings and present a preliminary ruling to the CJEU whether the German authorities were lawfully entitled to prohibit the activities of Mesopotamia Broadcast and Roj TV. The German court wishes to know, in particular, whether the concept of 'incitement to hatred on grounds of race, sex, religion or nationality', the interpretation of which is reserved in the present context to the Danish authorities, also includes infringements of the 'principles of international understanding'.

#### b. Reasoning of the CJEU

The CJEU on 22 September 2011 decided the case. The Court addressed in detail the analysis of the concept of 'incitement to hatred' laid down in the directive with the purpose of forestalling any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons. According to the referring court, Mesopotamia Broadcast and Roj TV play a role in inciting violent confrontations between persons of Turkish and Kurdish origin in Turkey, and in heightening tensions between Turks and Kurds living in Germany. In those circumstances, the Court declares that the conduct of Mesopotamia Broadcast and Roj TV, as described by the German court, is covered by the concept of 'incitement to hatred'.

However, the CJEU stresses that according to the Television without frontiers directive, only the Danish authorities are competent to verify whether that conduct constitute 'incitement to hatred' and to enforce the application of the same directive on Roj TV so as to prohibit the such incitement. Moreover, the CJEU reminds that according to the directive, Member States are not authorised to restrict the retransmission on their territory of programmes broadcast from another Member State.

In that connection, the CJEU states that the contested measures are designed not to prevent the retransmission in Germany of television broadcasts carried out by Roj TV, but rather to prohibit the

activities in Germany of that broadcaster and Mesopotamia Broadcast in their capacity as associations.

Thus, the reception and private use of Roj TV's programmes are not prohibited and, indeed, remain possible in Germany. However, as a prohibited association, Roj TV can no longer organise activities in Germany, and activities carried out for the benefit of that broadcaster are also prohibited there. Accordingly, the CJEU replies that the measures taken against Mesopotamia Broadcast and Roj TV do not, in principle, constitute an obstacle to the retransmission of programmes broadcast by Roj TV from Denmark. Nevertheless, the referring court must verify whether or not in practice the actual effects which result from the prohibition decision prevent the retransmission of those programmes to Germany.

c. Subsequent proceedings at national level

Immediately after the decision of the CJEU (on September 2011), a Danish prosecutor initiated criminal proceedings against the two companies behind Roj TV, charging them of promoting a terror organization in violation of the Danish Criminal Code. The City Court of Copenhagen decided the case in 2012 and found that the defendant promoted a terrorist organisation (the PKK), highlighting that the TV channel in various programmes in a one-sided and uncritical way had communicated PKK's messages, including requests for rebellion and for joining the PKK. The sanction for such an offence was a fine of 349,000 euro for each broadcasting company, without the application of the deprivation of the right to broadcast nor the confiscation of the broadcasting licence.<sup>95</sup>

On appeal to the High Court of Eastern Denmark (Østre Landsret) upheld the decision, confirming the findings of the lower court. The sanction was increased to 671,000 and adding the deprivation of the license to broadcast. The latter was justified by the application of an effective, proportionate and dissuasive criminal penalties as imposed by the EU's Council Framework Decision of 3 December 2001 on combating terrorism.. The Supreme Court, then in February 2014 upheld the ban.<sup>96</sup>

The broadcasting companies then lodged a claim before the ECtHR claiming a violation of art 10 ECHR. The ECtHR decided the case on 24 May 2018.

The decision took into account the assessment provided by the domestic courts regarding the facts of the cases and the balancing exercise applied as regards the right to freedom of expression of the broadcasting company. On the basis of the domestic court assessment the ECtHR acknowledged that not only the national courts addressed all the relevant facts and evidence, but they also evaluated the potential limitation of the freedom of expression taking into account the programmes' content, presentation and connection and found that the limitation was legitimate.

Accordingly, the ECtHR found that art 17 ECHR was applicable due to the fact that the programmes and contents broadcasted were contrary to the prevention of terrorism and terrorist-related expressions advocating the use of violence. Therefore, by virtue of art 17 ECHR the complainant may not be protected by art 10 ECHR and their complaint is deemed inadmissible.

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<sup>96</sup> Case no. 231/2013, available at

## Analysis

### *a. Role of the Charter*

Art 11 of the EU Charter was mentioned in the CJEU judgement along with art 10 ECHR, though no specific analysis of the impact of the provision on the specific case is provided by the CJEU.

Wider attention is given to the definition of incitement to hatred as provided by art 22a Dir. 89/522 which is interpreted by the CJEU as “*any ideology which fails to respect human values, in particular initiatives which attempt to justify violence by terrorist acts against a particular group of persons*” (par. 42).

### *b. Judicial dialogue*

#### *Horizontal dialogue – comparative reasoning*

Although overlapping in the timeline, the decisions of the national court in Germany and in Denmark do not show any direct cross-reference, neither in their content nor in their arguments. However, it is significant that the prosecutor in Denmark started its criminal investigation when the preliminary reference of the German Federal Administrative Court was lodged at the CJEU. This may entail that the doubts raised by the German court could have been one of the indirect triggers of the criminal investigation.

#### *Horizontal dialogue (European) – consistent interpretation*

From the perspective of the horizontal dialogue among European courts, it is relevant to note that the ECtHR, though mentioning the CJEU decision in joined case C-244/10 and C-245/10, did not give it a weight in its reasoning, at least confirming that a shared evaluation of the content of the programmes of Roj TV as incitement to hatred.

## Reference cases

COMMISSION DECISION of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final, at par. 18.

COMMISSION DECISION of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final.

COMMISSION DECISION of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3 (2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final.

Request for a preliminary ruling from the Vilniaus apygardos administracinis teismas (Lithuania) lodged on 3 November 2017 — Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija, Case C-622/17

### *Core issues*

Which are the powers of Communication authorities in case of programmes containing incitement to hatred?

Which is the balance between prohibition of hate speech and freedom of broadcasting?

## At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
<ul style="list-style-type: none"> <li>Lithuania</li> </ul>	<ul style="list-style-type: none"> <li>freedom of expression</li> <li>hate speech</li> </ul>	<ul style="list-style-type: none"> <li>Directive 2010/13</li> </ul>	<ul style="list-style-type: none"> <li>national communication authority</li> <li>first instance court</li> <li>European Commission</li> </ul>	<ul style="list-style-type: none"> <li>preliminary reference</li> </ul>

## Case(s) description

### a. Facts

<sup>97</sup> Casesheet drafted on the basis of the template provided by Sigita Formiciova.

In 2015, the Lithuanian communication authority adopted a decision regarding the RTR Planeta, a Russian channel transmitted in in Lithuanian country via cable and satellite, which consisted in a temporary suspension of the re-transmission of the channel for three months. The decision was based on the fact that RTR Planeta broadcast programmes that could “*be considered as being aimed at creating tensions and violence between Russians, Russian-speaking Ukrainians and the broader Ukrainian population*” as well as “*inciting tensions and violence between the Russians and the Ukrainians but also against the EU and NATO States*”.<sup>98</sup> Therefore, they were deemed as incompatible with EU law and seriously and gravely infringing art 6 AVMS.

Accordingly, the Communication authority sent the decision to the European Commission, which found the decision compatible with EU law.

After such decision, the Communication authority tried to establish a dialogue with the broadcaster so as to enforce the application of EU law through the collaboration of the Swedish communication authority (being RTR Planeta a registered broadcaster in Sweden), which eventually ended up in another suspension order.<sup>99</sup>

In 2018, the Communication authority informed the Commission of another set of infringements to art 6 AVMS. This time the order sanctioned the RTR Platena with a suspension of twelve months.<sup>100</sup>

#### b. Reasoning of the Commission

The Commission in evaluating the compliance with EU law of the Lithuanian Communication authority based its reasoning on the definition of “*incitement to hatred*” provided in CJEU decision, *Mesopotamia*, joined cases C-244/10 and C-245/10.<sup>101</sup> In particular, the Commission evaluated if the Lithuanian authorities provided information on the content of programmes that could be qualified as incitement to hatred, “*since they involve express language that can be considered on the one hand as an action intended to direct specific behaviour and, on the other hand, as creating a feeling of animosity or rejection with regard to a group of persons*”.

Having confirmed the evaluation of the Lithuanian communication authority, the Commission acknowledged that freedom of expression is a fundamental right protected by the Charter, but it may be limited according to art 52(3) CFR. The express choice of the legislator regarding hate speech is then a legitimate ground for limitation.

As a result the Commission affirms the compatibility of the measure with EU law.

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<sup>98</sup> COMMISSION DECISION of 10.7.2015 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 10.7.2015, C(2015) 4609 final, at par. 18.

<sup>99</sup> COMMISSION DECISION of 17.2.2017 on the compatibility of the measures adopted by Lithuania pursuant to Article 3(2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 17.2.2017, C(2017) 814 final.

<sup>100</sup> COMMISSION DECISION of 4.5.2018 on the compatibility of the measures adopted by Lithuania pursuant to Article 3 (2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services, Brussels, 4.5.2018, C(2018) 2665 final.

<sup>101</sup> See Casesheet n. 1, above.



### c. Subsequent proceedings at national level

Few months before the decision of the Lithuanian Communication authority was taken, also a Lithuanian court faced the application of the provisions implementing art 6 AVMS in an administrative proceeding.

The Vilnius county administrative court received the appeal by Baltic Media Alliance against the decision of the Lithuanian Communication authority, requesting the annulment of the decision no. KS-12 of the latter prohibiting the retransmission of the Baltic Media Alliance channels in Lithuanian country. Similar to the previous case of RTR Planeta, Baltic Media Alliance received the information regarding the decision of the Lithuanian communication authority and decided to appeal against it before the Lithuanian courts.

The Vilnius administrative court decided then to stay the proceedings and present a preliminary reference to the CJEU presenting the following questions:

*“Does Article 3(1) and (2) of Directive 2010/13/EU 1 of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services cover only cases in which a receiving Member State seeks to suspend television broadcasting and/or re-broadcasting, or does it also cover other measures taken by a receiving Member State with a view to restricting in some other way the freedom of reception of programmes and their transmission?”*

*Must recital 8 and Article 3(1) and (2) of Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services be interpreted as prohibiting receiving Member States, after they have established that material referred to in Article 6 of that directive was published, transmitted for distribution and distributed in a television programme re-broadcast and/or distributed via the Internet from a Member State of the European Union, from taking, without the conditions set out in Article 3(2) of that directive having been fulfilled, a decision such as that provided for in Article 33(11) and 33(12)(1) of the Lithuanian Law on the provision of information to the public, that is to say, a decision imposing an obligation on re-broadcasters operating in the territory of the receiving Member State and other persons providing services relating to distribution of television programmes via the Internet to determine, on a provisional basis, that the television programme may be re-broadcast and/or distributed via the Internet only in television programme packages that are available for an additional fee?”*

The case is still pending before the CJEU.

## **Analysis**

### *a. Role of the Charter*

Reference to the Charter was included also in the decision of the European Commission, affirming the legitimacy of the limitations to freedom of expression on the basis of art 52(3). In this case, then the Commission applies (without a very detailed analysis) the three steps test provided by the Charter.

### *b. Judicial dialogue*

*Vertical dialogue – preliminary reference*

The pending preliminary reference will require the CJEU to verify if in case of hate speech the limitation to freedom of expression may be overcome by the application of an alternative solution, such as re-broadcasting through Internet channels upon the payment of a fee.

*Casesheet n. 3 – CJEU, Glawischnig-Piesczek v Facebook, C-18/18, pending case*

**Reference case**

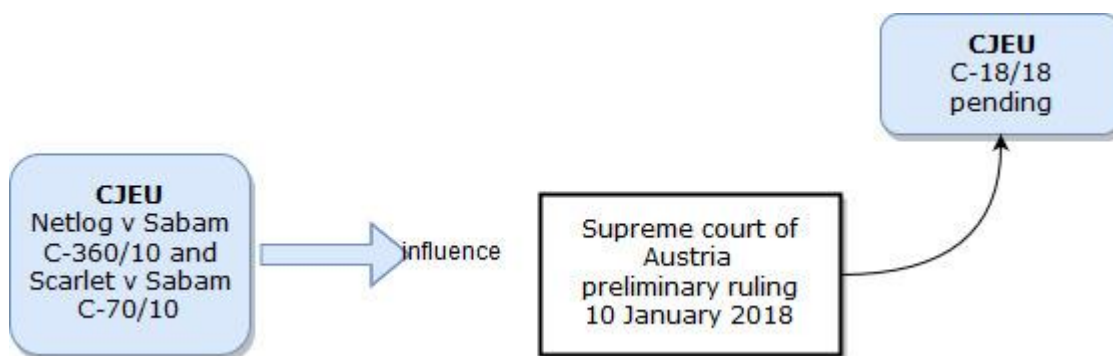
Request for a preliminary ruling from the Oberste Gerichtshof (Austria) lodged on 11 January 2018 — Eva Glawischnig-Piesczek v Facebook, Case C-18/18

*Core issues*

What is the role of Internet intermediary in countering hate speech?

Can an Internet intermediary be requested to monitor hate speech comments worldwide?

**Graphical representation**



**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Austria	<ul style="list-style-type: none"> <li>• freedom of expression</li> <li>• hate speech</li> <li>• defamation</li> </ul>	•Directive 2000/31	<ul style="list-style-type: none"> <li>•first instance court</li> <li>•supreme court</li> <li>•CJEU</li> </ul>	•preliminary reference

**Case(s) description**

a. Facts

In 2016 the former leader of the Austrian Green party, Eva Glawischnig-Piesczek was the subject of a set of posts published on Facebook on by a fake account named ‘Michaela Jaskova. The posts included rude comments, in German, about the politician along with her image.

Ms Glawischnig-Piesczek requested Facebook to delete the image and the comments, but it failed to do so. Thus, Ms Glawischnig-Piesczek filed a lawsuit before the Wien first instance court, which eventually resulted in an injunction against Facebook, which obliged the social network not only to delete the image and the specific comments (making them inaccessible worldwide), but also to delete any future uploads of the image if it was accompanied by comments that were identical or similar in meaning to the original comments.

