Handbook on Techniques of Judicial Interaction in the Application of the EU Charter

FREEDOM OF EXPRESSION AND COUNTERING HATE SPEECH

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

FUNDED BY THE EUROPEAN COMMISSION FUNDAMENTAL RIGHTS & CITIZENSHIP PROGRAMME

Researcher responsible for the handbook:
Dr. Federica Casarosa

With the collaboration of
Dr. Madalina Moraru

NATIONAL EXPERTS AND COLLABORATORS

The e-NACT team would like to thank the following experts and collaborators who contributed to the selection of the national and European case law on which this handbook is built.

Fabrizia Bemer
Andrea Bindi
Marta Carmo
Bogdan Cristea
Valeria De Risi
Evelyne Esterzon
Sigita Fomičiova
Eric Joos
Meeli Kaur
Gehard Kuras
Nefeli-Zoi Lappa
Hans Peter Lehofer
Elissavet Margariti
Martina Maršić
Krasimira Milachova
Attila Mráz
Ieva Navickaitė-Sakalauskienė
Evangelia Psychogiopoulou
Jan Stiavnicky

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Acknowledgements

I wish to express my gratitude to the project partners and to the members of the e-NACT Working Group on Freedom of Expression for sharing their practice and experience concerning the application of the Charter, and for sending us their suggestions on how to improve the e-NACT handbook so as to make it useful to them.

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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. It is considered one of the pillars of a democratic society and an essential precondition for ensuring the protection of individuals' other human rights.[1] As a matter of fact, the freedom of every citizen to freely express his or her ideas nourishes a dialogue that in the end serves not only the individual but also 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 the absence of an effective flow of ideas and comparison among them.[2]

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

Even before the entry into force of the Lisbon Treaty and the integration of the Charter of Fundamental Rights of the European Union (hereafter, the EU Charter) within EU primary law,[6] the CJEU considered freedom of expression to be one of the core principles of the European legal order.[7] 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.

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[1] See ECHR, *Handyside v the United Kingdom*, paras. 48-50

[2] Rolla, G. (2010), La tutela costituzionale dei diritti (Milano: Giuffè); 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 7/6/2006.

[3] Starting with 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 in a pluralist environment.

[4] Judgment of 16 June 1981, no. 1 BvL 89/78, in BVerfGE 57, 295.

[5] Judgment of the Spanish Constitutional Court 31/2010, 28 June 2010.

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

[7] For instance, in the judgment of 22 October 2009 in *Kabel Deutschland* at para. 37: "It should be noted that the maintenance of pluralism which the legislation in question seeks to guarantee is connected with the 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."

As a fundamental right, freedom of expression permits 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 in our closer vicinity.

Academic literature and jurisprudence have identified the following rights 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 thoughts;
- the right to be informed;
- the right to be silent.[8]

From each of these, 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 thoughts includes messages transmitted orally or on paper, and also artistic expression, including music, videos, paintings, sculptures, comics and the like. All these can obviously be broadcast on the internet, which is now the most common means of communication. In all these cases, the regulation applicable at the 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 active and passive aspects 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 the case of a 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 the case of media. As a result of the development of jurisprudence and the impact that this has had on legislation, the right to inform has been used as a justification for providing 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 the consent of the individuals concerned, and
- may exercise a right to access 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 the national level regarding such conflicts differs depending on the interpretation of the freedom of expression in terms of constitutional guarantee and its balance with 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. Therefore, citizens may exercise their right to be informed by those who hold information, such as in the case of access to documents held by state authorities. However, citizens may also exercise their right to be informed by those who hold the means of conveying information, such as the press and media in general. For instance, courts have inferred several obligations for broadcasting media: TV is commonly regarded

[8] Bychawska-Siniarska D. (2018), Protecting the Right to Freedom of Expression Under the European Convention on Human Rights – A Handbook for Legal Practitioners, 13; Woods L. (2014), Article 11, in S. Peers et al., Commentary to the EU Charter, 322.

as a general public service and it has a crucial role in guaranteeing internal state pluralism. Therefore, it should ensure impartial and accurate information and a range of opinions and comments, with stricter obligations for public broadcasters than private ones.[9]

1.2. Legal provisions at the 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 the European and national levels but also at the international level.[10] What follows is a brief overview of the main legal sources of freedom of expression.

The European Union

Primary law

Before the entry into force of the EU Charter, freedom of expression was not proclaimed or 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 the Treaty of Lisbon provided some hints regarding the Union's gradual interest in the protection of human rights, as is shown by Article 2 TEU.[11]

Only through the reform of Article 6 TEU with legal status being conferred on the EU Charter was "*the system of fundamental rights protection in Europe [...] expected to reach apparently the highest formal level of individual rights protection that has ever existed in the European Communities.*"[12] 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, and on the Member States "*when they are implementing Union law.*"[13] Within the boundaries of its scope of application, the Charter can be enforced before Union and national courts. Importantly, 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 regarding 'corresponding rights.'

Interestingly enough, the Explanations relating to the Charter – which must be taken into due account when interpreting its provisions[14] – point out that the meaning and scope of 'corresponding rights'

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9 Woods L. (2014), Article 11, in S. Peers et al., **The EU Charter of Fundamental Rights: A Commentary**.

10 For a detailed analysis of the international sources that include freedom of expression as a fundamental right, see the Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, 2016. See also Woods L. (2014), Article 11, in S. Peers et al., The EU Charter of Fundamental Rights: A Commentary , 314 ff.

11 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.*"

12 A. B. Capik (2009), Still lost in space – searching for an effective enforcement of Fundamental Right under the Lisbon Treaty, in Piontek, E., and Karasiewicz K. (eds), Quo vadis Europe? III, UKIE Warsaw, p.449.

13 Cf. Article 51(1) CFR. According to the most recent case law of the CJEU (notably, see 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").

14 Cf. Article 6(1) TEU and Article 52(7) CFR.

are to be determined by also having regard to the case law of the Strasbourg Court, and that the duty of parallel interpretation laid down in Article 52(3) CFR also encompasses limitations provided by the ECHR. It has become official in primary law that the human rights of the ECHR are to be applied in the EU.[15]

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

> Art. 11 EU Charter
> "(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."

The 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, the Explanations of the Charter make it 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.[16]

Secondary legislation

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

For instance, the Audiovisual media service Directive 2010/13/EC regulates television broadcasting, recalling the "growing importance" of audiovisual media for democratic societies, also regarding education and society. For example, its paragraphs 16 and 48 recall the compliance of the Directive with the freedom of expression enshrined in Article 11 EU Charter.

Similarly, in the General Data Protection Regulation no. 2016/679, paragraph 153 affirms that reconciliation between the data protection framework defined by the Regulation and the rule protecting freedom of expression is a task for Member States, allowing for specific exemptions regarding the processing of personal data solely for journalistic purposes or for the purposes of academic, artistic or literary expression.[17]

Another example is the Council Decision 2006/515/EC promoting cultural diversity and expression, which defines expression of cultural diversity in its Article 4 and which recalls universal rights. This Council Decision follows the UNESCO Convention with the same name and permits it to be approved on behalf of the Union. It recalls human rights and promotes a diversity of cultural expressions, again enlarging the scope and definition of freedom of expression.

[15] Cf. the explanation of Article 52(3) CFR.
[16] See below.
[17] See Article 85 of the Regulation. See more detail below at para. 4.3.

The European Convention on Human Rights

Freedom of expression is enshrined in Article 10 of the ECHR and extensive protection of it 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 interference by authorities. Furthermore, it also confers a right for the public to receive these ideas.

> Article 10 ECHR
> 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 provides freedom of expression with broad protection, and it extends it to the protection of commercial expression, artistic expression and political expression. This difference in protection will tend to be more favourable to political speech or statements when it conflicts with other freedoms or rights. On the one hand, States have a negative obligation to abstain from interference in the exercise of freedom of expression; on the other, there may be positive obligations to protect this right, even against interference by private persons.[18]

The protection offered through Article 10 ECHR is wide, and constantly progressing thanks to the ECtHR's prolific jurisprudence. When there is 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."[19]

Once it has passed these stages, the interference has to pass a 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[20] and the possibility of the state adopting less intrusive measures.[21] However, the jurisprudence of the ECtHR does not show perfect consistency

[18] See ECHR, Research report - Positive obligations on Member States under Article 10 to protect journalists and prevent impunity, 2011.
[19] ECtHR, *Handyside v UK*, cit., para. 48.
[20] ECtHR, *Lingens v Austria* , cit.
[21] ECtHR, *Mamère v. France* (2006).

regarding its assessment of proportionality, which could lead to different outcomes according to the context and the assessment applied to it.[22]

The limitation may also be a result of interference with 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 freedom. The interference can be legitimate when it is justified by an overriding requirement of public interest[23] or by a legitimate aim such as the protection of the rights of others.[24]

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 the proportionality test, the ECtHR has developed the notion of 'margin of appreciation.' The ECtHR "*reserves to itself the position of final arbiter.*"[25] However, it also restrains itself by using the notion of margin of appreciation, which is recognised to the Member States with respect to the assessment of a restriction to a freedom. The ECtHR uses the margin of appreciation to manage the differences between the signatories states.