Facebook complied with the injunction only across the Austrian country, blocking access to the original image and comments, then appealed the decision. The Appeal court upheld the first instance decision only partially, requiring the deletion of the image only in case of comments that were identical to the original wording or similar in meaning upon notice by the plaintiff or third parties.

Both parties appealed the court of appeal's decision, which brought the case to before the Oberste Gerichtshof. Addressing the case, the Austrian supreme court affirms that Facebook is considered as an abettor to the unlawful comments, thus it may be required to take steps so as to repeat the publication of identical or similar wording. However, in this case the injunction regarding such a proactive role for Facebook could be indirectly impose a monitoring role, which is in conflict not only with art 15 e-commerce Directive, but also with the previous jurisprudence of the CJEU in [Netlog v Sabam](#) and [Scarlet v Sabam](#) cases. Therefore, the Supreme court decided to stay the proceedings and present a preliminary reference to the CJEU, including the following questions:

*Does Article 15(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce') preclude the national court, to make an order requiring a hosting provider who has failed to expeditiously remove illegal information not only to remove the specific information but also other information that is identical in wording?*

*With regards to the first question, does Article 15(1) precludes such an order that requires the hosting provider to remove such information (or block access to it) worldwide or only in the relevant member state?*

*Does Article 15(1) precludes such an order that is limited to removing or blocking access to the illegal information only from the specific user who posted the content and whether such an order would be applicable worldwide or only in the relevant member state?*

*If the previous questions are answered in the negative: does the same answer apply to information that is not identical in wording, but similar in meaning?*

*Does the same answer apply to information that is not identical in wording, but similar in meaning, once the host provider has actual knowledge of the information?<sup>102</sup>*

## b. Reasoning of the CJEU

The case is currently pending before the CJEU.

## Analysis

### a. Judicial dialogue

#### *Vertical dialogue – preliminary reference*

The Austrian Supreme court points to highly debated issue which was emerging not only in the European but also at worldwide level. As a matter of fact, in the same period also the Supreme Court

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<sup>102</sup> Questions translated by the preliminary reference decision of the Oberste Gerichtshof, OGH, case number 6Ob116/17b.

of Canada granted an interlocutory injunction against Google in the form of a global de-indexing order.<sup>103</sup>

*Horizontal dialogue – comparative reasoning*

It is worth noting that also a French court addressed the issue of injunction with worldwide scope with a reference to the de-listing from Google search results. The Paris first instance court ordered such an injunction in 2014 as an application to the right to be forgotten of a French lawyer. In the case, the judge hearing the application for interim relief held that the request for de-listing was well-founded, and imposed to Google France the removal of the defamatory links. This injunction did not limit to the links of Google.fr, on the ground that the defendant did not establish the impossibility of connect from the French territory using the other endings of the search engine.<sup>104</sup>

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<sup>103</sup> For a detailed history of the interplay between Canadian and US courts as regards the enforceability of the injunctions see the analysis provided by the Global Freedom of expression at Columbia University, available at <https://globalfreedomofexpression.columbia.edu/cases/equustek-solutions-inc-v-jack-2/>.

<sup>104</sup> See below at Casesheet n. 14.

**Reference case**

ECHR, [Féret v Belgium](#)

*Core issues*

Which are the legitimate grounds for the limitation to freedom expression?

Are the limitations regarding the expression and gesture linked to an ideology based on discrimination, superiority of race, and ethnic hate legitimate?

**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Italy	<ul style="list-style-type: none"> <li>• Freedom of expression</li> <li>•hate speech</li> </ul>	<ul style="list-style-type: none"> <li>•Chapter III Charter</li> <li>•Directive 2000/43</li> </ul>	<ul style="list-style-type: none"> <li>•first instance court</li> <li>•ECtHR (indirect)</li> </ul>	<ul style="list-style-type: none"> <li>•consistent interpretation</li> </ul>

**Case(s) description**

a. Facts

In 2013, a neighborhood in Milan was populated by ROMA families, who were allegedly accused of having committed crimes against property and heritage. This caused a very high tension in that part of the city, and a set of protests against the ROMA settlement were organized. As a reaction to the protests, the Prefect decided for the forced eviction of the ROMA settlement.

In the occasion of the city council meeting after the eviction, another protest was organized by right-wing associations before the city council. In order to avoid the heightening of tension, some representatives of those organizations were invited to participate as observers to the city council.<sup>106</sup>

During the meeting, a left-wing councilor asked if the representatives of the right-wing association who had organized the protest were in the Council Chamber, because if that was the case the councilor would have left. As a reply, a criminal lawyer belonging to one of the right-wing organisations stood up to his question with the expression “*proud to be here*” and in saying so he raised his hand and arm straight in the manner of the fascist salute.

The scene was filmed by a journalist and seen by several participants to the city council. Given that the fascist salute is a criminal offence according to Italian law, general excitement followed, ended with the lawyer shouting to the left wingers “*we shall face you on the streets*”.

b. Reasoning of the court

The court addressed the qualification of the fascist salute as a criminal offence according to national law (Law 205/1993) taking into account also international and European provisions, referring to the New York Convention of 1966, art. 14 ECHR, art. 19 TFUE, Chapter III of the CFR, art. 7 of the International Criminal Court Statute.

<sup>105</sup> Casesheet based on the template provided by Valeria de Risi.

<sup>106</sup> Citizens may participate to city councils as observers.

The Italian court addressed the crime along the qualification of discrimination based on race, colour, and ethnic origins as qualified by the New York Convention and by the Directive 43/2000 implemented at national level by Law 215/2003. According to national jurisprudence of the Supreme Court, the fascist salute qualifies as a manifestation typical of a political party having an ideology which favours the spread of discrimination, the superiority of race and ethnic hate. Thus, the behavior of the criminal lawyer is affirmed to be a criminal offense made during a public meeting, such as the one which took place in the Council Chamber of Milan.

The Italian court then took into account whether the gesture could be covered by the principle of freedom of expression protected by art 10 ECHR and by art 21 of Italian Constitution. The Italian court drew a parallel between the jurisprudence on art 10(2) ECHR as regards limitations to freedom of expression and the interpretation of art 21 Const. as interpreted by the Italian Constitutional court in cases where a question of constitutionality was raised regarding laws deemed to be in conflict with freedom of expression principle.<sup>107</sup>

In particular, the Italian court highlighted that the interpretation of the Constitutional court to law Law 645/1952 on apology of fascism by decision n. 25184/2009 is to be interpreted as an offence which does not limit freedom of expression per se, rather it limits the expression in case of public meeting where there is a foreseeable danger that such expressions, on the one hand, may favour the dissemination of ideas based on discrimination, and on the other may constitute a potential trigger to disorders and violence.

## Analysis

### *a. Role of the Charter*

The Charter was only mentioned in a general manner, indicating its Chapter III dedicated to equality, where in particular art 21 CFR on non-discrimination is included. However, no additional analysis was provided so as to highlight the impact of the Charter in the reasoning of the national court.

Similar weight was given to art. 10 ECHR, though in this case a more detailed paragraph was dedicated to ECtHR jurisprudence where the feature of freedom of expression as a not absolute right is highlighted, so as to identify the legitimate limitations based “*on the respect of equal dignity of all people as a basis for a democratic and pluralist society*”, mentioning those cases that address hate speech, such as [Feret v Belgium](#) and [Incal v Turkey](#).

### *b. Judicial dialogue*

#### *Vertical dialogue – consistent interpretation*

The Italian court draws a direct parallel between the jurisprudence on hate speech of the ECtHR and Italian constitutional court jurisprudence on the limitation of art 21 Const. In this sense consistent interpretation was used directly to support the argument that freedom of speech is not absolute and, in case of ideologies linked to discrimination, superiority of race and ethnic hate, the protection of public order is a legitimate ground for limitation.

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<sup>107</sup> Italian Constitutional Court, decision n. 37581/2008 and n. 31655/2001.

## Reference cases

Belgium, Constitutional Court, n°9/2015, January, 28th 2015

### Core issues

Which are the legitimate grounds for the limitation to freedom expression?

Can the legislator qualify as a crime the dissemination of messages that incite the perpetration of terrorist acts? Which is the proportionality test applicable in order to avoid an unjustified encroachment on freedom of expression?

## At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Belgium	<ul style="list-style-type: none"><li>• freedom of expression</li><li>• hate speech</li></ul>		<ul style="list-style-type: none"><li>• constitutional court</li><li>• ECtHR (indirect)</li></ul>	<ul style="list-style-type: none"><li>• consistent interpretation</li></ul>

## Case(s) description

### a. Facts

The Belgian Human Rights League presented an action before the Constitutional court against the modification of a criminal provision to criminalize the dissemination of messages that incite the perpetration of terrorist acts or any other mean to make those messages available to the public, should the dissemination imply a risk of commitment of those acts or not.

### b. Reasoning of the court

The Belgian Constitutional Court evaluates the constitutionality of the Art.2 of the Law 3 August 2016 amending art 140 bis Criminal code against art 19 Belgian Constitution, as well art. 10 ECHR, art. 11 EU Charter and art. 19 ICCPR. Those provisions are qualified by the Constitutional court as an indissoluble whole.

The Constitutional court address the analysis of the amended criminal code provision taking into account that in 2015 a similar question of constitutionality was addressing the previous version of the provision, resulting in legitimate ground for the limitation of freedom of expression.<sup>109</sup>

The Constitutional court starts from the assumption that the protection of democracy implies the protection of the values and principles of the ECHR against persons or organisations that try to undermine those fundamental values by inciting to commit violence and therefore to commit terrorism.

When an expressed opinion justifies that terrorism is committed to achieve the goals of the author of the opinion, national authorities can limit freedom of expression. Nevertheless, the criminalisation of

<sup>108</sup> Case based on template provided by Eric Jooris & Evelyne Esterzon.

<sup>109</sup> Constitutional Court, January 28th 2015, n° 9/2015.



public provocation to commit terrorist acts doesn't allow the repression of acts that have no relation with terrorism which can infringe freedom of expression.

According to this provision, the judge has to take several elements into account: the person who disseminates the message or makes it available to the public, the recipient of the message, the nature of the message, the context of the message. The person disseminating the message or making it available to the public can only be sanctioned if she acts with a special intent, i.e. incitement to terrorist acts.

According to the preparatory work of this provision, the criminalisation of such messages occurs only if there's a risk of terrorist acts. This condition is considered as a safeguard against the repression of offences unrelated to terrorism: the criminalisation cannot lead to the repression of offences that are unrelated to terrorism – which would infringe freedom of expression. Therefore, the criminalisation can only occur if there's serious evidence that there's a risk of terrorist act.

The Constitutional court then acknowledges that the amended Art. 140bis Criminal Code deletes the requirement of the existence of a risk in order to simplify proof of incitement to terrorism. According to the preparatory works in Parliament, the range of this requirement is not clear and it can be difficult to prove the existence of such an element.

In the previous decision regarding the same provision, the Constitutional Court considered that the definition of risk is clear enough to be fully in line with the principle of legality. Besides the judge has to exercise his discretion and examine whether or not there's serious evidence of a risk depending on the identity of the person disseminating the message or making it available to the public, its recipient, nature and context.

The need to simplify the production of evidence cannot justify a sentence to imprisonment and the fine for terrorism incitement when there's no serious evidence of a risk of terrorist acts. A provision of a Council Framework Decision on combatting terrorism requires to examine if such a risk exists.

Thus, the constitutional court affirms that the new version of art. 140bis Criminal Code containing various provisions in terms of counter-terrorism is a limitation to freedom of expression, it is not necessary in a democratic society and limits the freedom of expression to a disproportionate extent, therefore it must be annulled.

## **Analysis**

### *a. Role of the Charter*

The Charter is mentioned but not analysed in detail by the Constitutional court, neither in the decision of 2018 nor in the previous decision of 2015 on the same provision. However, it is important to note that the Constitutional court analyses the freedom of expression as guaranteed by the Constitution, ECHR and the Charter as a whole.

### *b. Judicial dialogue*

#### *Vertical dialogue – consistent interpretation*

According to the qualification of the national constitution, the ECHR, the Charter and the ICCPR as an indissoluble set of provisions, the court relied on the jurisprudence of the ECtHR so as to provide the standards for the limitation of the freedom of expression principle. In this case, the consistent interpretation approach taken by the court is not qualified as an interaction with "foreign" jurisprudence, rather as an internalised jurisprudence.

**Reference case**

ECHR, [Stern Taulats v Spain](#)

*Core issues*

Which is the balance between freedom of expression and the protection of the honour and integrity of public institutions?

Can an insult to public institutions be qualified as hate speech? Under which conditions?

**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
•Spain	•freedom of expression •hate speech		•constitutional court •ECHR	•consistent interpretation

**Case(s) description**

a. Facts

In September 2007, while the King was on an official visit to Girona, the applicants set fire, during a public demonstration, to a large photograph of the royal couple which they had placed upside-down.

As a result, they were sentenced to 15 months’ imprisonment for insult to the Crown. The judge subsequently replaced that penalty with a fine of 2,700 euros each but ruled that, in the event of failure to pay the fine in whole or in part, the applicants would have to serve the prison term. That judgment was upheld by the Audiencia Nacional on 5 December 2008. When the judgment became final the applicants paid the fine.

However, they lodged an individual appeal (“recurso de amparo”) with the Constitutional Court.

b. Reasoning of the Court

The Spanish Constitutional Court upheld the interpretation of inferior courts regarding the qualification of the facts as a criminal offence –injury or insult to the Crown- in application of article 490.3 of the Spanish Criminal Code. The conduct of the applicants consisting of setting fire to a large photograph of the King, which also was placed upside-down, was not a legitimate form of freedom of expression according to the Spanish Constitutional Court.

The Court reiterates that freedom of expression should be balance with other rights, especially the right to honour and, in this case, the protection of the integrity of public institutions. In this balancing, freedom of expression is paramount because of its relevance for a democratic society. However, freedom of expression is not absolute. Setting fire to a photograph of the King may qualify as a symbolic speech which express political ideas and, therefore, in principle, freedom of expression is applicable. However, the circumstances of the case led the Spanish Constitutional Court to determine

<sup>110</sup> Casesheet based on the template provided by Joan Solanes Mollor.

that the conduct of the applicants incorporated violence, intolerance and hate. The Spanish Constitutional Court qualified the acts of the applicants as an example of a hate speech/crime, calling for violence and disturbs. Thus, freedom of expression does not cover the acts of the applicants.

After the decision of the Constitutional Court, the applicants presented a complaint for a violation of their freedom of expression right before the ECtHR.

c. Subsequent decision by the ECtHR

In the case *Stern Taulats and Roura Capellera*, judgment of the European Court of Human Rights of 13 March 2018, the Strasbourg Court condemned Spain for a violation of article 10 of the ECHR. The ECtHR specially rejected the use of the hate speech/crime argument by the Spanish Constitutional Court.

In analysing the context in which the facts occurred, the ECtHR determined that the setting fire of the photograph placed upside-down was a political critique to the institution of the monarchy, as well as its symbolic representation of the Spanish state as an oppressor of the independence movement of Catalonia. This political critique should be protected by the freedom of expression.

From the context, the acts occurred after a public demonstration, cannot be inferred the incitement to hatred or violence. The conduct of the applicants can be qualified as a “performance” expressing political ideas in a debate of a public interest, i.e. the role of the monarchy and the independence movement in Catalonia.

For all of these, national authorities interfered in the right to freedom of expression of the applicants and this interference was not necessary in a democratic society.

## Analysis

a. *Role of the Charter*

The Charter was not invoked in national proceedings and was not taken into account by the Spanish Constitutional Court. Council Framework Decision 2008/913/JHA of 28 November 2008 was not mentioned in national proceedings and, therefore, the Charter was not conceived as an applicable instrument.

It seems difficult to find a link between the facts of the case and the Council Framework Decision. The case is not related to the discriminatory grounds which is based the Decision: race, colour, religion, descent or national or ethnic origin. The facts of the case are related to a speech or conducts connected to a political ideology or beliefs –critique to the Crown and the Spanish State-, without this xenophobic or racism connections. Therefore, the Charter is not applicable as well.

Despite the criticism of the ECtHR in *Stern Taulats*, the Spanish Constitutional Court expressly qualified the facts of the case as a hate speech or hate crime. The own Constitutional Court brings to the case the hate speech/crime discourse. In this context, the Court did not refer to the Council Framework Decision or the Charter for justifying its decision. EU law and the Charter, with the importance of the Council Framework Decision in this matter, were ignored by the Spanish Constitutional Court.

## b. Judicial dialogue

### *Vertical dialogue – consistent interpretation*

The Spanish Constitutional court supported its reasoning through the reference to the ECtHR jurisprudence. The consistent interpretation approach linked directly the national jurisprudence on freedom of expression to the ECtHR. In particular the court rely on the decisions of the ECtHR in *Otegi v. Spain*, where the exercise of freedom of expression by a politician can allow “*to resort to a dose of exaggeration, or even of provocation, that is, of being somewhat immoderate in their observations*”, and in *Feret v Belgium*, where freedom of expression may be limited so as to “prevent all forms of expression that propagate, incite, promote or justify hatred based on intolerance”.

It is interesting to see that, although the reasoning of the Constitutional court was based on the ECtHR jurisprudence, the latter in the subsequent decision qualified the facts of the case in a different manner.

## Reference case

ECHR, \*\*\*

### Core issues

Can the limitation to freedom of expression be a justification for a denial to enforce a European Arrest Warrant?

## At a glance

Country	Legal area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Portugal	<ul style="list-style-type: none"><li>• freedom of expression</li><li>• hate speech</li></ul>	<ul style="list-style-type: none"><li>• Council Framework Decision 2002/584/JHA on the EAW</li><li>• Council Framework Decision 2009/299/JHA</li><li>• Council Framework Decision 2008/913/JHA</li></ul>	<ul style="list-style-type: none"><li>• Supreme court</li><li>• first instance court</li></ul>	<ul style="list-style-type: none"><li>• consistent interpretation</li></ul>

## Case(s) description

### a. Facts

The Nuremburg-Fürth Regional Tribunal issued a European arrest warrant (EAW) regarding a German citizen (AA) who fled and was found in Portugal. According to the EAW, the convicted made several statements, in internet articles and public speeches (on May 8th, 2002 and January 11th, 2004), denying the crimes committed by the Third Reich against Jews during the II World War, considering it “the most profitable lie in the history of human race”, insulting the Federal Republic of Germany and inciting hatred against Jews.

To comply with the EAW, the Portuguese authorities detained AA on April 11th, 2012. The Évora Court of Appeal (Appeal Court) judge confirmed the execution of the EAW and ordered AA’s extradition.

AA appealed to the Portuguese Supreme Court of Justice (Supremo Tribunal de Justiça, STJ), which after a detailed reasoning on the arguments presented by the applicant, reaffirmed the decision of the Appeal Court.

### b. Reasoning of the court

In the decision under analysis, the STJ began its legal reasoning with a summary on the main arguments presented by the appellant for the non-execution of the EAW by Portuguese authorities. First, AA claimed that the German court’s decision, and the consequent EAW issued against him, had political motivations which was, according to the former article 11(2)(e) of Law n° 65/2003, a ground for mandatory non-execution of the EAW. Secondly, the applicant invoked the double criminality condition, maintaining that, according to Portuguese Law, he had not committed any crime since his right to express freely that same opinion would be protected by the Constitution of

<sup>111</sup> Casesheet drafted on the basis of the template provided by Marta Carmo.

the Portuguese Republic (Constituição da República Portuguesa, hereinafter CRP) , namely articles 13, on the principle of equality , and 37, on freedom of expression and information . The double criminality condition is a ground for optional non-execution of the EAW, according to article 12(1)(a) of Law no. 65/2003 , which foresees that Portuguese authorities can refuse to execute an EAW when the act which resulted in the issuing of the EAW does not constitute an offence under national law. Finally, AA claimed that if his extradition to Germany would take place, he would not be granted a fair trial .

The Court advanced with considerations on the concept and evolution of the EAW. However, the more relevant reasoning of the decision is related to the second main argument presented by AA in the request for appeal – lack of double criminality – because, in this instance, the STJ made important remarks and drew relevant conclusions concerning the balance to be found between the constitutional right to freedom of expression and the criminalisation of hate speech.

AA claimed he was convicted for exercising his right to freedom of thought and expression, rights that should be granted to every citizen. The STJ admitted that freedom of expression is, indeed, protected by article 37 of the CRP. According to the Court, the right to freely express one's thought and opinions is a negative right of every citizen of not being prevented from expressing and disseminating his or her opinions. The STJ decision affirmed that this right cannot be restricted . This is such a pronounced constitutional protection that it encompasses a prohibition of censorship even if the opinion which is being expressed is unconstitutional. Nonetheless, the STJ found that, still, the right to freedom of expression is not absolute and it can be limited when there is a collision with other rights with equal or higher constitutional value, for example the right to personal dignity, to a good name and reputation, (article 26 of the CRP) and that the violation of such limits can result in criminal or administrative punishment .

The Court carries on its reasoning by discussing article 240 of the Portuguese Criminal Code (Código Penal, hereinafter CP) on discrimination and incitement to hatred and violence . The Court clarifies that the legislator used the denial of genocide, war crimes and crimes against peace and humanity as an example in article 240(2). In fact, according to the STJ, the denial of genocide and other crimes of the same nature cannot be, in itself, criminalised due to the constitutional protection afforded to freedom of expression. That is the reason why article 240(2) requires that the denial of such crimes is accompanied by the offender's intention to provoke acts of violence, inflict libel, threaten or incite violence and hatred against a person or a group of people, i.e., act committed by the offender constitutes or is accompanied by hate speech.

The Court proceeds by mentioning the Council Framework Decision 2008/913/JHA by agreeing that the mere dissemination of opinion on the occurrence, or not, of a certain fact, without making any value judgement cannot be considered as a reason to restrict the right to freedom of expression. Instead, the act which is criminalised and punishable by law is the diffusion of behaviours and ideas which “justify” a genocide or the denial of genocide as a manifestation of hate speech.

When considering whether the declarations of the applicant, that crimes against Jews were not committed by the Third Reich and that such idea is the “most profitable lie in the history of humanity”, are a criminal offence under Portuguese national law, the STJ declares that AA's conduct can, indeed, be considered as an offence under article 240(2) of the CP. To reach this conclusion, the Court notes that the applicant did not just denied the genocide, but he also made a clear negative judgement which was offensive to the victims, their families and friends by declaring it as a “profitable lie”.

The Court, thus, considers that the statements made by AA, in the context of his denial of the crimes committed during the II World War by the Third Reich, were offensive to the Jews and constitute hate speech. This means, as the Court affirms, that the act of the appellant exceeds the limits of the constitutional protection afforded to the right to freedom of expression and, consequently, is a

criminal offence under article 240(2) of the CP. Therefore, the double criminality condition was verified and the STJ decided to consider the request for appeal unfounded and confirmed the decision of the Court of appeal.

## **Analysis**

### *a. Role of the Charter*

The case is highly relatable with the Charter because, in the core of the STJ's reasoning is a discussion on the restriction of the right to freedom of expression. Therefore, articles 11, on freedom of expression, as well as article 51(1), on the scope of guaranteed rights, of the Charter are directly related to the case under analysis by the STJ. However, the Charter was not mentioned in the decision of the STJ, the relevant point of reference in this case was instead the ECHR.

### *b. Judicial dialogue*

#### *Horizontal dialogue – consistent interpretation*

The STJ refers, in its decision, case law of the Portuguese Constitutional Court and of the ECtHR. In what concerns the vertical interaction of national courts, the decision under analysis is a decision on appeal of the Évora Court of Appeal's decision of confirming the execution of the EAW and extradite AA. The STJ considered the case and, in the end, confirmed the Court of Appeal's decision to extradite the applicant.

## Reference case

ECHR

### Core issues

What is the role of public media broadcaster in ensure media pluralism?

## At a glance

Country	Legal area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
•Greece	<ul style="list-style-type: none"> <li>•freedom of expression</li> <li>•media freedom and pluralism</li> </ul>	<ul style="list-style-type: none"> <li>•Protocol no. 29 to the TFEU on the system of public broadcasting in the Member States</li> </ul>	<ul style="list-style-type: none"> <li>•Supreme court</li> <li>•ECHR (indirect)</li> </ul>	<ul style="list-style-type: none"> <li>•consistent interpretation</li> </ul>

## Case(s) description

### c. Facts

The case concerns an action for annulment, lodged by POSPERT - the Pan-Hellenic Federation of Public Radio and Television Employees, that is, ERT's trade union - and its president, against Decision OIK.02/11.6.2013 of the Deputy Minister to the Prime Minister and the Minister of Finance of 11/6/2013 (FEK B 1414) on the "Abolition of the public undertaking "Hellenic Broadcasting Corporation", Public Limited Company (ERT SA)". The joint ministerial decision abolished ERT and its subsidiaries; provided for the interruption of the transmission of radio and television broadcasting, of the publishing, of the operation of websites and of any other activity of ERT after the end of its programme of 11/6/2013 until the establishment of a new PSB in the public interest, with due respect for the principles of transparency and good management; and ordered that ERT's frequencies should remain inactive until the creation of such a new PSB.

On 17 June 2013, the President of the Council of State, by means of a temporary injunction, ordered the partial suspension of the joint ministerial decision. This was confirmed by Decision 236/20.6.2013 of the Suspensions Committee of the Council of State, which was issued following a suspension petition by POSPERT and its president. The Decision ordered the suspension of the joint ministerial decision exclusively with regard to the interruption of the transmission of radio and television broadcasting by ERT, the interruption of the operation of its websites and the inactivity of its frequencies. The Decision also ordered the Minister of Finance, the Deputy Minister to the Prime Minister and the special liquidator to take all necessary organizational measures, including the hiring of personnel, for the broadcasting by an interim public organization, as soon as possible, of the necessary radio and television programs and the operation of websites until the establishment and operation of a new PSB.

On 10 July 2013, a transitional operator "Hellenic Public Radio and Television" started program transmission.

On 26 July 2013, Law 4173/2013 on the new public service operator was published.

<sup>112</sup> Casesheet drafted on the basis of the template provided by Evangelia Psychogiopoulou.



d. Reasoning of the CJEU (if applicable)

The Council of State (CS) started its FR reasoning by interpreting relevant constitutional provisions. The provisions of Article 14(1) and (2) Const. guarantee freedom of expression. A basic manifestation of free speech is considered to be the right to disseminate news, comments and opinions through the press, radio and television (right to inform). The same constitutional provisions, read in conjunction with Articles 5(1) (free development of personality) and 5A(1) (the right to information) Const. guarantee the right of everyone to be informed regularly and freely from any available source on any matter of interest (right to be informed). According to the CS, the above mentioned provisions, together with Article 10 ECHR, safeguard the freedom to inform and to be informed as a prerequisite for the free development of one's personality and a constituent element of the democratic system.

As regards radio and television broadcasters, the constitutional legislator, having regard to the wide scope, immediate effects and power of influence they have, has determined, in Article 15(2) Const., that their operation falls under the direct control of the State. This direct control involves both the granting of licences and ensuring that broadcasters' operation serves certain public interest objectives such as the objective and on equal terms transmission of information, news, products of speech and art, the quality of the programs in correspondence with the social mission of radio and television and the cultural development of the country, respect for the value of the human being and the protection of childhood and youth. Licensing responsibilities as well as the supervision of public interest objectives and the imposition of sanctions are granted to an independent authority, the "National Council of Radio and Television (NCRT). Furthermore, Article 14(9) Const. provides for the adoption of laws on the disclosure of ownership, financial situation and means of financing the media and for the adoption of measures and restrictions necessary to ensure full transparency and pluralism in information. It also states that the concentration of the control of more media of the same or another type is prohibited.