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

The national level

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

Most national constitutions include this freedom amongst the general principles associated with citizens' rights. Its essential content includes the possibility of having and expressing opinions, either directly or indirectly through the role of the media in disseminating information and providing citizens with a range of different views and opinions. In only a few countries do the relevant constitutional provisions make a clear distinction between freedom of expression and freedom of the press by devoting specific provisions to the latter (introducing constitutional articles on this point).[29]

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. For historical reasons, the drafting of constitutional principles in several countries dates back to the period when only the printed press was available to inform citizens. Therefore, the formulation of freedom of the press in various

[22] Woods L. (2006), 'Freedom of Expression in the European Union,' European Public Law, Volume 12, Issue 3, p. 376.
[23] Decision as to admissibility by the ECtHR: app. no. 40485/02, *Nordisk Film & TV A/S v. Denmark* (2005).
[24] ECtHR, *Hachette Filipacchi Associés (Paris-Match) v. France* (2007).
[25] L. Woods, 'Freedom of Expression in the European Union,' European Public Law, Volume 12, Issue 3, Kluwer Law International, 2006, p. 377.
[26] ECtHR, *Müller and others v. Switzerland* (1988).
[27] ECtHR, *Perna v Italy* (2003).
[28] See Centre for Media Pluralism and Media Freedom, Media Pluralism Monitor, 2016, 14.
[29] See inter alia the constitutional clauses in Belgium, Romania and Greece.

languages is clearly connected to this origin. In those countries where no constitutional reform has addressed freedom of the press, the concept has only been extended to subsequent technological developments – namely broadcasting first and then eventually to new media – through the jurisprudence of constitutional courts.[30]

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 courts' balancing exercises leading to different outcomes when assessing the proportionality of state measures restricting freedom of expression in different media.[31]

1.3. Limitations

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

The European Union

The EU Charter contains a general clause regarding the possibility of limiting 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.

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[30] One exception to this general trend is the Belgian case, which shows 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 the 'press' and in the decisions of the highest civil court freedom of the press and the prohibition of censorship is interpreted restrictively as only applying to the written press but not to radio or television. On the contrary, the Constitutional Court adopts a more technologically neutral approach, which was shown in particular in the decision regarding the recently adopted legislation on 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.

[31] See for, instance, 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 through other means of communication.

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.

Art. 52 EU Charter is a general clause applicable to all the fundamental rights included in the EU Charter, and therefore also to Art. 11. A specific correlation exists among EU Charter general clauses and Art. 10 (2) ECHR as regards the legitimate limitations to the 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 a general interest recognised by the Union or the need to protect the rights and freedoms of others;
- be necessary for the objective pursued;
- be proportionate to the objective pursued.

The necessity of measures is evaluated on a case-by-case basis and takes into account the relevance of the reasons presented by national authorities justifying restrictive measures. It is important to note that in this case the CJEU (according to the jurisprudence of the ECtHR) provides for a relatively wide margin of appreciation for national authorities in terms of the existence of a so-called 'pressing social need.'[32]

The CJEU evaluates proportionality in terms of correspondence between means and ends, again taking into account the margin of appreciation of Member States – although in this case the jurisprudence of the CJEU is not always consistent.[33]

The European Convention on Human Rights

The formulation of Article 10(2) ECHR provides a clear example in which 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 its *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*

[32] See, for instance, 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.
[33] Woods L. (2014), Article 11, in S. Peers et al., The EU Charter of Fundamental Rights: A Commentary, 329.

> *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.*[34]

It is a different matter when 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 a case, only indisputable imperative reasons can justify interference with the enjoyment of a Convention right.

In addition to the clause on "respect for the reputation and rights of others," Article 10(2) ECHR lists a large 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 the rights of others, preventing the disclosure of information received in confidence, maintaining the authority of the judiciary and 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, information on the restriction must be 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. While in the case of political expression States enjoy a narrow margin of appreciation, in the case of public morals, decency and religion, they enjoy a wider margin of appreciation. These differences are based on the fact that there is no consensus at the 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, which can be regarded as a safety mechanism designed to prevent the ECHR from being misused or abused.[35] For instance, the ECtHR has applied this Article in order to deny protection under Article 10 ECHR to racist, xenophobic and anti-Semitic speech, as well as statements denying, disputing, minimising or condoning the Holocaust or other (neo-)Nazi ideas.[36]

The 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 the EU Charter. In the latter case, constitutions implicitly allocate the burden of striking the balance between competing interests to domestic courts, whether civil or criminal. For instance, in the

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[34] Ibid. para. 113.
[35] See below at 2.2.
[36] ECtHR, *Norwood v the United Kingdom* (2004).

Croatian constitution the limitation clause does not provide any list of issues, but rather opts for case-by-case evaluation.[37]

Instead, in 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. There are three possible options: (1) limitations linked to the rights of other people; (2) limitations that protect public values; and (3) temporary limitations.

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

2. Limitations that protect public values and 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, the prevention of disorder or crime). Alternatively, limitations can be based on the need to protect the basic features of the state or prevent 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 on declarations of war, military or other states of emergency.

[37] 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."

2. Hate speech

2.1. The 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 cases of specific content such as "expressions which spread, incite, promote or justify hatred based on intolerance."[38] In such cases, expression by an individual may fall in the category of **hate speech**.

Several pieces 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 the international and national levels focus on different facets of this concept, looking at the content and the manner of speech, and 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 ones 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 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.

Framework Decision 2008/913/JHA should have been implemented by the MSs by November 2010. However, not all the MSs have adapted their legal frameworks to the European provisions, as was confirmed in 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 took place, the legislative intervention followed different approaches according to national approaches to

[38] ECHR, *Erbakan v Turkey*, par. 56.

hate speech: either through inclusion of the offence in the criminal code or through adoption of 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.[39]

Moreover, the implementation of the Framework Decision may overlap with pre-existing national legislation addressing this issue. For instance, in Belgium, hate speech is covered by the Anti-racism Act (covering the grounds provided in 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 a definition of hate speech. Instead, it may range from 'discrimination' to 'insult' to 'incitement to hatred and violence' depending on the nature of the speech.[40] In Greece, instead, the reference point is 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 and disability.[41]

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. Unlike the Framework Decision, in these two directives the prohibition of incitement to hatred is more general, also including sex as a ground for protection.

Art. 6 of the 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 the e-Commerce directive provides 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;

[39] European Parliament, Legal framework on hate speech, blasphemy and its interaction with freedom of expression, France country report, p. 230.
[40] European Parliament, Legal framework on hate speech, blasphemy and its interaction with freedom of expression, Belgium country report, p. 152.
[41] European Parliament, Legal framework on hate speech, blasphemy and its interaction with freedom of expression, Greece country report, p. 211.

So far, the CJEU has only addressed the definition of hate speech in relation to broadcasting across EU Member States in the *Mesopotamia Broadcast* and *Roj TV* decisions, joined cases C-244/10 and C-245/10 (Casesheet no. 1). However, no decision has addressed the hate speech dimension of Art. 3(4) of the e-commerce directive.

Although on many occasions national courts have addressed the issue of hate speech in the media context and the online context, the arguments of parties and courts have referred more frequently to ECtHR jurisprudence (see below) or to national legislation (Casesheets nos. 4, 5, 6 and 7). On the one hand this is due to the more developed, yet not uniform, jurisprudence of the ECtHR on hate speech in the media context and on the other hand to 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 have addressed the hate speech dimension of online dissemination of information, namely the preliminary reference from the Vilnius administrative court addressing compliance between national legislation and Art. 6 of the AVMS Directive (Casesheet no. 2) and the preliminary reference from the Austrian Supreme Court regarding remedies in the case of hate speech on an online platform (Casesheet no. 3).

More recently, however, the approach of EU institutions regarding hate speech (and more generally also illegal content) has 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 private companies under the assumption that the latter will have more incentives to comply with the rules agreed.[42]

As a matter of fact, on 31 May 2016, the Commission adopted the Code of conduct on countering illegal hate speech online, which was signed by the biggest players in the online market: Facebook, Google, Microsoft and Twitter. The Code of conduct requires the IT company signatories to the code to 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.*"[43] Moreover, according to the Code of conduct, the IT companies should provide a removal notification system which allows them to review removal requests "*against their rules and community guidelines and, where necessary, national laws transposing the Framework Decision 2008/913/JHA.*"

Similarly, a current proposal for a reform of the AVMS Directive also includes a specific provision dedicated to hate speech on video-sharing platforms, namely Art. 28a.[44] In this case too, the proposed directive encourages the use of co-regulatory measures in order to implement the provision either at the national level (in subsection (4)) and at the European level (in subsection (10)) with the collaboration of the Commission and ERGA.

Art. 28a of the AVMS Directive
1. Without prejudice to Articles 12 to 15 of Directive 2000/31/EC, Member States shall ensure that video-sharing platform providers under their jurisdiction take appropriate measures to protect:

[42] This is not a

[43] Ibid. at p. 2.

[44] See Directive (EU) 2018/1808 of 14 November 2018 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 (Audiovisual Media Services Directive) in view of changing market realities.

(a) minors from programmes, user-generated videos and audiovisual commercial communications which may impair their physical, mental or moral development in accordance with Article 6a(1);
(b) the general public from programmes, user-generated videos and audiovisual commercial communications containing incitement to violence or hatred directed against a group of persons or a member of a group based on any of the grounds referred to in Article 21 of the Charter;
(c) the general public from programmes, user-generated videos and audiovisual commercial communications containing content the dissemination of which constitutes an activity which is a criminal offence under Union law, namely […] offences concerning racism and xenophobia as set out in Article 1 of Framework Decision 2008/913/JHA.
[…]
4. For the purposes of the implementation of the measures referred to in paragraphs 1 and 3 of this Article, Member States shall encourage the use of co-regulation as provided for in Article 4a(1).
[…]
9. The Commission shall encourage video-sharing platform providers to exchange best practices on the co-regulatory codes of conduct referred to in paragraph 4.
10. Member States and the Commission may foster self-regulation through the Union codes of conduct referred to in Article 4a(2).

Apart from the potential results of the effectiveness of the co-regulatory mechanism,[45] the approach taken by the EU institutions may affect the decisions of national courts regarding the application of hate speech provisions.

In particular, when looking at the above-mentioned code of conduct on illegal hate speech online, the following legal issues may emerge:

- The definition of 'illegal' hate speech

The code of conduct builds its definition of hate speech on that provided in the above-mentioned Framework Decision without adding any more detailed criteria. However, the code of conduct requires IT companies to define in their 'Rules or Community Guidelines' incitement to violence and hateful conduct. As each IT company has included its own qualification of hate speech, this may lead to additional discrepancies between the applicable law (EU or national) and contractual obligations applicable to users of the IT services provided.

Facebook definition[46]	**Youtube definition[47]**	**Twitter definition[48]**	**Code of conduct definition**
We define hate speech as a direct attack on people based on what we call protected	Hate speech is not allowed on YouTube. We remove content promoting violence or	*Hateful conduct*: You may not promote violence against or directly attack or	Illegal hate speech, as defined by the Framework Decision 2008/913/JHA of 28

[45] The third monitoring report on the application of the code an shows increasing level of compliance by the IT companies with the code, both in terms of time of reply and in terms of processing of notifications, see http://ec.europa.eu/newsroom/just/item-detail.cfm?item_id=612086.
[46] https://www.facebook.com/communitystandards/hate_speech
[47] https://support.google.com/youtube/answer/2801939?hl=en
[48] https://help.twitter.com/en/rules-and-policies/hateful-conduct-policy

characteristics – race, ethnicity, national origin, religious affiliation, sexual orientation, caste, sex, gender, gender identity and serious disease or disability. We also provide some protections for immigration status. We define attack as violent or dehumanising speech, statements of inferiority, or calls for exclusion or segregation. We separate attacks into three tiers of severity, as described below.	hatred against individuals or groups based on any of the following attributes: • Age • Caste • Disability • Ethnicity • Gender Identity and Expression • Nationality • Race • Immigration Status • Religion • Sex/Gender • Sexual orientation • Victims of a major violent event and their kin • Veteran status	threaten other people on the basis of race, ethnicity, national origin, caste, 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. *Hateful imagery and display names*: You may not use hateful images or symbols in your profile image or profile header. You also may not use your username, display name, or profile bio to engage in abusive behavior, such as targeted harassment or expressing hate towards a person, group, or protected category.	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.

As emerges from the previous table, the definitions provided by the IT companies and that in the Code of conduct do not completely converge. Instead, the definitions provided by the 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 achievement of a higher level of protection. However, the inclusion of hate speech prohibition in the rules or community guidelines becomes *de facto* rules of behaviour for users of such services.[49] In this sense, the IT companies, ex officio or on notification, are allowed to verify the content of expressions published on their platforms, leading to a privatisation of enforcement as regards those conducts that are not covered by the Framework Directive.

What legal consequences does the use of the hate speech concept adopted by the IT companies entail?
Is there a conflict between them and that adopted in the Framework Decision?
In the affirmative case, what are the possible judicial interaction techniques to solve the conflict?

49 W. Benedek and M.C. Kettemann (2013), Freedom of expression and the Internet, Council of Europe Publishing, 101.

- 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 decisions by IT companies. In this case, the code of conduct does not provide any specific requirement, either in terms of judicial procedures or through alternative dispute resolution mechanisms. Therefore, it is left to the IT companies to introduce an appeal mechanism. Currently, among the signatories to the code, only Google provides such a mechanism. It only allows the user to present an appeal against the decision to take down his/her uploaded content.[50] In all other cases, the contractual rules included in the user agreements regarding conflicts between users and the relevant IT company apply. According to the agreements currently in force, users may be subject to the jurisdiction of US courts or EU courts where consumer protection regulations apply.[51]

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

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

ECtHR decisions can be distinguished according to the approach taken by the court, namely a 'broader' approach or a 'narrower' approach.[52] The broader approach analyses the facts of the case through the lens of Art. 17 ECHR, which prohibits the abuse of rights, whereas the narrower approach analyses the facts of the case through the lens of Art. 10 (2) evaluating restrictions imposed on the protection of freedom of expression, which implies a detailed balancing exercise between freedom of expression and the legitimate objectives that lead to its limitation.

In the narrow approach, the jurisprudence of the ECtHR has 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, in each decision showing the difficulty in 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), in which the ECtHR addressed the case of a Belgian member of Parliament and chairman of the Front National political party, who during an

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[50] See the Google Appeal Community Guidelines actions, available at https://support.google.com/youtube/answer/185111

[51] See, for instance, Art. 15 of the Facebook Terms of service, available at https://www.facebook.com/legal/terms.

[52] F. Tulkens (2015), When to say is to do: Freedom of expression and hate speech in the case-law of the European Court of Human Rights, Speech at European Judicial Training Network Seminar on Human Rights, Strasbourg, 7 July 2015, available at http://www.ejtn.eu/Documents/Administrative%20Law%202015/5)%20ECtHR%20for%20Judicial%20Trainers/ECtHR%20and%20hate%20speech%20(paper).pdf.

election campaign distributed leaflets that, according to the 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 was justified by the interest of preventing disorder, given that the resonance of political slogans during an electoral context is higher.

Similarly, in *Jersild v Denmark* (1994) the ECtHR evaluated the limitation to freedom of expression in the case of journalistic activity which allowed the reporting of racist remarks. In this case, a journalist was convicted for a documentary including footage dedicated to a racist group active in Denmark. This 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). This case in the Grand Chamber of the ECtHR concerned 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 breached Art. 10 ECHR. The Court first addressed the balance between the right to freedom of expression and the right to respect for private life of the Armenians, which was protected under Art. 8 ECHR, and second the proportionality between the means used to protect each right. The Court then affirmed that it was not 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 the reasonings of national courts, such as in the Casesheets regarding a decision by the Italian Tribunal of Milan (Casesheet no. 4) and decisions by the Belgian Constitutional Court (Casesheet no. 5).

The broader approach has been applied in recent case law to affirm the inadmissibility of claims where the claimant is not entitled to the protection of Art. 10 ECHR as his/her expressions clearly conflict with the Convention's underlying values.

For instance, *M'Bala M'Bala v. France* (2015) concerned the conviction of Dieudonné M'Bala M'Bala for his show in Paris containing public insults directed at a person or group of persons on account of their origin or for belonging to a given ethnic community, nation, race or religion, specifically in this case persons of Jewish origin or faith. The ECtHR affirmed that the factual circumstances could not allow the show to be qualified either as satirical or provocative but instead "*a demonstration of hatred and anti-Semitism and support for Holocaust denial.*" Therefore, 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. Therefore, his claim was deemed inadmissible according to Art. 17 ECHR.

Similarly, in *Belkacem v. Belgium* (2017), the ECtHR addressed 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 still have issues in interpreting and applying it to the national framework, as a Spanish Constitutional Court decision shows (Casesheet no. 6).

The distinction between hate speech and other concepts

Hate speech and hate crime

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

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

Therefore, any offence ranging from threat to murder to property damage may fall into the category if the offence was committed motivated by bias.

Although bias or 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,*"[53] if in the factual circumstances the victim is not part of the group is not an element that may shift the qualification.