Pursuant to Articles 5(1), 5A(1), 14(1)-(2) and (9) and 15(2) Const., the State is the ultimate guarantor of the functioning of the broadcasting sector and of pluralism. The State (i.e. the legislative and executive branches and the NCRT as an independent regulatory authority) has the positive obligation to take all necessary measures (legislative, administrative, procedural, substantive, etc.), including the imposition of administrative sanctions, to ensure that the universal provision of radio and television broadcasting services is in line with constitutional values, the principle of transparency of media ownership, the media's financial situation and funding, as well as the rules preventing ownership concentration, at the same time refraining from interfering with the content of the broadcasting organisations' programs. However, according to the CS, the aforementioned constitutional provisions do not impose a duty on the state to ensure the operation of a PSB. The legislator is entitled to decide, taking into account the financial situation of the State at any given time, whether or not it is necessary and feasible to establish a public service media organisation, with a view to guaranteeing the effective implementation of the constitutional provisions on radio and television. If a public broadcasting organisation is indeed established, it must have a pluralistic structure, be organised in ways that preclude political pressure from government and political parties and operate on the basis of the principles of objectivity, independence and pluralism.

Against this background, the CS rejected the applicants' argument that the joint ministerial decision should be annulled for breach of Article 15(2) Const. Although the applicants argued that Article 15(2) Const. should be interpreted as safeguarding the uninterrupted, continuous operation of the PSB, the CS took the position that Article 15(2) Const. did not require the establishment of a public broadcasting body. The position of the CS was influenced by the fact that ERT's abolition, besides being driven by budgetary considerations, was also aimed at establishing a new public broadcasting body and that the law providing for such a new body (Law 4173/2013) had been published shortly

after ERT's shutdown (on 26/7/2013); that a transitional public broadcaster (Hellenic Public Radio and Television) had begun to operate (and would do so until the operation of the new public service entity); and that the operation of both the nation-wide and local private broadcasters in Greece continued without problems, under the supervision of the NCRT.

One of the other grounds put forward for the annulment of the contested joint ministerial decision was breach of Article 11 CFR on freedom of expression and information as well as breach of Protocol no 29 to the TFEU "on the system of public broadcasting in the Member States". For the applicants, these provisions secured the existence and operation of ERT SA as the public service operator in the field of broadcasting.

Having referred to the relevant provisions, the CS declared that the competence to establish and organize a system of public broadcasting rests with the Member States; it is not governed by EU law. In particular, the CS interpreted the provisions of Protocol no 29 as authorizing the financing of public service broadcasting on condition that the Member State concerned has indeed chosen to set up a public service operator, underlining that Protocol no 29 does not oblige the Member States to introduce a system of public service broadcasting. In relation to the CFR, the CS held that in accordance with Article 51 CFR, the provisions of the CFR, and thus also Article 11 CFR, govern the actions of the Member States only when they apply Union law; they do not concern purely internal policy measures.

On this basis, the CS rejected the plea that the contested act should be annulled for breach of Protocol no 29 and of Article 11 CFR.

Another ground advanced for the annulment of the joint ministerial decision was infringement of Article 10 ECHR. This was also considered by the applicants to protect the existence and operation of ERT SA as the public service broadcasting provider. The CS declared that Article 10 ECHR should not be construed as obliging the contracting states to establish a public broadcaster where there are other means to ensure the quality and balance of programs. Considering that in Greece there were other media organizations that ensured the quality and balance of programs through the operation of a large number of private broadcasters under the control of an independent authority (the NCRT), the abolition of ERT SA (which was moreover intended to lead to the establishment of a new public service broadcaster) was not a violation of Article 10 ECHR.

## **Analysis**

### *c. Role of the Charter*

The CFR and in particular Articles 11 and 51 CFR have been mentioned and discussed by the CS because breach of Article 11 CFR was put forward as an argument for the annulment of the contested joint ministerial decision on the abolition of ERT SA.

The CS considered ERT's closure to be a purely internal measure and rejected the argument about breach of Article 11 CFR as unfounded. It did not however rule on whether or not Article 11 CFR guarantees the existence and operation of a system of public service media.

Although the CS did not rule on whether or not Article 11 CFR guarantees the existence and operation of a system of public service media, it did so in relation to Article 10 ECHR. It held that Article 10 ECHR does not impose a requirement on states party to the ECHR to establish a public service broadcaster if there are other means to ensure balanced and quality programming.

It is also worth mentioning that when presenting the constitutional and legal framework concerning the right to free speech and information (thus before the examination of the grounds advanced by the

applicants for the annulment of the contested decision), the CS referred to the relevant constitutional articles, in conjunction with Article 10 ECHR, but it did not mention Article 11 CFR.

d. Judicial dialogue

*Horizontal dialogue – consistent interpretation*

In dismissing as unfounded the applicants' argument about breach of Article 10 ECHR, the CS cited the ECtHR judgment, *Manole and Others v. Moldova*, of 17 September 2009. This was a mere citation. The CS did not analyze the ECtHR ruling but simply referred to it when indicating that Article 10 ECHR does not create an obligation on states party to the ECHR to establish a PSB if other means to ensure the quality and balance of programs exist.

## Reference case

Slovakia, Constitutional Court II. ÚS 152/08, 15 December 2009

### Core issues

Which is the balance between freedom of expression and reputation in case of press articles?

## At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
•Slovakia	<ul style="list-style-type: none"><li>• freedom of expression</li><li>• defamation</li></ul>	<ul style="list-style-type: none"><li>• none</li></ul>	<ul style="list-style-type: none"><li>• Constitutional court</li><li>• ECHR (indirectly)</li></ul>	<ul style="list-style-type: none"><li>• consistent interpretation</li><li>• comparative reasoning</li></ul>

## Case(s) description

### a. Facts

In 2007, the tabloid weekly magazine Plus 7 published an article addressing the issue of the proportionality between the penalties for defamation awarded by courts vis-à-vis the compensation given to victims of crimes. The opinion presented was that there was a lack of proportionality in favour of the former, which could have the effect of triggering corruption of the judicial system. In particular, one example provided was the one of a judge who at that time awarded a sizeable amount in damages for defamation.

The judge then presented a claim for defamation against the periodical. Although the district court and the Bratislava Regional Court both ruled in favour of the judge with a pecuniary sanction of SKK 250,000 on the periodical, the Slovak Constitutional court reversed the decision.

### b. Reasoning of the court

The Constitutional court established a tight connection between the constitutional protection of freedom of expression by art. 26 and art 10 ECHR and its interpretation by ECtHR.

In particular, the Constitutional Court adopted a proportionality test based on the jurisprudence of the ECtHR, which includes the following criteria: Who criticized/ Who delivered an expression? Who was criticized? What had been said (expressed)? When was it done? Where was it done? How was it done?

The constitutional court provided a detailed analysis of each criteria:

<sup>113</sup> Casesheet based on the template provided by Jan Stiavinicki

#### “Who is criticized

*The result of the effort to support the discussion about topics interesting for public is the classification of the objects of critique. The degree of permissible critique varies according to the characteristics of the recipient of the critique. Boundaries of acceptable critique are the widest toward politicians as addressees of the criticism and the most strict when the “ordinary” people are criticized. Constitutional Court accepts the trend that is moving the judges, who stand somewhere in between, closer to politicians (...).*

#### Who criticizes

*Just as the recipients of criticism, the critics themselves are classified in terms of their importance for the exchange of views in society. It is clear that the privileged group are journalists. The European Court of Human Rights constantly reminds us that the press is democracy watchdog (“public watch dog”) and it plays an important role in the rule of law because it allows the free game of political debate. Journalists have a (social) obligation to provide information and ideas on all matters of public interest and the public has the right to receive such information. Journalists are even allowed to use some degree of exaggeration and provocation. Based on the abovementioned the ECHR provides the journalists with a higher level of protection compared with other subjects of freedom of expression. The Constitutional Court accepts this approach of the ECHR, and only based on it’s authority, but mostly because of the fact that the arguments of ECHR are convincing. (...)*

#### What is criticized

*The Constitutional Court and ordinary courts must examine the object and form of criticism. Criticism usually heads towards to judicial decision itself, its reasoning or the process in proceeding or it is headed sprightly towards the personality of the judge. (...)*

#### Where is he/she/it criticized

*The place where the expression was orally expressed or published is also useful criterion for assessment of the interference into freedom of expression. Generally speaking, the more distributed the criticism is the higher the protection of personal rights is. However, there is a need to understand the respective matter in connection with the criterion of the author of expression. If the author is a journalist, his or her privileged position partially neutralises the criterion of location. (...)*

#### When is he/she/it criticized

*When criticising the judicial decisions it is of importance whether they are criticised during the proceeding, resp. trial, or after the end of it. Timing of criticism should be seen not only in terms of phase of the trial, but also in terms of social timing. The respective magaziner concerned the proceeding that was not final as it was decided only by the court of first instance and the decision had been challenged before the court of the second instance (see also the decisions of the Constitutional Court no, II. ÚS 23/00, II. ÚS 13/02 (...)). In this case, it is generally necessary to raise the demands for more accurate reporting. In the present case there was no report about the judicial decision but selected cases and decisions served as the examples to illustrate the current problem of the number of cases before courts initiated by the public figures who were provided high amounts of money as non-pecuniary damage in those cases. The social topicality is linked also to say historical actuality. While building judiciary in the rule of law, the countries in transition can protect judiciary against public discussion with perhaps defamatory aspects or on the other hand they can open discussion about judiciary. The Constitutional Court is inclined to accept the second of these*

*alternatives, taking into account the fact that changes in the judiciary are underway for two decades already. (...)*

How is he/she/it criticized

*Not only what is said needs to be taken into account. Also how it is said is of an importance in assessment of acceptability of the criticism. In this case the criticism is indirect, genre criticism of respective judicial decisions, and implicitly it is also the criticism of the judge who has been successful in these cases before the courts. The magazine has been published on the last but one page of the magazine under the column "Word of Publisher" with the caricature of prickly hedgehog. This means that it was a commentary, not reporting section of the magazine. A reader hence counts with the value-colouration or polemical text and therefore a reader treats the article more cautiously. The tone of the article can be seen as sarcastic but not as insidious. Form of criticism is therefore the disagreement with the judicial decisions but there are no offensive, incursive or indecent formulations. In overall context the magazine refers to a systematic problem of high satisfactions of non-pecuniary damages granted to judges in the defamation trials. The primary goal is to critique the specific decision-making practice of the courts, which corresponds to the title of the article where there is no name of the applicant mentioned. (...)."<sup>114</sup>*

The court, after the thorough evaluation of the six criteria, held that the right to freedom of expression should have prevailed over right to privacy, thus the decisions of the lower courts should be overruled as they were in violation of the freedom of expression of the magazine (publisher of the magazine).

## **Analysis**

### *b. Role of the Charter*

The CFR was not mentioned.

### *c. Judicial dialogue*

*Vertical dialogue – consistent interpretation*

The Constitutional Court in its reasoning used as a point of reference the standards provided by the ECtHR, using consistent interpretation so as to adapt such standards into the national legal discourse.

Moreover, the court provided for a rich comparative reasoning exercise taking into account into account several decisions from foreign European and international courts, including the German Federal Constitutional Court, the US Supreme Court, the Constitutional Court of the Republic of Georgia and the Supreme Court of Canada. The latter were not only mentioned, rather their content was directly quoted as a supporting argument.

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<sup>114</sup> II. ÚS 152/08. English translation in L. Berdisová, Constitutional law, Trnavská univerzita v Trnave, Právnická fakulta, 2013, p. 56-58, available at <http://iuridica.truni.sk/sites/default/files/dokumenty/zahranicne-vztahy/en/publications/pdf/02Constitutional%20Law.pdf>.

**Reference case**

ECHR, [Lingens v. Austria](#)

*Core issues*

Which is the balance between freedom of expression and reputation in case of press articles?  
 What is the standard applicable in case of politicians?

**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial InteractionTechnique
•Romania	<ul style="list-style-type: none"> <li>• freedom of expression</li> <li>•defamation</li> </ul>	•none	<ul style="list-style-type: none"> <li>•Supreme court</li> <li>•ECHR (indirectly)</li> </ul>	•consistent interpretation

**Case(s) description**

a. Facts

The company O.T. S.R.L., the owner of a television channel (O.T.V.), was subject to an administrative fine and to the obligation to make public such sanction, applied by the National Council for Audio-visual (CNA), the Romanian regulatory authority in the field of audio-visual programs.

The company was sanctioned for having presented, during a television show images of the former Romanian prime-minister, E.B., who was filmed naked in the changing room of a fitness gym. The images had been taken from another television, A.1, which had displayed them as well. Apart from presenting the images, the moderator of the show and his guest made various ironical and offensive comments regarding the appearance of the former prime-minister

The CNA concluded that the television had committed a violation of the rules regarding the protection of fundamental rights such as the right to dignity, to private life, honour, reputation and personal image. The television had disregarded the fact that the images presented did not serve the public interest in any way, but referred exclusively to the private life of Mr. E.B.

b. Reasoning of the court

The High Court of Cassation and Justice, deciding upon the special appeal of the plaintiff O.T.V., denied the appeal and maintained the first-instance decision of the Bucharest Court of Appeal, ruling that the sanctions imposed by the CNA had been lawfully applied.

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<sup>115</sup> Casesheet based on the template provided by Sorina Ioana Doroga.

The Court analysed the right to dignity, private and family life and the right to image and reputation, in balance with the freedom of expression of journalists. In invoking the freedom of expression, the plaintiff relied on both the provisions of article 10 ECHR, as well as those of article 11 CFREU.

Firstly, the Court held that the argument invoked by the plaintiff concerning the fact that the images had already been broadcast by other television channels and that O.T.V. had only re-run them, could not justify the latter's actions, since the liability of each television was to be engaged for the type of images that it presented.