Therefore, the difference between hate crime and hate speech lies in the fact the hate speech lacks a criminal offence basis. However, where incitement to criminal offences occurs, and a bias motive exists, then 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 cases where a comparable situation results in a differentiated treatment of individuals (or groups) without an objective justification. The discrimination usually involves worse treatment and may be based on various grounds such as age, sex, race, ethnic origin, sexual orientation, etc. Many of these grounds overlap with those related to hate speech. Therefore, it may be possible that hate speech includes an incitement to discrimination against specific groups or individuals.[54]

Hate speech and defamation

Defamation refers to cases where an 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 having been obliged to 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.

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

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[53] See the OSCE/ODIHR materials available at http://hatecrime.osce.org/what-hate-crime

[54] ECHR, Aksu v. Turkey

3. The main legal and judicial bodies

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

For instance, in the case of defamation by the press, the legal framework provided at the national level depends on the interpretation of freedom of expression in terms of constitutional guarantee and its balance with the reputation of others. This different approach may lead to the qualification of the offence under criminal law, potentially with civil damages being awarded, or exclusively under civil law. Accordingly, the remedies available may also differ and may range from limitation to personal freedom to imprisonment to pecuniary sanctions.[55]

Moreover, other bodies may play an important role in implementing the 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. Therefore, they have the power to award broadcasting licences, to monitor whether broadcasters are fulfilling their legal obligations and to impose sanctions if they fail to carry out these 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 with the freedom of expression and media freedom.[56]

Similarly, through investigative and corrective powers data protection authorities supervise the application of data protection law. Within this remit they have the task of deciding cases where data subjects claim unlawful processing of their data showing a conflict between data protection and freedom of expression, such as in the case of processing of data by journalists, or dissemination of personal data as a corollary to the right to be informed.[57]

In the case of hate speech, other regulatory bodies may have specific competence for deciding on complaints from victims and for carrying out investigations into such cases. For instance, national human rights 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.[58] Accordingly, they may address cases where hate speech includes an incitement to discrimination against specific groups or individuals.

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[55] OSCE, Defamation and Insult Laws in the OSCE Region: A Comparative Study, 2017.

[56] See Casesheet no. 2.

[57] See Casesheet no. 13.

[58] Art. 19, Responding to 'hate speech': Comparative overview of six EU countries, 2018. On the different powers and remits of national human rights 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 mean that decisions taken by independent or regulatory authorities should be subject to judicial review.[59] Therefore, according to the 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 independent/regulatory bodies do not qualify as courts or tribunals according to Art. 267 TFEU, they may not directly engage with the CJEU. When decisions are then appealed before courts, the latter may present a preliminary reference to the CJEU with respect to the scope of judicial review or 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 with conflicting rights.

[59] See also ACTIONES Handbook, Module 3.

4. The specificities of the use of the Charter of Fundamental rights at the European and national levels

4.1 Media freedom

One of the most distinctive features of the EU legal framework regarding freedom of expression is the fact that Art. 11(2) CFR expressly provides a specific reference to media freedom along with the protection of media pluralism.

According to the Explanations of 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. In fact, up to 2007 the EU legal framework for media was mainly related to broadcasting legislation, and in particular to the interplay between media freedom and the freedom to provide (audiovisual) services. However, even before the entry into force of the Charter, the jurisprudence of the CJEU linked the importance of media freedom to the enhancement of media pluralism as a basis for democracy in the EU. In this sense, the decision in the C-260/89 *ERT* case is to be interpreted as one of the first attempts by the CJEU to interpret EU legal provisions in the light of fundamental rights.

In fact, press and media freedom has a double objective: on the one hand it seeks to protect the content delivered by the press; on the other it seeks to ensure that legal or administrative requirements do not hamper the exercise of press and media activities (for instance, in the 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 should impart information and ideas on issues and areas of public interest.[60] This does not mean, however, that press freedom has automatic prevalence over other conflicting interests such as data protection, the right to privacy, reputation, criminal justice, or others. Instead, 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 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 that although it had won an open bid for national television concessions, it did not receive an operating frequency. In 2008, on a preliminary reference from the supreme administrative court, the CJEU affirmed that a licensing system should be based on objective, transparent, non-discriminatory and proportionate criteria.

After a subsequent national proceeding, Centro Europa 7 lodged 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. In particular, the ECtHR acknowledged that the state's legislative measures did not satisfy the obligation to guarantee effective pluralism: "*To ensure true pluralism in the audio-*

[60] The role of the press as 'public watchdog' was first emphasised by the ECtHR in *Lingens v. Austria*. Note that both national courts and 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."[61]

4.2. Defamation and libel

Among the legitimate grounds for limitations to freedom of expression, there is the protection of the 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, the right to privacy and/or family life may allow for limitations based on the protection of rights of others.

Due to their different purposes, the exercise of freedom of expression might conflict with the right to privacy and/or family life on several occasions. Freedom of expression allows the dissemination and publication of information and facts related to the private lives of individuals when this information serves 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.

In fact, the purpose of provisions on defamation is to protect individuals' reputations from damage caused by the dissemination of false or offensive information or opinions about them to third parties. Equally, such provisions may aim to protect specific state symbols (such as the national flag or anthem). These provisions may be both criminal and civil and may relate both to oral defamation (slander) and written defamation (libel). Expressions used in Member State legislation to describe the offence that here we refer to as 'defamation' include 'insult,' 'abuse,' 'affront to honour and dignity' and 'calumny.' In theory, there is a difference between defamation (an 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 EU competence in this field, the point of reference regarding interpretation and balancing between the freedom of expression and the right to reputation is the ECtHR jurisprudence, which provides some useful guidelines.

According to the ECtHR, an individual's reputation is protected by Art. 8 ECHR.[62] 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*).[63] Thus, it is possible that the balancing exercise between the freedom of expression and the right to private life may not occur if an attack does not count as seriously offensive enough to trigger the application of Art. 8 ECHR.

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[61] *Centro Europa 7 v Italy*, par. 130.

[62] 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.

[63] See para. 64. Note that previously in *Pfeifer v Austria* the ECtHR followed 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 the case that Art. 8 ECHR applies, the balancing between the freedom of expression and the right to respect for private life should enjoy the same margin of appreciation. The relevant criteria defined in 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;

- the circumstances in which the photographs were taken (where appropriate),

- the penalty imposed.[64]

For instance, in *Sousa Goucha v. Portugal*, the margin of appreciation adopted by the ECtHR was wider as the case concerned defamatory speeches against a well-known celebrity after he made a public announcement concerning his sexual orientation. Although the defamatory statements were presented as a parody, the ECtHR evaluated that the context in which they were expressed did not count as a debate on a matter of public interest and so they passed the limit of what is acceptable under Art. 10 ECHR.[65]

Regarding the liability regime, the ECtHR has addressed the nature and severity of the sanctions imposed by the national legislation in detail 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 in which attention is paid to the effect of the sanctions both on the individual applicant and on journalistic activity as a whole. In particular, with the decision in the *Cumpana and Mazare v Romania* case, the Court introduced the so-called ‘chilling effect’ principle into the proportionality analysis of sanctions. 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.

Regarding 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.[66]

A criminal sanction with restriction of liberty is *a fortiori* a grave restriction of freedom of expression. Therefore, the Court has never recognised that imposing a prison sentence is well-founded or acceptable in defamation cases.[67]

[64] 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.

[65] Para 51.

[66] See, for example, ECtHR, *Cumpănă and Mazăre v Romania*, and *Azevedo v Portugal*. 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.

[67] 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, the proportionality of a sanction should also be addressed in the case of civil compensation. In this type of case, 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.*" In fact, the Court held that there must be a "*reasonable relationship of proportionality*"[68] 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 cost orders: in determining proportionality between damages awarded and the offence, the Court weighs up the injury to reputation with the impact of all the orders (damages and costs) on the (means of the) defendant.[69]

An important development is related to the liability of the (online) press for user-generated content, in particular in the case of comments. Although there should be no distinction between offline and online publication, the liability for defamation in the online context may be challenged by the different organisation structure in the online publication chain and the level of professionalisation. On the one hand, different actors may emerge: the author of the content, who can be framed as a non-professional blogger or as a journalist; the online platform or internet content provider; and the internet service provider (ISP). Here, the jurisprudence of national courts has addressed two factors. On the one hand, national courts have faced cases were the author of the defamatory statement is a blogger who has published his/her opinion on an online platform. In these cases, the courts struggle to identify if and how the blogger can be liable in terms of defamation by the press.[70] It is interesting to note that in the case of countries where criminal liability is applicable to defamation by the press, an extension of the liability regime by analogy is not feasible.[71] On the other hand, courts may address the liability regime applicable to the ISP. In this case, the decisions of courts can be different depending on the way in which the ISP does or does not fall within the liability exceptions provided in European Directive 2000/31/EC on e-commerce (Articles 12-14).

According to CJEU jurisprudence, host providers enjoy an exemption from liability when they comply with the following conditions:

- the service provider plays a neutral role;

- the existence of an economic interest in the relevant content does not preclude hosting status;

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[68] ECtHR, *Tolstoy Miloslavsky v. United Kingdom* (1995).

[69] See ECtHR, *Kasabova v Bulgaria* (2011). In particular, note that the Bulgarian courts had already sought to apply a 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 the seriousness of the libel. The Bulgarian courts had also waived 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.

[70] 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] EHHC 1946 (QB) (racist allegations on an internet blog).

[71] However, see the decision by the Tribunal of Livorno, no. 38912, 2/10/12, where a case of defamatory speech published on the social network Facebook was interpreted by the court as a case of defamation by the press.

- there is an absence of specific monitoring or facilitating activity by the hosting platform of the activity of the users of the service.[72]

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

In *Delfi AS v Estonia*, the ECtHR addressed the liability regime for user-generated comments on an internet news portal. The news portal had been held liable by the national courts for defamatory statements that were posted by its readers/users in the comments area below a news item dedicated to a ferry company, even though the news portal removed the comments (six weeks) after the ferry company notified it. 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 portals – was justified by the rights and interests of others and of society as a whole. In particular, the ECtHR noted that the national courts had correctly qualified Delfi as the 'publisher' of the comments and not as an ISP and so 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* provide more detailed guidelines regarding the elements that should be taken into account in evaluating the proportionality of the preventive measures to be adopted by news operators. In particular, in *Pihl v Sweden* the ECtHR identified 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 breadth of readership);
- the moderation approach (the explicit praxis regarding existing or missing monitoring activity);
- the expeditiousness of reaction on notification of the infringing content.

The ECtHR considered 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 fine-tuned the previous jurisprudence so as to take into account the negative effects of an *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*".

[72] 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). But also see the decision in C-18/18, *Glawischnig v Facebook* (3 October 2019) in Casesheet no. 3. At the national level, see 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 recommendations to interested users and suggestions of further (presumably) interesting videos.

4.3. Conflicts between freedom of expression and data protection

Along with freedom of expression, data protection is also an equally protected right in the European bill of rights and national constitutions. Art. 8 CFR provides 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 has been invoked in several CJEU decisions to evaluate the compliance of national law with EU law,[73] and to evaluate the compliance of European norms with the fundamental principles enshrined in the EU Charter.[74]

Before the entry into force of the EU Charter, however, the European legislator had already provided 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, Regulation 2016/679 on the protection of natural persons with regard to the processing of personal data was the result of a legislative reform in this area. In both Directive 95/46 and in Regulation 2016/679 (hereafter GDPR), the potential conflict between data protection and freedom of expression is acknowledge and regulated.

In 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 Directive 95/46), personal data include "*any information relating to an identified or identifiable natural person.*" This wide definition includes in its scope of application any communication activity that involves the collection of personal data.

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 limited by the safeguarding 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 reporting. This may lead to publishing comprehensive personally identifiable data on the person who is the object of an 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 addresses such potential interaction. providing an exemption in the case of processing of personal data for journalistic purposes.

[73] See Casesheet no. 13.
[74] 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 the national level must be the result of balancing between the basic rights to freedom of expression and to data protection. In judicial practice, then, two different issues may emerge: (a) if the exemption or derogation can be applied 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.

In the case of (a), a definition of journalistic activity is deliberately not provided in the GDPR, which in recital 153 affirms that this concept should be interpreted in a broad manner.[75] This is justified by the fact that new means of communication allow users not only to access information but also to directly contribute to public debate. Therefore, the traditional boundaries of journalistic activity are blurred and online versions of traditional print newspapers and broadcast radio and TV news are no longer 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 journalistic 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.[76]

[75] 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*".
[76] This wide interpretation of the concept of journalism, also encroaching on blogging and social media, was confirmed in the CJEU decision in C-345/17, *Sergejs Buivids v. Datu valsts inspekcija*, 14 February 2019, where the Court affirmed that "Article 9 of Directive 95/46 must be interpreted as meaning that factual circumstances such as those of the case in the main proceedings, that is to say, the video recording of police officers in a police station, while a statement is being made, and the publication of that recorded video on a video website, on which users can send, watch and share videos, may constitute a processing of personal data solely for journalistic purposes, within the meaning of that provision, in so

Accordingly, a case-by-case analysis of activities carried out by social media will be of utmost importance for the court to decide whether or not to apply the exemption.

In the case of (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 case law, which was triggered by a case dating back to 2003, addressed the breadth of the interpretation to be provided to the exemption, showing the different balancing exercises provided by the CJEU and the ECtHR (see Casesheet no.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 weighing 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 an individual can correct and re-frame his/her image in society.

Although this concept was not new in some national legal frameworks,[77] the decision by the CJEU in C-131/12 *Costeja v Google Spain* heavily affected the ways in which national courts balanced the interests of data subjects vis-á-vis data processors and the 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.

Unlike the previous Data protection Directive, the GDPR includes a specific provision on the right to be forgotten where an exemption is provided. However, more specific criteria which are useful to balance the rights are available in a document provided by Art. 29 WP, namely Guidelines on the implementation of the Court of Justice of the European Union judgment in "*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

far as it is apparent from that video that the sole object of that recording and publication thereof is the disclosure of information, opinions or ideas to the public".

[77] See, for instance, Italy, where the qualification of this concept was related to dignity and reputation.

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.

The same issue was also addressed by the ECtHR[78] in *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.[79] As such, this aspect of freedom of the press has less weight when performing the balancing activity than in cases where its more well-known function as a watchdog is at stake. Therefore, it may be possible to allocate a responsibility to news archives as regards the accuracy of the articles published requiring an active intervention of the press without infringing Art. 10 ECHR. More recently, the decision in *Węgrzynowski and Smolczewski v. Poland* has allowed the ECtHR to confirm that national legislation imposing an enhanced accuracy requirement may be deemed proportionate interference in the freedom of expression where the 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 imparting information and ideas of all kinds and in all possible ways of communication, and a passive part, meaning freedom to seek, find and receive information. Traditionally, the 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.

[78] 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).
[79] 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.*"

With the development of new communication technologies which have blurred the boundaries of imparting and spreading information, it was necessary to find new means of protecting cultural expression. Copyright, trademark and patent law, known as intellectual property rights, have developed as such means. Nevertheless, while intellectual property rights support the development 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 of 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 mainly addresses the original literary or artistic form in which ideas and/or information appear,[80] the boundary between the form of expression and the underlying idea is not always clear-cut in practice.[81] 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 of public entities or government information.[82]

Historically, the protection provided through copyright was based on the efforts of governments to regulate and control the output of printers, applying an implicit censoring of the information distributed to the public. For instance, privileges and monopolies were awarded by Britain as a censorship regime.[83] 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. the printing press).[84]

Progressively, copyright law and policy have been developed so as to strike a balance among three different actors, namely the author (who spends time and energy to produce a work), the intermediary (who invests in the duplication and distribution of the work) and the public at large (who receive 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 to 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 on his or her work, which could also provide

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

[81] Moreover, in some cases the dissemination of an idea cannot exclude the exact reproduction of the expression. See below.

[82] The Infosoc directive, 2001/29/EC 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.

[83] "Only members of the company could legally produce books. The only books they would print were approved by the Crown. The company was authorised to confiscate unsanctioned books. It was a sweet deal for publishers. They got exclusivity – monopoly power to print and distribute specific works – the foundation to copyright. The only price they paid was relinquishing the freedom to print disagreeable or dissenting texts." S. Vaidhyanathan, Copyrights and Copywrongs: The Rise of Intellectual Property and how it Threatens Creativity, NYU Press, 2001.

[84] Lee, E. (2007), 'Freedom of the Press 2.0,' 42 Georgia Law Review 309 analyses 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).

an incentive for further production.[85] 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.

This framework is applicable to any type of content, also including 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 costs of gathering and transmitting the information but also to control a possible re-use of such information by third parties. Technological developments require a reframing of copyright protection. Nowadays, several new intermediaries have entered the production chain, shifting both revenue and control over news content distribution and 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.[86] This was based on the internalisation of a set of criteria in copyright legislation, namely the concept of originality of work, the distinction between idea and form of expression, the limits posed on economic rights[87] a predefined length of time for copyright protection[88] and the existence of several exceptions.[89]

Recently European courts have started to interpret copyright law taking into account an additional, i.e. external,[90] limit, which would require further *ad hoc* restrictions on copyright protection when it conflicts with freedom of expression.

It is important to note that the reasoning is based on the jurisprudence of the ECtHR in *Fressoz v France*,[91] 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 in legislation do not allow such activity.

In terms of the scope of legal norms, there is an important distinction between the EU and ECHR systems with regard to balancing these two rights. Under the ECHR system, the right to property is considered to fall under Article 1 of the First Protocol of the Convention (which also covers intellectual property).[92] 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 of the EU Charter, cases also started to be approached in the light of Article 17(2) EU Charter. Article

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[85] MacQueen, H., G. Laurie, A., Brown and C. Waelde (2010), Contemporary intellectual property law and policy (2nd ed., Oxford: Oxford University Press) describes the distinction between the Anglo-American or common law approach and the continental Europe or civil law approach.