Secondly, the Court rejected the argument of the plaintiff regarding the public interest which would justify the airing of the images. It concluded that "the nude images of E.B. and the offensive comments regarding his physical aptitudes have nothing to do with any public interest and that exchange of ideas did not include opinions indispensable in a democratic society." The Court indicated the even though the person pictured was a public person, their political activity is not to be confused with their private life and a reasonable balance should be maintained between the freedom of expression protected by article 10 of the ECHR and article 8 of the same Convention relating to the protection of the right to private life. The Court went on to show that the freedom of expression is not absolute and that its exercise may be limited in the situations indicated at paragraph 2 of article 10 ECHR, even for journalists (who are expected to engage in exaggerations or provocations in relation to the value judgments that they issue in the performance of their activity). It further referred to the ECtHR's case-law in *Lingens v. Austria*, stating that the "press may not go beyond the limits necessary for the protection of other persons' reputation; it is incumbent upon it to impart information and ideas on the problems debated in the political arena and in other sectors of public interest".

Thirdly, with respect to the argument of the plaintiff that the affirmations of the show moderator were value judgments issued in the exercise of his freedom of expression, the Court dismissed this defence. It stated that such a value judgment, as a declaration of a journalist made without any factual basis, is excessive and is not justified by the purpose of article 10 ECHR. Even though the accepted limits of criticism are higher in the case of a politician who acts in such capacity, such person is nonetheless to be protected within the framework of their private life and when their dignity is affected. The Court made reference to the ECtHR's judgment in the case of *Oberschlick v. Austria* and concluded that in the circumstances of the case, the actions of the television and the commentaries of the show moderator were in violation of the right to private and family life of E.B. and therefore, the CNA sanctions had been lawfully applied.

In light of these arguments, the High Court of Cassation and Justice denied the special appeal and maintained the decision in first instance of the Bucharest Court of Appeal, ruling that the sanctions imposed on O.T.V had been lawful.

## **Analysis**

### *a. Role of the Charter*

The CFREU was invoked by the plaintiff when referring to the application of the freedom of expression, alongside the provisions of article 10 ECHR. In its ruling, the Court did not make a separate analysis of the provisions of the Charter but dealt with the freedom of expression exclusively in reference to the ECHR framework and to the relevant case-law of the ECtHR.

### *b. Judicial dialogue*

*Vertical dialogue – consistent interpretation*



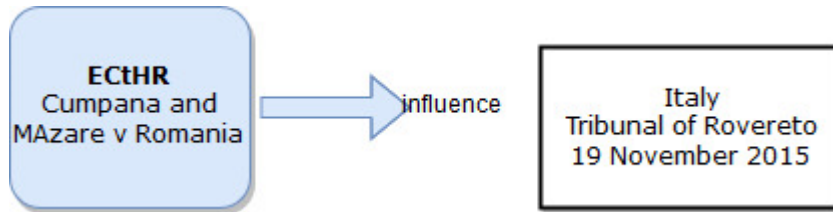
The Romanian Supreme Court consistently interpreted the national legislation regulating audio-visual activities with the ECHR provisions and case-law of the ECtHR regarding the freedom of expression and the right to private and family life.

*Core issues*

Which is the balance between freedom of expression and reputation in case of press articles?

Which are the proportionate remedies in case of defamatory speech that may not trigger a chilling effect on journalists?

**Graphical representation**



**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
•Italy	<ul style="list-style-type: none"> <li>• Freedom of expression</li> <li>• defamation</li> </ul>	<ul style="list-style-type: none"> <li>• art 10 ECHR</li> </ul>	<ul style="list-style-type: none"> <li>• first instance court</li> <li>• ECtHR (indirect)</li> </ul>	<ul style="list-style-type: none"> <li>• consistent interpretation</li> </ul>

**Case(s) description**

a. Facts

In 2015, the president of a cultural association associated with a traditional view of Catholicism published, on the web page of the association, an article.

The article was entitled “B .: update the country (with paedophilia)”. The article included several quotations from previous writings and interviews by Mr B. dedicated to the sexuality of minors. Mr B. was in fact an intellectual and writer known for his unconventional and libertarian ideas. Additionally, the article included the image of a banner bearing the inscription “B. infamous paedophile”.

Mr B. presented a claim for defamation before the first instance court of Rovereto, which decided the case in abbreviated procedure.

b. Reasoning of the court

The decision address in detail the legal issues emerging in case of defamation disseminated on Internet, taking into account the various national and European jurisprudential trends.

The court analysed in detail the content of the allegedly defamatory article. It supported the analysis with the ECtHR jurisprudence on the balance between freedom of expression – and in particular

freedom of the press – and reputation and dignity. The reference case was *Lingens v Austria*, where the role of journalists as watchdogs of democracy was defined.

Moreover, on the basis of the facts of the case, the court affirms that freedom of expression is not univocal, stating that "*if a public figure [...] releases scathing statements on sensitive issues such as sexuality in general and that of minors in particular, provocative and aggressive towards a well-identified part of public opinion, he can not complain if representatives of that same party react in an equally scathing manner, for the obvious reason that the freedom of expression of thought is valid for him as for its contradictory. Until the conflict is held at the level of a debate between ideas we can not doubt the full legitimacy of the debate, regardless of the tones used, but when ideas become verbal attacks against the counterparty, the legitimacy of the opinions expressed depends on the concrete manner and contents expressed*".

After having affirmed the defamatory content of the article, the court provided for a detailed justification regarding the sanction to be applied in this case. Firstly, the court explicitly affirms that custodial sanction may not be imposed according to the ECtHR jurisprudence on defamation cases. In particular, the national court referred to the decision in *Cumpana and Mazare v Romania* and *Belpietro v Italy* where the European court affirmed that prison sentence for crimes committed by press must be relegated to the cases of exceptional gravity. Accordingly, the Italian court order the application of a pecuniary sanction based on the gravity of the conduct.

It is important to note that the Italian court affirmed that the current formulation of art 13 of Law 47/1948 imposing custodial sentence in case of defamation by press may raise doubts of compliance with ECHR provisions as well as with constitutional principle of freedom of expression. However, the Italian court did not go as far as presenting a question to the Constitutional court concerning such doubt.

## **Analysis**

### *a. Role of the Charter*

The EU Charter was not mentioned, but the reasoning of the court clearly linked the national constitutional provision on freedom of expression with art 10 ECHR.

### *b. Judicial dialogue*

#### *Vertical dialogue – consistent interpretation*

The First instance court in its reasoning used as a point of reference the standards provided by the ECtHR, using consistent interpretation so as to adapt such standards into the national legal discourse.

However, the court did not step forward a more direct vertical debate with the Italian Constitutional court, though it hints to the potential issue of constitutionality of national provisions regarding the sanctions to be applied to defamation by press

## Reference case

ECHR, Delfi v Estonia

### Core issues

What is the balance between freedom of expression and reputation in case of comment of online articles?

Who is responsible in case of comments to online articles?

Which are the remedies for the breach of reputation rights?

## At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
•Romania	<ul style="list-style-type: none"><li>• freedom of expression</li><li>• defamation</li></ul>		<ul style="list-style-type: none"><li>•Supreme court</li><li>•ECHR (indirect)</li></ul>	<ul style="list-style-type: none"><li>•consistent interpretation</li></ul>

## Case(s) description

### a. Facts

The case concerns defamatory statements against several persons who were running financial activities. Their full name was given in several statements published on an online website related to complaints regarding the security market, administered by the defendant. Several articles were posted from the readers of this site for the duration of several months, including various defamatory statements, some even with criminal connotations against the complainant, such as whether he can be accused of having committed illegal acts such as evasion, money laundering and deception, supported by few legal arguments but subjected to excessive value judgments, such as the "scam", the "bullet jumble", the "screaming of the charlatans", etc., for which the proof of good faith has not been made and which were of the nature to affect the complainant dignity, honor and self-esteem, values respected and protected.

Some of the subjects of these statements brought a liability action against the administrator of the website before the ordinary court. Both the first and second instance courts found the administrator guilty, with the only difference that the second instance court reduced the amount of civil damages from 25,000 lei to 10,000 lei. He then followed a complaint before the last instance court, the High Court of Cassation and Justice. In a very detailed judgment of approx. 20 pages, the Court set out the guidelines on how to balance the freedom of expression with the right to reputation, where to strike the balance, and what are the remedies in case the manifestation of freedom of expression in the online forum endangers the reputation of a person. Its judgment is heavily based on the judgments of

<sup>116</sup> Casesheet drafted on the basis of the template provided by Bodgan Christea and Madalina Moraru.

the Grand Chamber of the ECtHR on freedom of expression and right to reputation regarding online statements.

b. Reasoning of the court

The High court of Cassation and Justice addressed the case firstly affirming that expressing opinions on the professional, moral and personal qualities of a person who is accused of unlawful acts (such as evasion, money laundering and deception) without any specific proofs or arguments, are such as to affect his dignity, honour and self-esteem, values to be respected and protected.

Against this background, while recognizing the importance of the right to freedom of expression in a democratic society, the Court considered that the virtual space could not be transformed into an ad hoc court in which anyone may affirm the existence of facts with criminal connotations without showing a solid factual basis in this respect, nor can it become a tribune of insults against natural persons, without proper sanction, insults that have acquired racial connotations, which is also unacceptable.

The overall evaluation of the articles posted on the website brings the court to the conclusion that they were, in the opinion of the reader, likely to outline a negative perception of the reputation of the complainant.

From that perspective, the court addressed the legal conditions for the admissibility of the liability of the defendant in respect of the existence of an unlawful act (the disclosure on the website of information liable to infringe the right to the image of to an individual) as well as to the existence of damage (adversely affecting that person's image).

After having established the causal link between the unlawful act consisting in the publication of defamatory statements against the applicant's person and the damage to the image caused to the latter, the Court addressed the admissibility of civil liability for the defendant's guilt. Here, the court refers to the case law of the European Court of Human Rights (*Delfi AS v. Estonia* and *Öztürk v. Turkey*), whereby the responsibility for publishing defamatory statements against a person is based on the dissemination of such information to the public.

The court then addressed in detail the correspondence between Art 30 (6) and (7) of the Romanian Constitution with Art 10 ECHR on freedom of expression, where both include the possibility of limitation on the basis of the protection of reputation and dignity. In particular the Court refers to the ECtHR jurisprudence on duties and responsibilities applicable to journalists as well as to persons who have the opportunity to inform the public on matters of general interest. These duties and responsibilities may be of particular importance if there is a risk of harming the reputation of others, thus endangering the rights of others (*Tănăsoaica v. Romania*, *Tammer v. Estonia*).

The Court affirms that the fact that the articles posted were taken based on articles published in other websites does not exonerate the defendant from the duties and responsibilities provided by art. 10 of the Convention, including those to respect the right to good repute guaranteed by art. 8 of the Convention.

Finally, the court supports its reasoning by returning to the decision in *Delfi AS v. Estonia* where the interference provided for by national law to freedom of expression was deemed to be legitimate also in a case of a national website specialized in news services.

The court then concluded that since on the website administered by the defendant, a series of defamatory articles, some even with a criminal connotation, coming from the site's readers, were posted in regard to the complainant, the webmaster not only is responsible for failing to fulfill his positive censor obligations or preventing the publication of messages with defamatory content, but he also encouraged the expression of insulting opinions to those who are active in the financial market by publishing the articles in which these views were presented by presumed readers.

When assessing the limits to the freedom of expression on the basis of the need to respect the right to privacy, namely the right to image and the right to reputation, the Court cited the ECtHR judgment in *Niculescu Dellakeza v. Romania*, as to whether there is a public interest in the debated issue (the *Bugan v Romania*), the good faith of the journalist (the case of the criticism, the style and the context of the critical message, the context in which the article was drafted, the case of *Ileana Constantinescu v. Romania*), the relationship between value judgments and factual situations, the exaggeration of the artistic language, the proportionality of the sanction with the deed and the motivation of the judgment (*Bugan v Romania*, *Dumitru v Romania*).

Also in *Delfi v Estonia* (judgment of 10 October 2013), analyzed by the Court of First Instance in a broad and coherent manner, ECtHR considered relevant issues in assessing the existence of an interference with the right to free expression: the context of messages posted on the Internet, the measures that Delfi took to prevent the defamatory messages, the individual responsibility of the authors of these messages, but also the difficulty of identifying them, given that a large part of the messages were anonymous and the postings were made without the authors' obligation to reveal their identity, by the national court.

By virtue of the legal norms set out and the considerations set out, it is clear that the appellant (defendant), as the administrator of the website, is responsible for failing to fulfill his positive obligations to censor or hinder the publication of messages with defamatory content and, moreover, encouraged the expression of insulting opinions to those who are active in the financial market by publishing the articles in which these views were presented by presumed readers.

As regards the existence of the damage, as an essential element of the civil liability in question, the Court in agreement with the first instance court, noted that the factual elements listed by the appellant as not likely to cause harm, such as: the position of director of the complainant; the fact that the plaintiff was known by his or her immediate relatives as a professional operating on the capital market, the applicant's young age, a fresh graduate may, on the contrary, constitute elements relevant to determining the existence of damage to the individual's image, since not only persons with a certain professional experience or advanced age enjoy protection, but every person has the right to private life, with the distinctions made by the ECtHR that the intimate private life and social private life, the young people being obviously included in this category and having the legal protection against the excess and arbitrariness presumed to overcome the legal limits in the exercise of freedom of expression.

In the same sense, in terms of personality, it is important not only what others think about you, reflecting your image, but also your own subjectivity, which can be harmed through insulting phrases by third parties in public, virtual space.

The High Court of Cassation and Justice confirmed the judgment of the second instance court as regards qualification and damages.

## **Analysis**

### *a. Role of the Charter*

The High Court of Cassation and Justice did not refer to the Charter, however it referred extensively to the judgments of the Grand Chamber of the ECtHR on the legitimate limitations to the freedom of expression.

### *b. Judicial dialogue*

Conform interpretation with the relevant judgments of the ECtHR.