[86] The most cited examples are the 1985 case '*copyright as an engine of free speech*' and the 2003 *Eldred v. Ashcroft* case. The U.S. Supreme Court has highlighted several important "built-in-First-Amendment accommodations" in copyright law.

[87] The economic rights protected under copyright law 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.

[88] 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.

[89] This proportionality of copyright protection is also assessed where a collective society is in charge of managing the rights of its members, claiming the fees. This reasoning was clearly addressed by the French Courts in *Cassation re Civ*., 14/01/2010, pourvoi n° 08-16.022, Bull. 2010, I, n° 9; *Cassation 1re Civ*., 14 /01/2010, pourvoi n° 08-16.023; and *1re Civ*., 14/01/2010, pourvoi n° 08-16.024, where the balance between freedom of expression (pursuant to 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).

[90] See the distinction provided in Birnhack, M. (2003), 'Acknowledging the conflict between copyright law and freedom of expression under Human rights Act,' Ent. L. Rev. 24, between external and internal mechanism of conflict solving.

[91] ECtHR: app. no. 29183/95, *Fressoz and Roire v France* (1999).

[92] ECtHR, *Melnychuk v Ukraine* (2005).

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**

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 well-known decisions in *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 to freedom of expression and information guaranteed by Article 11 of the EU Charter.

In *UPC Telekabel Wien* the CJEU then provided a set of more detailed guidelines for courts and private parties to identify the "fair balance" between an intermediary's freedom to conduct its business and other fundamental rights such as freedom of expression. Measures 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 subject matter that has been made available to them in breach of the intellectual property right.

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

At the national level, constitutional and civil courts have addressed this balancing exercise through different approaches. In France, courts have been less open to allowing freedom of expression defences in copyright cases, as is clearly exemplified in the *Utrillo* case, where the Court of Cassation did not acknowledge a freedom of expression defence in the case of briefly displaying protected works of art during television broadcasts.[93]

In Germany, instead, constitutional and civil courts have 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-authorised broadcasting. For instance, the decision by the German Constitutional Court in the *Germania 3* case affirmed that incorporation of large extracts of literary works (of Bertold Brecht) in the defendant's own literary

[93] Cour de Cassation, Chambre civile 1, 13/11/2003, 01-14.385.

work was protected by the German Basic Law. The exception to copyright for quotation was interpreted in the light of artistic freedom pursuant to Art. 5(3) of the German Basic Law.[94]

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Part II - Selected cases

Methodological remarks

The casesheets that follow are based on cases that have been provided by the national experts that participated in 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 as far as possible the problems, questions and ambiguities that national judiciaries face in relation to the use of the Charter in the field of consumer protection.
2. **EU relevance**: the national jurisprudence identifies as far as possible issues of EU-wide relevance that touch on the application (or omission of application) of the Charter in connection with the application of EU primary and secondary sources in the application of the freedom of expression principle.
3. **The 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) and the possible motives for doing or not doing so may be highlighted.
4. **The level of protection of the EU Charter of Fundamental Rights:** particular attention is paid to national jurisprudence where the EU Charter was used to ensure a higher standard of protection of freedom of expression compared to the protection ensured by EU secondary legislation.
5. **The relation between the EU Charter of Fundamental rights and the ECHR:** has the EU Charter been used to confer more extensive protection of fundamental rights than that offered under the ECHR or *vice versa*?
6. **Judicial Dialogue**: a special emphasis is placed on national jurisprudence that used one or more of the following judicial interaction techniques: the preliminary reference procedure under Art. 267 TFEU, direct reference to the case law of the CJEU or ECtHR, references to the jurisprudence of foreign national courts, and disapplication of national legislation implementing EU secondary legislation.
7. **Divergent positions of national judiciaries**: national jurisprudence highlighting divergent positions of national courts is considered: lower level courts vs. high courts/constitutional courts/other specialised national courts.
8. **A CJEU case law connection**: national jurisprudence highlighting differences or common approaches to legal issues also faced by the CJEU.

Selected sets of cases

On the basis of the decisions provided by national experts, the Casesheets that 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 development of the jurisprudence at the national level.

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

Each Casesheet will present a decision cycle, including not only the CJEU decision but the preliminary ruling and the follow-up decision of the same court, together with decisions directly connected with the case that sow the dynamics of the judicial dialogue at the national and supranational level.

Where available, the Casesheet includes a section addressing the impact of the CJEU decision on national jurisprudence, taking into account cases where the CJEU decision is referred to in cases decided by foreign courts (other 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 also include cases decided by national authorities, such as data protection authorities, media and communication authorities, and national human rights bodies.

Hate speech

Casesheet no. 1 – CJEU, *Mesopotamia Broadcast* A/S METV (C-244/10) and *Roj TV* A/S (C-245/10) *v Bundesrepublik Deutschland*

Casesheet no. 2 – CJEU, *Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija*, Case C-622/17, pending

Casesheet no. 3 – *Glawischnig-Piesczek v Facebook*

Casesheet no. 4 – Italy, First instance court Milan, decision 13716/15, 17 December 2015

Casesheet no. 5 – Belgium, Constitutional Court, n°31/2018, 15 March 2018

Casesheet no. 6 – Spain, Constitutional Court, no. 177/2015, 22 July 2015

Casesheet no. 7 – Portugal, Supreme Court of Justice, 48/12.2YREVR.S1, 5 June 2012 59

Media Freedom

Casesheet no. 8 – Greece, Council of State, Case 1901/2014 (Supreme Administrative Court) 62

Defamation and libel

Casesheet no. 9 – Slovakia, Constitutional Court II. ÚS 152/08, 15 December 2009

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

Casesheet no. 11 – Italy, Tribunal of Rovereto, 19 November 2015

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

Conflicts between freedom of expression and data protection

Casesheet no. 13 – CJEU, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, Case C-73/07.

Casesheet no. 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 no. 1 – CJEU, Mesopotamia Broadcast A/S METV (C-244/10) and Roj TV A/S (C-245/10) v Bundesrepublik Deutschland

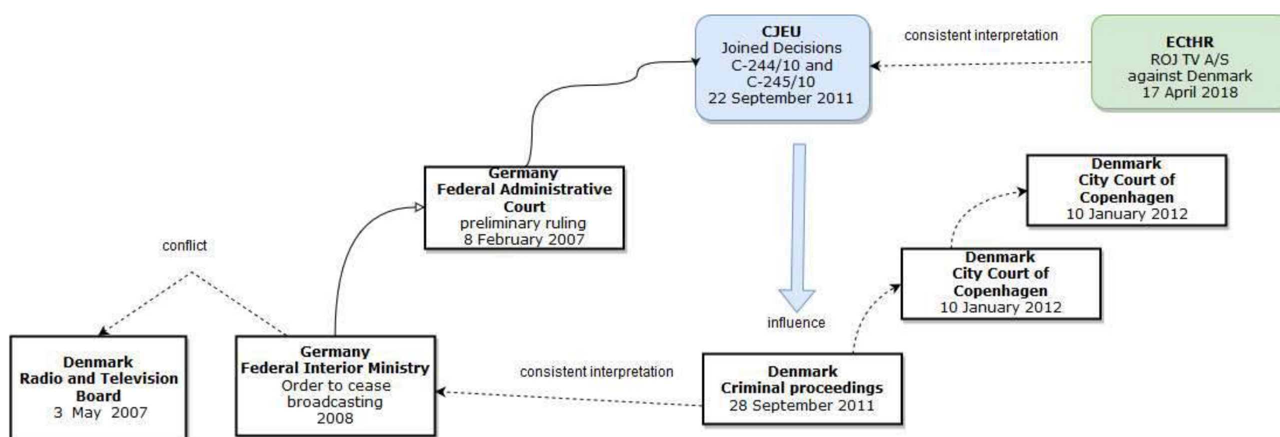
Reference case

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
What definition of 'incitement to hatred' is adopted at the EU level?
What powers do communication authorities have over programmes containing incitement to hatred?

Graphical description



At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Denmark • Germany	• freedom of expression • hate speech	• Directive 89/552/EEC	• first instance court • Supreme court • CJEU • ECHR	• preliminary reference • consistent interpretation

Case descriptions

a. Facts

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

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

The decision by the German authority was based on an evaluation that Roj TV's programmes were at variance with the "principles of international understanding" as defined in German constitutional law. The ground for the prohibition rested on the fact that Roj TV's programmes called for resolution of differences between Kurds and Turks through violent means, including in Germany, and they 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 this prohibition set aside, relying on the fact that according to the directive only Denmark could control their activities.

The German Federal Administrative Court dealing with the case decided to stay the proceedings and request a preliminary ruling from the CJEU on whether the German authorities were lawfully entitled to prohibit the activities of Mesopotamia Broadcast and Roj TV. The German court wished 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 for the Danish authorities, also includes infringements of 'principles of international understanding'.

b. Reasoning of the CJEU

On 22 September 2011 the CJEU 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 through terrorist acts against a particular group of persons. According to the referring court, Mesopotamia Broadcast and Roj TV played 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 these circumstances, the Court declared that the conduct of Mesopotamia Broadcast and Roj TV as described by the German court was covered by the concept of 'incitement to hatred.'

However, the CJEU stressed that according to the Television Without Frontiers Directive, only the Danish authorities were competent to verify whether that conduct constituted 'incitement to hatred' and to enforce application of the directive on Roj TV so as to prohibit such incitement. Moreover, the CJEU recalled 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 this connection, the CJEU stated that the contested measures were 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.

Therefore, the reception and private use of Roj TV's programmes were not prohibited and indeed remained possible in Germany. However, as a prohibited association, Roj TV could no longer organise activities in Germany, and activities carried out for the benefit of this broadcaster were also prohibited there. Accordingly, the CJEU replied that the measures taken against Mesopotamia Broadcast and Roj TV did 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 prevented the retransmission of these programmes to Germany.

c. Subsequent proceedings at the national level

Immediately after the CJEU's decision (in September 2011), a Danish prosecutor initiated criminal proceedings against the two companies behind Roj TV, charging them with promoting a terror organisation 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 in various programmes in a one-sided and uncritical way the TV channel had communicated PKK messages, including urges for rebellion and to join the PKK. The sanction for such an offence was a fine of 349,000 euros for each broadcasting company, without application of a deprivation of the right to broadcast or confiscation of the broadcasting licence.

On appeal, 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 deprivation of the license to broadcast was added. The latter was justified by applying an effective, proportionate and dissuasive criminal penalty as imposed by the EU's Council Framework Decision of 3 December 2001 on combating terrorism. Then in February 2014 the Supreme Court upheld the ban.[95]

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 regarding the right to freedom of expression of the broadcasting company. On the basis of the domestic court's assessment, the ECtHR acknowledged that not only had the national courts addressed all the relevant facts and evidence but they had also evaluated the potential limitation of the freedom of expression taking into account the content, presentation and connection of the programmes 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 broadcast were contrary to the prevention of terrorism and terrorist-related expressions advocating the use of violence. Therefore, by virtue of Art. 17 ECHR the complainants may not be protected by Art. 10 ECHR and their complaint was deemed inadmissible.

Analysis

a. Role of the Charter

[95] Case no. 231/2013.

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

Wider attention was given to the definition of incitement to hatred provided in Art. 22a Dir. 89/522, which was 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 by the national courts in Germany and in Denmark do not show any direct cross-reference, either in their content or in their arguments. However, it is significant that the prosecutor in Denmark started its criminal investigation when the preliminary reference by 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 for 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, despite mentioning the CJEU decision in joined case C-244/10 and C-245/10, did not give it weight in its reasoning, at least confirming the shared evaluation of the content of the programmes of Roj TV as incitement to hatred.

Casesheet no. 2 – CJEU, Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija, Case C-622/17, pending case [96]

Reference cases

COMMISSION DECISION of 10/7/2015 on the compatibility of 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 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 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 on *Baltic Media Alliance Ltd v Lietuvos radijo ir televizijos komisija*, Case C-622/17

Core issues
What powers do communication authorities have over programmes containing incitement to hatred?
What 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
• Lithuania	• freedom of expression • hate speech	• Directive 2010/13	• national communication authority • first instance court • European Commission	• preliminary reference

Case description

a. Facts

[96] Casesheet drafted on the basis of a template provided by Sigita Formiciova.

In 2015, the Lithuanian communication authority adopted a decision regarding RTR Planeta, a Russian channel transmitted in Lithuania 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*" and "*inciting tensions and violence between the Russians and the Ukrainians but also against the EU and NATO States.*" Therefore, they were deemed 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 this decision, the communication authority tried to establish a dialogue with the broadcaster so as to enforce the application of EU law through collaboration with the Swedish communication authority (as RTR Planeta was a registered broadcaster in Sweden), which eventually ended up with another suspension order.

In 2018, the communication authority informed the Commission of another set of infringements of Art. 6 AVMS. This time the order sanctioned RTR Platena with a suspension of twelve months.

b. Reasoning of the Commission

In evaluating the Lithuanian communication authority's compliance with EU law, the Commission based its reasoning on the definition of '*incitement to hatred*' provided in the CJEU *Mesopotamia* decision in joined cases C-244/10 and C-245/10.[97] In particular, the Commission evaluated whether the Lithuanian authorities provided information on the content of the 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 by 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 by the legislator regarding hate speech was then a legitimate ground for limitation.

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

c. Subsequent proceedings at the national level

A few months before the decision by the Lithuanian communication authority, a Lithuanian court also faced the application of provisions implementing Art. 6 AVMS in an administrative proceeding.

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

[97] See Casesheet no. 1, above.

The Vilnius administrative court then decided 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*

A reference to the Charter was also included in the European Commission's decision affirming the legitimacy of the limitations to freedom of expression on the basis of Art. 52(3). In this case, the Commission then applied (without a very detailed analysis) the three-step test provided in the Charter.

b. Judicial dialogue

Vertical dialogue – preliminary reference

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

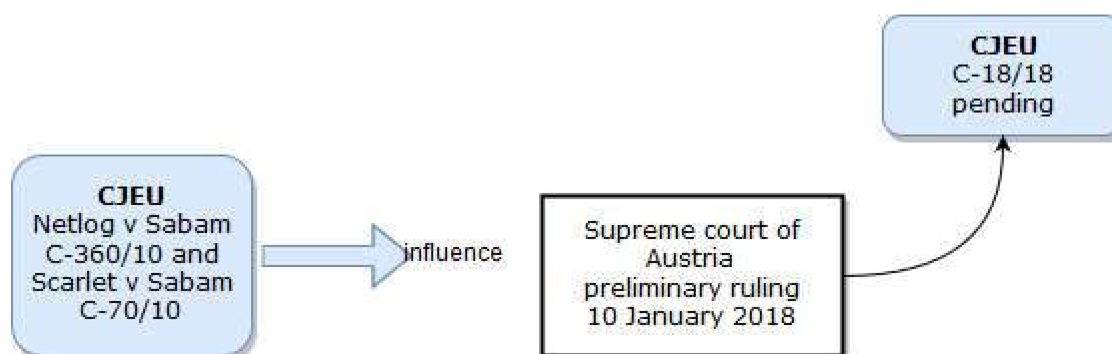
Casesheet no. 3 – CJEU, Glawischnig-Piesczek v Facebook, C-18/18, pending case

Reference case

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

Core issues
What is the role of an 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 Interaction Technique
• Austria	• freedom of expression • hate speech • defamation	• Directive 2000/31	• first instance court • supreme court • CJEU	• preliminary reference

Case 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 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. Therefore, Ms Glawischnig-Piesczek filed a lawsuit before the Wien first instance court, which eventually resulted in an injunction against Facebook obliging 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 they were accompanied by comments that were identical or similar in meaning to the original comments.

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

Both parties appealed the court of appeal's decision, which brought the case to the Oberste Gerichtshof. Addressing the case, the Austrian supreme court affirmed that Facebook is considered an abettor to the unlawful comments so it may be required to take steps so as to prevent the publication of identical or similar wording. However, in this case the injunction regarding such a pro-active role for Facebook could be indirectly imposed in 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*. 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 regard to the first question, does Article 15(1) preclude 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) preclude 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?[98]

b. Reasoning of the CJEU

In his opinion, AG Szpunar considered that *to impose a general monitoring obligation on a host provider* would alter the nature of the intermediary as it would become aware of the information stored and an injunction should not do that. However, AG Szpunar also remarked that domestic courts are in a position to prevent illegal activity. In order to overcome this conflict, AG Szpunar distinguished *general monitoring* from *specific monitoring,* which is monitoring applicable *to a specific case* and *limited* in terms of *the subject* and *the duration*.

In addition, the AG suggested that automation preserves the neutrality of a platform: automation has the capacity to detect the reproduction of the same content by any user of a social network and at the same time it does not transform (*legally speaking*) the nature of an intermediary. In this passage, the AG built on *Google France SARL (2010),* which ruled that automation does not necessarily result in the platform having knowledge of, or control over, information.

[98] Decision of the Oberste Gerichtshof, OGH, in case number 6Ob116/17b.

The CJEU's decision argued that as Facebook was aware of the existence of illegal content on its platform it could not benefit from the exemption of liability applicable pursuant to Art. 14 of the e-Commerce Directive. In this sense, the Court affirmed that, according to recital 45 of the e-Commerce Directive, national courts cannot be prevented from requiring a host provider to stop or prevent an infringement. The Court then followed the interpretation of the AG in the case,[99] affirming that no violation of the prohibition of monitoring obligation provided in Art. 15(1) of the e-Commerce directive occurs if a national court orders a platform to stop and prevent illegal activity if there is a genuine risk that the information deemed to be illegal can be easily reproduced. In these circumstances, it was legitimate for a Court to prevent the publication of "information with an equivalent meaning," otherwise the injunction would be simply circumvented. The CJEU then defined information with an equivalent meaning as "information conveying a message the content of which remains essentially unchanged and therefore diverges very little from the content which gave rise to the finding of illegality" (par. 39).