*Casesheet n. 13 – CJEU, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07.*

**Reference case**

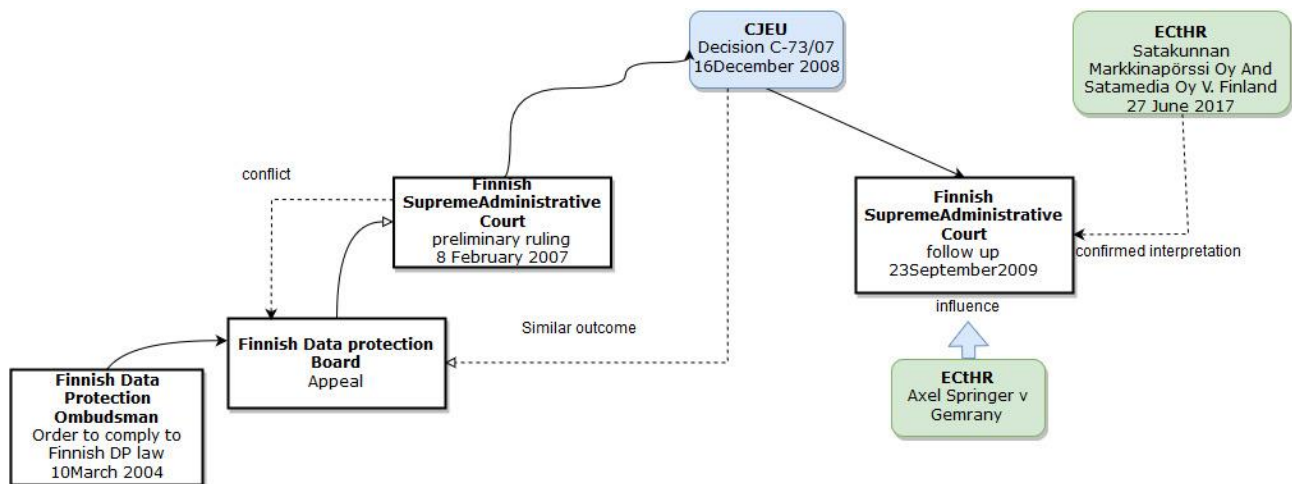
CJEU, Judgment of the Court (Grand Chamber) of 16 December 2008, [Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07](#).

ECHR, [Satakunnan Markkinapörssi Oy And Satamedia Oy V. Finland](#) (Grand Chamber)

*Core issues*

Which is the balance between freedom of expression and data protection in case of journalist activity?  
Should the exemption for journalistic activity be interpreted strictly?

**Graphical representation**



**At a glance**

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
<ul style="list-style-type: none"> <li>Finland</li> </ul>	<ul style="list-style-type: none"> <li>freedom of expression</li> <li>data protection</li> </ul>	<ul style="list-style-type: none"> <li>Art 11 CFR</li> <li>art 10 ECHR</li> <li>Dir. 95/46</li> </ul>	<ul style="list-style-type: none"> <li>Data Protection authority</li> <li>first instance court</li> <li>supreme court</li> <li>CJEU</li> <li>ECtHR</li> </ul>	<ul style="list-style-type: none"> <li>preliminary reference</li> <li>proportionality</li> <li>consistent interpretation</li> </ul>

**Case(s) description**

a. Facts



Two Finnish companies, Satakunnan Markkinapörssi Oy and Satamedia Oy, were collaborating in publishing tax information regarding Finnish citizens contained in a public register.<sup>117</sup> The first company in particular published a magazine “Veropörssi” dedicated to this topic. In 2003, the two companies established a text-messaging service in cooperation with a Finnish telecommunications provider, through which the users may access the database of tax information published in Veropörssi.

In 2003, the Finnish Data Protection Ombudsman issued a notice under Finnish data protection law requiring Satakunnan and Satamedia to cease the data processing activity. However, the companies refused to comply. Thus, the Ombudsman requested the Data Protection Board to issue a ban on the two companies’ collection and publishing of the tax data, both in the Veropörssi magazine and by the text-messaging service.

The Data protection Board dismissed the request as it shared the arguments presented by the two companies affirming the applicability of the exemption for journalistic purposes according to the Finnish Data Protection Act. The appeal to the decision was then lodged before the Helsinki Administrative Court by the Ombudsman, eventually confirming the decision of the Data protection board. A following appeal was lodged to the Finnish Supreme Administrative Court.

The Supreme court then decided to stay its proceedings in order to present a preliminary reference to the CJEU. I believe that it is important to follow the reasoning of the Finnish court and refer here to the entirety of questions presented to the Luxembourg court:

*“(1) Can an activity in which data relating to the earned and unearned income and assets of natural persons are:*

*(a) collected from documents in the public domain held by the tax authorities and processed for publication,*

*(b) published alphabetically in printed form by income bracket and municipality in the form of comprehensive lists,*

*(c) transferred onward on CD-ROM to be used for commercial purposes, and*

*(d) processed for the purposes of a text-messaging service whereby mobile telephone users can, by sending a text message containing details of an individual’s name and municipality of residence to a given number, receive in reply information concerning the earned and unearned income and assets of that person,*

*be regarded as the processing of personal data within the meaning of Article 3(1) of [the directive]?*

*(2) Is [the directive] to be interpreted as meaning that the various activities listed in Question 1(a) to (d) can be regarded as the processing of personal data carried out solely for journalistic purposes within the meaning of Article 9 of the directive, having regard to the fact that data on over one million taxpayers have been collected from information which is in the public domain under national legislation on the right of public access to information? Does the fact that publication of those data is the principal aim of the operation have any bearing on the assessment in this case?*

#### b. Reasoning of the CJEU (if applicable)

The CJEU decided the case on 16 December 2008, but the Court did not give a concrete solution to the question. It provided a limited set of elements useful to check whether the activity carried out by

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<sup>117</sup> Note that information on natural persons’ taxable income and assets is public information in Finland, subject to the law on public disclosure of tax information, (Laki verotustietojen julkisuudesta ja salassapidosta) no. 1346 of 30 December 1999. Thus, the register included information to which any person may request access.

the two companies were falling into the category of ‘journalistic purposes’. The Finnish Court was then in charge of verifying whether the test was satisfied, on the basis of the fact of the case.

The balancing exercise carried out by the CJEU revolved around the right of privacy and freedom of expression, taking into account that derogations to the data protection rules based on freedom of expression are allowed only when strictly necessary. Although the analysis of the CJEU was based on the narrow construction applicable to derogations, it ended up in a broad interpretation of the concept of journalism. Accordingly, the exemption and derogations provided by Art. 9 Directive 95/46 can apply not only to media organisations but to every person engaged in journalism.<sup>118</sup> This was also supported by the fact that the dissemination of information is no more strictly linked to the type of medium used to transmit such data. Moreover, also commercial justification can be at the basis of professional journalistic activity. The test of the CJEU, then, resulted in the fact that the activities in question are to be considered as being “solely for journalistic purposes” within Article 9, Directive 95/46/EC “if the sole object of those activities is the disclosure to the public of information, opinions or ideas” leaving completely to the national courts to verify whether this is the case.<sup>119</sup>

This test however differ to the one provided by the ECtHR in the **Hannover and Axel Springer cases**, where the court set out seven criteria relevant to balancing competing rights under Arts. 8 and 10 ECHR:

1. The contribution of the information to a debate of general interest;
2. The notoriety of the person concerned;
3. The prior conduct of the person concerned;
4. The content, form and consequences of the publication;
5. The circumstances in which the photograph was taken.
6. The reliability of the published story and
7. The level of severity of the court sanction.

### c. Outcome at national level

The Finnish Supreme Administrative Court decision was delivered on 23 September 2009.<sup>120</sup> Here, the court developed a proportionality test mixing the maximum standards of protecting freedom of expression as resulting from the CJEU preliminary ruling with the maximum standard of protection of the other fundamental right at issue - right to privacy, as developed by the ECtHR in the Hannover and Axel Springer cases.

The Court pointed out that the balance requires that, for the part of freedom of speech, information provided to the audience must be important for the society and not only serve curiosity. Thus, greater attention should be given to the protection of private life in light of the capacity of new communication technologies to maintain and reproduce personal information.

Turning to the text-message service, the Finnish Court went on with the balancing exercise, and held that since the processing of data was not directed to the discussion of a social interest necessary in a democratic society, then it could not qualify as processing for journalistic purposes under the Data

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<sup>118</sup> Ibid. at para. 58. See also A. Flanagan, “Defining ‘journalism’ in the age of evolving social media: a questionable EU legal test”, (2012) International Journal of Law and Information Technology.

<sup>119</sup> Ibid. at para. 62.

<sup>120</sup> KHO:2009:82.

Protection Act. The Supreme Administrative Court applied directly the proportionality test under Article 8 ECHR to determine the applicability of the derogation in this specific instance.

According to this proportionality test, the Court sent the case back to the Data Protection Board, obliging the Board to send a refusal to Satamedia on their continued publishing of the data. The refusal covered both the publications and the SMS service. The Court stated in its judgement that Article 2.4 of the Finnish Personal Data Act is not in line with the way in which the CJEU has interpreted the scope of application of the Directive.<sup>121</sup>

After a following set of proceedings regarding the enforcement of the order of the Data Protection Board before the national courts, the two companies lodged a claim before the ECtHR for the violation of art 10 ECHR.

The ECtHR decided in the Grand Chamber the case on 27 June 2017 finding no violation of the right to freedom of expression and information. In the views of the ECtHR the prohibition issued by the Finnish Data Protection Board that prohibited two media companies from publishing personal taxation data in the manner and to the extent they had published these data before, is to be considered as a legal, legitimate and necessary interference with the applicants' right to freedom of expression and information. The ECtHR approves the approach of the Finnish authorities denying the applicants' claim to rely on the exception of journalistic activities within the law of protection of personal data.

The most relevant issue was whether the interference was necessary in a democratic society, being sufficiently and pertinently motivated and proportionate in its dimension or impact. In this case, the ECtHR confirms the approach taken by the national courts, which based on the criteria laid down in the ECtHR jurisprudence. Moreover, the court affirms that the journalistic purposes derogation "*is intended to allow journalists to access, collect and process data in order to ensure that they are able to perform their journalistic activities, themselves recognised as essential in a democratic society*".

However, the ECtHR follows on affirming that "*the existence of a public interest in providing access to, and allowing the collection of, large amounts of taxation data did not necessarily or automatically mean that there was also a public interest in disseminating en masse such raw data in unaltered form without any analytical input*".<sup>122</sup> In this sense, the ECtHR implies that if the a publication do not contribute to a debate of public interest, it cannot enjoy a privileged position that traditionally calls for a strict scrutiny by the ECtHR and that allows little scope for restrictions under Article 10(2) ECHR.

## Analysis

### a. Role of the Charter

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<sup>121</sup> Article 2 of the Finnish Data Protection Act on the scope of application provides that "(1) The provisions of this Act apply to the processing of personal data, unless otherwise provided elsewhere in the law.

(2) This Act applies to the automatic processing of personal data. It applies also to other processing of personal data where the data constitute or are intended to constitute a personal data file or a part thereof.

(3) This Act does not apply to the processing of personal data by a private individual for purely personal purposes or for comparable ordinary and private purposes.

(4) This Act does not apply to personal data files containing, solely and in unaltered form, data that have been published by the media.

(5) Unless otherwise provided in section 17, only sections 1—4, 32, 39(3), 40(1) and (3), 42, 44(2), 45—47, 48(2), 50, and 51 of this Act apply, where appropriate, to the processing of personal data for purposes of journalism or artistic or literary expression."

<sup>122</sup> § 175.

Although the Charter was not mentioned in the decisions, being it not binding at the time of the proceedings, the Satamedia case is illustrative of the different approaches of the CJEU and the ECtHR as regards the balancing between freedom of expression and the right to data protection. At the same time, it shows the attempt of a national court to ensure compliance with both the Strasbourg and Luxembourg courts' standards when they express different levels of protection of the same fundamental right. The Finnish Supreme Administrative Court referred a preliminary reference to the CJEU, asking the interpretation of the clause "solely for journalistic purpose" in Article 9 of Directive 95/46/EC.

The solution reached by the national court is thus an example of how to ensure both coherent application of EU law and higher standards of application of fundamental rights in a case of conflicting fundamental rights.

#### b. Judicial dialogue

##### *Vertical dialogue – preliminary reference*

The Supreme Court felt the need to present the preliminary reference so as to gather from the CJEU guidelines for the interpretation and the incorporation of the ECHR standard within the application of the EU law applicable in case of processing of data for journalistic purpose.

##### *Vertical dialogue – consistent interpretation*

In deciding whether to raise a preliminary question, the Supreme Court complied with the obligation under Art. 267(3) TFEU, and at the same time shielded Finland from possible claims under the principle of State liability and under the ECHR. However, the preliminary ruling did not provide an exhaustive solution. The Finnish Court, therefore, decided to fill the gaps and enriched the interpretation adopted by the CJEU with the very advanced proportionality test developed by the ECtHR.

*Casesheet n. 14 – CJEU, Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González, Case C-131/12*

**Reference case**

France, Tribunal de Grand Instance Paris, ordonnance de référé, 16 September 2014, n° 14/55975<sup>123</sup>

France, Tribunal de Grand Instance Paris (ord. réf.), 24 novembre et 19 décembre 2014 - Marie-France M. cl Google France et Google Inc.<sup>124</sup>

Netherlands, Rechtbank Amsterdam, 18 september 2014, ECLI:NL:RBAMS:2014:6118<sup>125</sup>

Netherlands, Rechtbank Amsterdam, 11 march 2015, C/13/563401/HA ZA 14-413, ECLI:NL:RBAMS:2015:1958<sup>126</sup>

Netherlands, Rechtbank Den Haag, 12 januari 2017, ECLI:NL:RBDHA:2017:264<sup>127</sup>

Germany, Urteil des Oberlandesgerichts Hamburg vom 7 Juli 2015 (Az. 7 U 29/12)<sup>128</sup>

Belgium, Cour de cassation, C.15.0052.F, 29 avril 2016

UK, Information Commissioner’s Office, Enforcement Notice to Google Inc., 18 August 2015

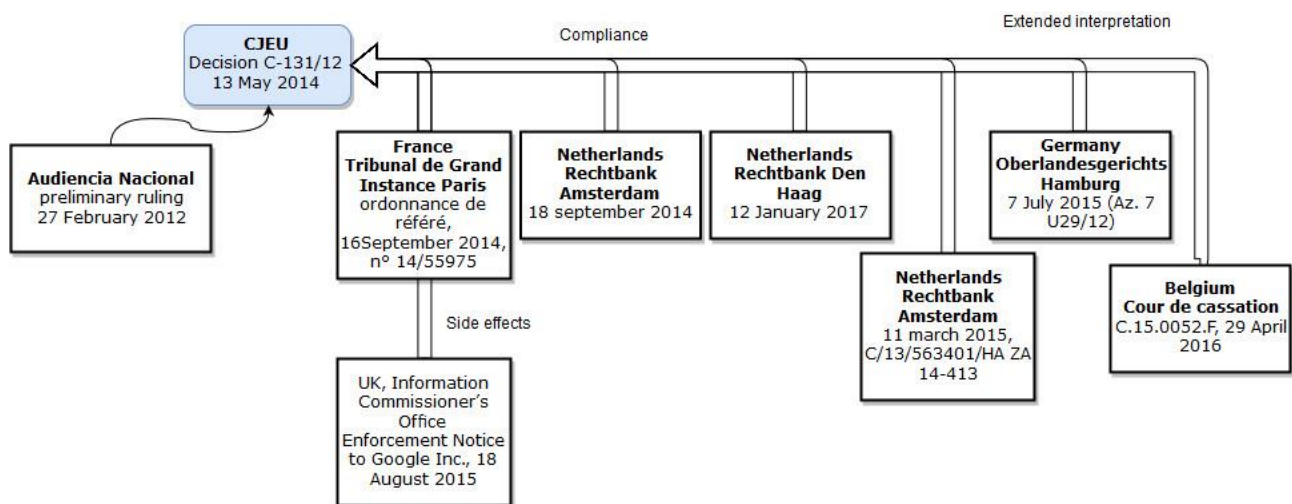
*Core issues*

Which is the balance between freedom of expression and data protection in case of past press publications?

Is there a different proportionality test in case of search engines and news outlets?

Which are the available remedies in case of violation of the right to data protection?

**Graphical representation**



<sup>123</sup> English summary of the case available at  
<sup>124</sup> English summary of the case available at  
<sup>125</sup> English summary of the case available at  
<sup>126</sup>  
<sup>127</sup>  
<sup>128</sup>

## At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Spain	<ul style="list-style-type: none"> <li>• freedom of expression</li> <li>• data protection</li> </ul>	<ul style="list-style-type: none"> <li>• art 11 CFR</li> <li>• dir. 95/46</li> </ul>	<ul style="list-style-type: none"> <li>• data protection authority</li> <li>• supreme court</li> <li>• first instance court</li> <li>• CJEU</li> </ul>	<ul style="list-style-type: none"> <li>• preliminary ruling</li> <li>• consistent interpretation</li> </ul>

## Case(s) description

### a. Facts

In 1998 the Spanish newspaper La Vanguardia published two announcements in its printed edition regarding the forced sale of properties arising from social security debts. The announcements were published on the order of the Spanish Ministry of Labour and Social Affairs and their purpose was to attract as many bidders as possible. A version of the edition was later made available on the web.

One of the properties described in the newspaper announcements belonged to Mario Costeja González, who was named in the announcements. In November 2009, Costeja contacted the newspaper to complain that when his name was entered in the Google search engine it led to the announcements. He asked that the data relating to him be removed, arguing that the forced sale had been concluded years before and was no longer relevant. The newspaper replied that erasing his data was not appropriate since the publication had been on the order of the Spanish Ministry of Labour and Social Affairs.

Costeja then contacted Google Spain in February 2010, asking that the links to the announcements be removed. Google Spain forwarded the request to Google Inc., whose registered office is in California, United States, taking the view that this was the responsible body. Costeja subsequently lodged a complaint with the Spanish Data Protection Agency (AEPD) asking both that the newspaper be required to remove the data, and that Google Spain or Google Inc. be required to remove the links to the data. On 30 July 2010, the Director of AEPD rejected the complaint against the newspaper but upheld the complaint against Google Spain and Google Inc., calling on them to remove the links complained of and make access to the data impossible.

Google Spain and Google Inc. subsequently brought separate actions against the decision before the Audiencia Nacional. The Audiencia Nacional joined the actions and stayed the proceedings pending a preliminary ruling from the CJEU on a number of questions regarding the interpretation of the Data Protection Directive:

*“1. With regard to the territorial application of Directive [95/46] and, consequently, of the Spanish data protection legislation:*

- (a) must it be considered that an “establishment”, within the meaning of Article 4(1)(a) of Directive 95/46, exists when any one or more of the following circumstances arise:*
- when the undertaking providing the search engine sets up in a Member State an office or subsidiary for the purpose of promoting and selling advertising space on the search engine, which orientates its activity towards the inhabitants of that State, or*
  - when the parent company designates a subsidiary located in that Member State as its representative and controller for two specific filing systems which relate to the data of customers who have contracted for advertising with that undertaking, or*

- when the office or subsidiary established in a Member State forwards to the parent company, located outside the European Union, requests and requirements addressed to it both by data subjects and by the authorities with responsibility for ensuring observation of the right to data protection, even where such collaboration is engaged in voluntarily?
- (b) Must Article 4(1)(c) of Directive 95/46 be interpreted as meaning that there is “use of equipment ... situated on the territory of the said Member State”:
- when a search engine uses crawlers or robots to locate and index information contained in web pages located on servers in that Member State, or
- when it uses a domain name pertaining to a Member State and arranges for searches and the results thereof to be based on the language of that Member State?
- (c) Is it possible to regard as a use of equipment, in the terms of Article 4(1)(c) of Directive 95/46, the temporary storage of the information indexed by internet search engines? If the answer to that question is affirmative, can it be considered that that connecting factor is present when the undertaking refuses to disclose the place where it stores those indexes, invoking reasons of competition?
- (d) Regardless of the answers to the foregoing questions and particularly in the event that the Court ... considers that the connecting factors referred to in Article 4 of [Directive 95/46] are not present:
- must Directive 95/46 ... be applied, in the light of Article 8 of the [Charter], in the Member State where the centre of gravity of the conflict is located and more effective protection of the rights of ... Union citizens is possible?

2. As regards the activity of search engines as providers of content in relation to Directive 95/46 ...:

(a) in relation to the activity of [Google Search], as a provider of content, consisting in locating information published or included on the net by third parties, indexing it automatically, storing it temporarily and finally making it available to internet users according to a particular order of preference, when that information contains personal data of third parties: must an activity like the one described be interpreted as falling within the concept of “processing of ... data” used in Article 2(b) of Directive 95/46?

(b) If the answer to the foregoing question is affirmative, and once again in relation to an activity like the one described must Article 2(d) of Directive 95/46 be interpreted as meaning that the undertaking managing [Google Search] is to be regarded as the “controller” of the personal data contained in the web pages that it indexes?

(c) In the event that the answer to the foregoing question is affirmative: may the [AEPD], protecting the rights embodied in [Article] 12(b) and [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, directly impose on [Google Search] a requirement that it withdraw from its indexes an item of information published by third parties, without addressing itself in advance or simultaneously to the owner of the web page on which that information is located?

(d) In the event that the answer to the foregoing question is affirmative: would the obligation of search engines to protect those rights be excluded when the information that contains the personal data has been lawfully published by third parties and is kept on the web page from which it originates?

3. Regarding the scope of the right of erasure and/or the right to object, in relation to the “derecho al olvido” (the “right to be forgotten”), the following question is asked: must it be considered that the rights to erasure and blocking of data, provided for in Article 12(b), and the right to object, provided for by [subparagraph (a) of the first paragraph of Article 14] of Directive 95/46, extend to enabling the data subject to address himself to search engines in order to prevent indexing of the information relating to him personally, published on third parties’ web pages, invoking his wish that such information should not be known to internet users when he considers that it might be prejudicial

*to him or he wishes it to be consigned to oblivion, even though the information in question has been lawfully published by third parties?”*

#### b. Reasoning of the CJEU

The CJEU ruled that an Internet search engine operator is responsible for the processing that it carries out of personal data which appear on web pages published by third parties, upholding a right of erasure.

Concerning the obligations and duties of the operator of a search engine, the court held that in the present case Article 7(f) of the directive, relating to legitimacy of processing, requires a balancing of the opposing rights and interests of the data subject and the data controller taking into account art 7 and 8 CFR.

Article 14(a) of the Directive, relating to the data subject's rights, allows the data subject, at least in the cases covered by articles 7(e) and 7(f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Article 12(b) of the directive, relating to the data subject's right of access to the data, allows the data subject to request erasure of the data. Such request may be made directly of the controller, who must then duly examine the merits of the request. If the request is not granted, the data subject may then direct the request to a supervisory authority or the judicial authority so that it carries out the necessary checks and orders the controller to take specific measures accordingly.

Regarding the question relating to the so-called right to be forgotten, the court held that the processing of data which is "inadequate, irrelevant or excessive" (i.e. not merely inaccurate) might also be incompatible with the directive. In such cases, where the data is incompatible with the provisions of article 6(1)(e) to (f) of the directive, relating to data quality, the information and links in the list of the results must be erased. It is not necessary that the information is prejudicial to the data subject.

#### c. Outcome at national level

The decision of the CJEU had a big impact on the jurisprudence of national courts which depending on the facts of the cases led to different balancing exercises with the freedom of expression principle. Moreover, additional issues emerged as exemplified by the caselaw below.

##### *Application of the Google Spain decision to search engines*

In France, the Tribunal de Grand Instance of Paris decided a case where Google only partially complied by a delisting request by an individual who was subject in 2006 to a sanction for fraud. The decision of 19 December 2014 applied the criteria identified by the CJEU in Google Spain and on the basis of the time passed, and that the sanction was not indicated on the person's criminal record, the request to the delisting was legitimate and did not interfere with the public's right to information.<sup>129</sup>

In the Netherlands, the District Court of Amsterdam on 18 September 2014, addressed the issue of the removal request presented by a convicted criminal against Google, which the latter only partially complied with. The Dutch court addressed the case in the light of the reasoning in Google Spain decision evaluating if the information available was "irrelevant, excessive or unnecessarily

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defamatory".<sup>130</sup> The court went on in the balancing exercise between right to privacy of the plaintiff and the freedom of information of the search engine as well as the interests of Internet users. In this case, however, the plaintiff had neither sufficiently substantiated that the search results in question were irrelevant, excessive or unnecessarily defamatory, nor had he shown compelling, legitimate grounds relating to his situation that would have required Google to remove the links. Consequently, the court rejected the removal claim.<sup>131</sup>

In a more recent case, the The Hague District Court decided a case where the applicant requested the delisting on the search results regarding a criminal investigation conducted in 2005 for mortgage fraud. The decision dated 12 January 2017 referred directly to Google Spain decision as well as to Art 11 CFR, art 10 ECHR and 7 of the Dutch constitution, resulting in a denial to the request to delisting. The court in particular affirmed that Google's right to freedom of expression and information, as well as that of its users weights more than the "right-to-be-forgotten" since the news articles to which Google linked were caused by the applicant's own behaviour.<sup>132</sup>

#### *Application of the Google Spain decision to online archives*

The District Court of Amsterdam in a case dated 11 March 2015 granted the right to be de-listed also against the online archives of a media company of online archives. In particular, the court upheld the request of an individual who demanded that two articles deemed to be no more relevant to be untraceable for search engines. Thus, the court ordered to the media company to request Google not to list the articles in its search results.<sup>133</sup>

The Hamburg Court of Appeal in a case dated 7 July 2015 addressed the case of an individual seeking an injunctive relief against a publisher of a printed and online newspaper as regards a set of articles reporting on the investigation proceedings brought against the plaintiff between 2010 and 2011. The claim was dismissed by the Hamburg District court, as deletion or amendment to articles that had initially been lawfully disseminated constituted a serious violation of press freedom. The Court of Appeal then set aside the district court decision and partially allowed the complaint affirming that the breach of the plaintiff personality rights perpetuated by the online availability of the information online and its easy retrievability through search engines was a serious one, and at the same time the public interest in the case was no more existing. Interestingly, the court of appeal affirmed that if according to the Google Spain decision such a right could be claimed against the operators of Internet search engines, then it could be asserted all the more against the authors of the relevant articles.

In Belgium, the Court of Cassation confirmed the decision of the Court of Appeal of Liège which granted the request of an individual to anonymise an article from an online archive on the basis of the right to be forgotten. The decision, dated 29 April 2016, affirmed that the online archive of newspapers can be subject to the application of the right to be forgotten, due to the fact that the online article availability, after several years, may cause disproportionate harm to the applicant vis-à-vis the newspaper's freedom of expression.

#### *Publication of delisting requests*

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<sup>130</sup> Note that the terminology is slightly different from the CJEU's one, which spoke about "inadequate, irrelevant or no longer relevant, or excessive" information.

<sup>131</sup>

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In the UK, the Information Commissioner's Office decided a case where an individual, who had successfully requested the delisting to Google, request a further delisting in relation to the search results linking to articles published by a news outlet focused on the successful and unsuccessful procedures ran by Google for the application of the right to be forgotten, where also his name was included. Given that the request was refused by Google, the individual lodge a claim before the ICO.

The independent authority disregarded the allegation of Google regarding the fact that the delisting itself was a story in the public interest and addressed the balance between data subject's rights and public's interest on the basis of the criteria identified by the Art 29 WG in the guidelines on the application of Google Spain decision. In this sense, the ICO affirmed that the removal of search engine links may be a matter of public interest in itself, but the information regarding the applicant were not.

## **Analysis**

### *a. Role of the fundamental rights*

The EU Charter was very relevant in the decision of the CJEU, however the court addressed only the articles dedicated to data protection and privacy, namely articles 7 and 8. The Court did not refer in any occasion to freedom of expression and to art 10, nor provided the needed balancing exercise between the two fundamental rights. This missing element was instead analysed in detail in some of the national decisions implementing the right to be forgotten, not only when the party to the case was a search engine, but also, and most importantly, when it was a news outlet.

### *b. Judicial dialogue*

#### *Vertical dialogue – consistent interpretation*

The national courts adopted the criteria identified by the CJEU in the cases emerging in the national context. In some cases, the courts do not limit to literal application of the criteria to similar cases, rather they extended the application of such criteria also to different categories of defendants, such as news outlets.

### Part III - Hypotheticals

This part is dedicated to the hypotheticals drawn from the caselaw addressed in the previous parts. The hypotheticals include reference to legislation and caselaw as well as provocative questions that will be used as a trigger discussion during the residential training event.

It is important to highlight that the purpose of the hypotheticals to give the trainees a chance to critically analyze the provision of their own legal system as regards the fields covered the Handbook and verify their compliance vis-à-vis the standard of protection of fundamental rights guaranteed by the EU Charter. Thus, the scenarios presented in each of the hypotheticals do not entail a “correct” answer, rather they provide for different answers and (hopefully) trigger new questions and doubts that shall improve the level of protection of fundamental rights at national as well as European level

The hypotheticals address

1. The conflict between freedom of expression and data protection
2. The liability of ISP in case of illegal content and its effect over freedom of expression principle
3. The limitation to freedom of expression on grounds of hate speech

## **General Data Protection Regulation**

### **Article 17 Right to erasure ('right to be forgotten')**

1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

- (a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;
- (b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;
- (c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);
- (d) the personal data have been unlawfully processed;
- (e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;
- (f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

### **3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:**

**(a) for exercising the right of freedom of expression and information;**

(b) for compliance with a legal obligation which requires processing by Union or Member State law to which the controller is subject or for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;

(c) for reasons of public interest in the area of public health in accordance with points (h) and (i) of Article 9(2) as well as Article 9(3);

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing; or

(e) for the establishment, exercise or defence of legal claims.

### Level I

In 2007, Mr Angelis, a company director was indicted for corruption and the news about the criminal proceeding was published in a national newspaper. Mr Angelis was then released without any criminal consequence, but no further article regarding the subsequent events was published in the same newspaper.

In 2017, Mr Angelis found out by chance that the digital archive of the newspaper still includes the article, allowing any Internet user to find it through the search engine of the newspaper.

### Level I.A - Lawyers

Mr Angelis consulted a lawyer as regards the possible avenues to erase the reference to that period of his life available by free search online. As suggested by the lawyer, Mr Angelis lodged a claim before the local First Instance Court, requesting the removal of the webpage from the newspaper's digital archive on the basis that the information was obsolete and not accurate.

You are asked to play the role of the lawyer representing Mr Angelis before the first instance court.

1. Which arguments would you use to justify the deletion of the news item?
2. Which jurisprudence would you refer to in order to support your argument?
3. How would you distinguish your case from the one decided by the ECtHR in [Times Newspapers Ltd v United Kingdom \(Nos 1 and 2\)](#)? Note that the ECtHR in this case affirmed that Internet archives made a substantial contribution to preserving and making available news and information. Here, the Court affirmed that *“the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material.”*

### Level I.b – Judges

Mr Angelis lodged a complaint before the local First Instance Court, requesting the removal of the webpage from the newspaper's digital archive on the basis that the information was obsolete and not accurate.

He argued that inclusion of the article in the digital archive can be hardly considered public interest –if not followed by subsequent one reporting that the judicial inquiry had ended with his acquittal.

You are asked to play the role of the First Instance Court.

1. Which fundamental rights would you balance in this case?
2. Would you consider the request to suppress legitimate and legal information as an impermissible interference with the freedom of expression of the publisher of the web page?
3. Which criteria would you use in order to evaluate the request of Mr Angelis?
  - a. Which information would you request to the claimant in order to evaluate his position?
    - i. Would you refer to the criteria identified by Art 29 WP in the [Guidelines to the implementation of Google Spain decision](#)?
4. How would you balance the two fundamental rights?
5. Which decision would you provide in order ensure a proportionate remedy to the claimant?
  - a. Update of news content
  - b. Anonimisation of news item (see decision of Belgian Court of Cassation, 2016, within casesheet n. 14)
  - c. Complete deletion of news item
  - d. Damages (see decision of Romanian High Court of Cassation and Justice, 2014, casesheet n. 10)

## Level II

[Similar facts – different defendant]

In 2007, Mr Angelis, a company director was indicted for corruption and the news about the criminal proceeding was published in a national newspaper. Mr Angelis was then released without any criminal consequence, but no further article regarding the subsequent events was published in the same newspaper.

In 2017, Mr Angelis found out that when typing his name and surname on Google search, the first link available is the one linking to the news article, allowing any Internet user to find it through the search engine of the newspaper.

### Level II.a – Lawyers

Mr Angelis consulted a lawyer as regards the possible avenues to request the erasure of Google link. As suggested by the lawyer, Mr Angelis presented a request for an injunction so as to block the availability of the link on the search engine, on the ground of the right to be forgotten.

You are asked to play the role of the lawyer representing Google before the court.

1. Which arguments would you use to deny the deletion of the link?
2. Which jurisprudence would you refer to in order to support your argument?
  - a. Would you address the issue of freedom of expression of search engines or to the journalistic exemption ex art 85 GDPR?
  - b. Would you address the issue of freedom of information of users (see decision of The Hague district court, 2017, within Casesheet n. 14)?

### Level II.b – Judges

Mr Angelis requested for an injunction in front of the same court so as to block the availability of the link on the search engine webpages, on the ground of the right to be forgotten.

You are asked to consider issuing an injunction.

1. Which fundamental rights would you balance in this case?
2. Would you consider the request to suppress automatic link as an impermissible interference with the freedom of expression of the search engine?
3. Would you consider the request to suppress automatic link as an impermissible interference with the freedom of information of users?
4. Which criteria would you use in order to evaluate the request of Mr Angelis?
5. Which decision would you provide in order ensure a proportionate remedy to the claimant?
  - a. In case you decide in favour of Mr Angelis, would you extend the delisting only to the national context or would you evaluate under which conditions the delisting may be extended worldwide?

### Level III

[Follow up of previous facts]

First instance court issues the injunction to delist the result limited to the country of origin of Mr Angelis. Google complies with the injunction. However, it informed directly the webmasters of the newspaper about the delisting decision, as well as the general public about it through a line regarding the delisting request.

Mr Angelis presented a complaint against Google as both activities in practice nullify the result of the injunction.

#### Level III.a – Lawyers

You are asked to play the role of the lawyer representing Google before the court.

1. Which arguments would you use to support the position of Google?
2. Which jurisprudence would you refer to in order to support your argument?
  - a. Would you address the issue of freedom of information of users?
3. Would you suggest the court a preliminary reference towards the CJEU as regards the lack of fair trials guarantees for users in case of delisting of content?

#### Level III.b – Judges

You are asked to play the role of the court receiving the claim.

1. Would you consider the request to deny access to webmasters to the information regarding the delisting as an unlawful interference with their freedom of expression?
2. Would you consider the presentation of a preliminary reference to the CJEU as regards the lack of fair trial guarantees in case of delisting?
3. Which criteria would you use in order to evaluate the request of Mr Angelis?
4. Which decision would you provide in order ensure a proportionate remedy to the claimant?

## Hypothetical n. 2 - The liability of ISP in case of illegal content and its effect over freedom of expression principle

### Level I

Facts:

John Doe is a journalist working in the online registered newspaper NewsToday.com. He published an uncut video documenting his investigative activity as regards terroristic threat at local level. The video is uploaded on the website of the online press.

The video includes footage where several people praise jihad and the terroristic attacks occurred abroad and foresee new ones against the major buildings in the local city. Moreover, from the footage, additional sources of information regarding terroristic materials is mentioned clearly.

Online users start to complain against the video and inform the authority as regards the availability of the video. The public prosecutor starts an investigation against the journalist for incitement to terrorism.

1. Which are the relevant criteria that should be taken into account in order to evaluate the criminal liability of the journalist in this case?
2. What is the weight of freedom of expression principle vis-à-vis public order in this case? Is a limitation to freedom of expression legitimate in case of incitement to crime?
3. What is the impact of good faith or compliance to journalistic ethics in this case?

### Level II

[Similar facts but different author (blogger)]

Jack Smith, a PhD student in Medieval History, with a passion for journalism, publishes an article regarding his recent encounters with potentially jihadist cells within the local community. The article is a blog post in Smith's personal blog. The blog is regularly updated by the student (with an average of a blog post every other day), the content includes commentary to the news content published in newspapers from several European countries and personal research and articles dedicated to security. The blog is written in English and widely followed abroad.

The article includes a video recorded with the personal phone where several people praise jihad and the terroristic attacks occurred abroad and foresee new ones against the major buildings in the local city.

Online users start to comment after the blog post and against the video and inform the authority as regards the availability of the video. The public prosecutor starts an investigation against the blogger for incitement to terrorism.

1. Can the activity carried out by Smith on his blog be qualified as journalistic in your country? Which are the criteria to evaluate the qualification of bloggers as journalists?



2. Is the liability regimes applicable to a blogger the same provided for journalists?
3. What is the weight of freedom of expression principle vis-à-vis public order in this case? Is a limitation to freedom of expression legitimate in case of incitement to crime?

In the decision of the ECtHR, *Riolo v Italy*, the Court affirmed that also individual citizens publishing their views in the press exercise the same role of the press as “public watchdog”, therefore they should be safeguarded by the same level of protection granted to journalists.

However, at national level differences occur between the way in which journalistic profession (and consequently its privileges and obligations) is interpreted, in particular as regards new media. The proportionality test regarding the distinction between value judgements and factual statements, as well as the obligations of completeness and consistency of the statements published by a journalist and a non-journalist can be different, conflicting with the standard provided by the ECtHR.

### Level III

[Follow up of level I - Liability of social platform]

After the publication of the video on the online press, several Facebook users upload the video on the social platform becoming viral. After several notices regarding the unsuitability of the content provided by other users, the platform deletes 80% of the occurrence of the video. As soon as the local criminal court decides on the case of criminal liability of the journalist, imposing the seizure of the video upon justification of public order, the public prosecutor start a connected investigation against Facebook for liability in disseminating illegal content online.

1. Which are the relevant criteria that should be taken into account in order to evaluate the liability of the social platform in this case?
2. Is the social platform exempted from liability according to art 15 e-Commerce directive?
3. Are the criteria set by ECtHR in *Delfi v Estonia* applicable so as to impose a monitoring obligation to social platforms?

### Level IV

[follow up of Level I – liability of AI]

In order to avoid liability, the social platform implements an AI system that elaborate the information, (i.a. face and language recognition application, geographical location, age and ethnic origins, etc.) so as to create a set of profiles that can be qualified according to different levels of critical risk. Among high risk, the AI includes those profiles that disseminate terroristic content, qualifying them as potential terrorists. In this case, the AI system does not allow the dissemination of information by the user: the user can still post content but this will not be publicly available to his/her network contacts.

The user is not aware that his/her content is not visible to his friends' newsfeed and to those who live in the nearby area.

John Doe uses the social platform as a means of communication and dissemination of his articles on security, given the content of the articles linked to his posts is caught by the AI system within the category of high risk and qualified as potential terrorist. Thus, he is subject to limitation of his expression. By chance, he discovers the effects of the AI system decision and decides to lodge a complaint against the social platform for censorship.

1. Which are the relevant criteria that should be taken into account in order to evaluate the liability of the AI system in this case?
  - a. Is the AI system liable?
  - b. Is the social platform or the programmer liable?

### Hypothetical n. 3 – The limitation to freedom of expression on grounds of hate speech

Mr Antar arrived in Italy in 2017 with other refugees from Syria, and was sheltered in a refugee camp on the Southern coast of Italy. Slightly after his arrival a local politician went visiting the camp so as to verify the local conditions.

During the visit, photographs were taken by a journalist and also by refugees themselves with their mobile phones. Among them also Mr Antar took a selfie with the local politician. The journalist published the photos of this visit in an article available on online newspaper he works for.

#### Level I

A few days after the publication, a politician from the opposite party gave a speech before the refugee camp before a group of supporters of the same party. The politician during the speech held a copy of the article and showing the photo taken of the selfie of Mr Antar and the local politician.

The speech included statements as “*on a daily basis this immigrants are coming here to rob, rape and kill our citizens! We must stop this! We must through them away from our country!*”

The public prosecutor then started a criminal proceedings against the politician for incitation to hatred.

1. Is the speech of the politician protected by freedom of expression?
  - a. Under which conditions?
  - b. Is the fact that the speech was given by a politician an element that requires a stricter interpretation of the freedom of expression guarantee?
  - c. Is the fact that the speech was given in proximity to the refugee camp an element that requires a stricter interpretation of freedom of expression guarantee?
  - d. Can the speech be considered to present a concrete threat?
2. Which jurisprudence would you refer to in order to support your argument/reasoning in the case?
3. How would you distinguish your case from the one decided by the ECtHR in [Feret v Belgium](#) (see at 2.2.)?

#### Level II

The selfie photo was subsequently reposted by online users, also cutting and pasting Mr Antar photo into ‘wanted’ posters, presenting him as a terrorist. This posters were then posted on social networks triggering subsequent threads of comments and threats by users against Mr Antar.

Subsequently, Mr Antar asked the social network to erase all the posts including the fake images and comments against him. The social network complied but the image reappeared on the social network again, posted by anonymous users.

Mr Antar lodged a claim before the local court requesting an injunction against the social network obliged to actively search out and delete the hate speech content.

1. Which are the relevant criteria that should be taken into account in order issue the injunction against the social platform in this case?
2. is it possible to impose a monitoring obligation on the social network?
  - a. Are the criteria set by ECtHR in [Delfi v Estonia](#) applicable in this case?

*E-Commerce Directive*

Article 14 - Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:

(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider.

3. This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.

Article 15 - No general obligation to monitor

1. Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers promptly to inform the competent public authorities of alleged illegal activities undertaken or information provided by recipients of their service or obligations to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.