Regarding the scope of the monitoring activity allocated to the hosting provider, the CJEU acknowledged that the injunction cannot impose excessive obligations on an intermediary and cannot require an intermediary to carry out an independent assessment of equivalent content deemed illegal, so automated technologies could be exploited in order to automatically detect, select and take down equivalent content.

Regarding the territorial scope of the injunction, the Court took into account the fact that the e-Commerce Directive does not provide for territorial limitation. Therefore, with the silence of the law Member States are not prohibited from asking for worldwide implementation of an injunction. Although the Court further clarified that Member States may order a host provider to remove information or to block access to that information worldwide if this is compatible with the applicable international law, it did not mention specifically which provisions of international law are relevant.

Analysis

a. Judicial dialogue

Vertical dialogue – preliminary reference

The Austrian Supreme court dealt with a highly debated issue which was emerging not only at the European but also at the worldwide level. In fact, in the same period the Supreme Court of Canada also granted an interlocutory injunction against Google in the form of a global de-indexing order.[100]

The CJUE affirmed the obligations of ISPs vis-à-vis hate speech content. However, it did not provide any specific analysis regarding the impact of such obligations on freedom of expression, excluding any reference to Art. 11 CFR in the decision, or on the need to ensure a review mechanism for third parties affected by measures adopted by the ISP.

Horizontal dialogue – comparative reasoning

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[99] In his Opinion AG Szpunar affirmed that an intermediary does not benefit from immunity and can "be ordered to seek and identify the information equivalent to that characterised as illegal only among the information disseminated by the user who disseminated that illegal information. A court adjudicating on the removal of such equivalent information must ensure that the effects of its injunction are clear, precise and foreseeable. In doing so, it must weigh up the fundamental rights involved and take account of the principle of proportionality."

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

It is worth noting that a French court also addressed the issue of injunctions with worldwide scope with a reference to de-listing from Google search results. The Paris first instance court ordered such an injunction in 2014 as an application of 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 on Google France the removal of the defamatory links. This injunction did not limit the links of Google.fr on the ground that the defendant did not establish the impossibility of connecting from the French territory using other endings of the search engine.[101]

[101] See Casesheet no. 14.

Casesheet no. 4 – Italy, First instance court Milan, decision 13716/15, 17 December 2015 [102]

Reference case

ECHR, *Féret v Belgium*

Core issues
What are legitimate grounds for the limitation of freedom of expression?
Are limitations regarding 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 Interaction Technique
• Italy	• Freedom of expression • hate speech	• Chapter III Charter • Directive 2000/43	• first instance court • ECtHR (indirect)	• consistent interpretation

Case description

a. Facts

In 2013, a neighbourhood in Milan was populated by Roma families, who were allegedly accused of having committed crimes against property and heritage. This caused much tension in that part of the city and a set of protests against the Roma settlement were organised. As a reaction to the protests, the prefect decided on forced eviction of the Roma settlement.
On the occasion of a city council meeting after the eviction, another protest was organised by right-wing associations before the city council. In order to avoid heightening the tension, some representatives of these organisations were invited to participate as observers in the city council.[103]
During the meeting, a left-wing councillor asked if the representatives of the right-wing association who had organised the protest were in the Council Chamber, because if that was the case the councillor would leave. As a reply, a criminal lawyer belonging to one of the right-wing organisations stood up and said "*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 at the city council. Given that the fascist salute is a criminal offence according to Italian law, general excitement followed, which 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), also taking into account international and European provisions, referring to the New York Convention of 1966, Art. 14 ECHR, Art. 19 TFUE, Chapter III of the CFR and Art. 7 of the International Criminal Court Statute.

[102] Casesheet based on a template provided by Valeria de Risi.
[103] Citizens may participate in city councils as observers.

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

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 the Italian Constitution. The Italian court drew a parallel between jurisprudence on Art. 10(2) ECHR regarding limitations to freedom of expression and the interpretation of Art. 21 of the Constitution as interpreted by the Italian Constitutional court in cases where a question of constitutionality was raised regarding laws deemed to be in conflict with the freedom of expression principle.[104]

In particular, the Italian court highlighted that the interpretation by the Constitutional court of Law 645/1952 on apology for fascism in decision no. 25184/2009 was to be interpreted as an offence which does not limit freedom of expression per se but rather it limited expression in the case of a 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 for disorder and violence.

Analysis

a. *Role of the Charter*

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

Similar weight was given to Art. 10 ECHR, although in this case a more detailed paragraph was dedicated to ECtHR jurisprudence where the fact that freedom of expression is not an absolute right is highlighted to identify legitimate limitations based "*on the respect of equal dignity of all people as a basis for a democratic and pluralist society,*" mentioning cases that address hate speech, such as *Feret v Belgium* and *Incal v Turkey*.

b. Judicial dialogue

Vertical dialogue – consistent interpretation

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

[104] Italian Constitutional Court, decision no. 37581/2008 and no. 31655/2001.

Casesheet no. 5 – Belgium, Constitutional Court, n° 31/2018, 15 March 2018 [105]

Reference cases

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

Core issues
What are legitimate grounds for limitation of freedom of expression? Can the legislator qualify the dissemination of messages that incite the perpetration of terrorist acts as a crime? What proportionality test is applicable in order to avoid unjustified encroachment on freedom of expression?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Belgium	• freedom of expression • hate speech		• constitutional court • ECtHR (indirect)	• consistent intepretation

Case description

a. Facts

The Belgian Human Rights League presented an action before the Constitutional court against the modification of a criminal provision to criminalise the dissemination of messages that incite the perpetration of terrorist acts or any other means of making these messages available to the public, whether or not the dissemination would imply a risk of commitment of such acts.

b. Reasoning of the court

The Belgian Constitutional Court evaluated the constitutionality of Art.2 of Law 3 of August 2016 amending Art. 140 bis of the criminal code against Art. 19 Belgian Constitution, Art. 10 ECHR, Art. 11 EU Charter and Art. 19 ICCPR. These provisions were qualified by the Constitutional court as an indissoluble whole.

The Constitutional court addressed an analysis of the amended criminal code provision taking into account that in 2015 a similar question of constitutionality had addressed the previous version of the provision resulting in a legitimate ground for the limitation of freedom of expression.[106]

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

When an expressed opinion justifies terrorism being committed to achieve the goals of the author of the opinion, national authorities can limit the freedom of expression. Nevertheless, the criminalisation of a public provocation to commit terrorist acts does not allow the repression of acts that have no

[105] Case based on a template provided by Eric Jooris and Evelyne Esterzon.
[106] Constitutional Court, 28 January 2015, n° 9/2015.

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

The Constitutional court then acknowledged that the amended Art. 140bis Criminal Code deleted the requirement for the existence of a risk in order to simplify proof of incitement to terrorism. According to the preparatory work in the 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 was clear enough to be fully in line with the principle of legality. In addition the judge had to exercise his discretion and examine whether or not there was serious evidence of a risk depending on the identity of the person disseminating the message or making it available to the public, its recipient, its nature and the context.

The need to simplify the production of evidence cannot justify a sentence to imprisonment and a fine for terrorism incitement when there is no serious evidence of a risk of terrorist acts. A provision in a Council Framework Decision on combatting terrorism required examination of whether such a risk existed.

Therefore, the constitutional court affirmed that the new version of Art. 140bis Criminal Code containing various provisions in terms of counter-terrorism was a limitation of freedom of expression, it was not necessary in a democratic society and limited the freedom of expression to a disproportionate extent. Therefore, it must be annulled.

Analysis

a. *Role of the Charter*

The Charter was mentioned but not analysed in detail by the Constitutional court, either in the 2018 decision or in the previous 2015 decision on the same provision. However, it is important to note that the Constitutional court analysed 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 to provide the standards for the limitation of the freedom of expression principle. In this case, the consistent interpretation approach taken by the court did not qualify as an interaction with 'foreign' jurisprudence but rather as internalised jurisprudence.

Casesheet no. 6 – Spain, Constitutional Court, no. 177/2015, 22 July 2015 [107]

Reference case

ECHR, *Stern Taulats v Spain*

Core issues
What 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 description

a. Facts

In September 2007 while the king was on an official visit to Girona, during a public demonstration the applicants set fire 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 insulting 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 the 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 was also placed upside down was not a legitimate form of freedom of expression according to the Spanish Constitutional Court.

The Court reiterated that freedom of expression should be balanced 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 expresses political ideas and therefore in principle freedom of expression is applicable. However, the circumstances of the case led the Spanish Constitutional Court to determine

[107] Casesheet based on a 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 disturbance. Therefore, freedom of expression did not cover the applicants' acts.

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

c. Subsequent decision by the ECtHR

In the *Stern Taulats and Roura Capellera* case, in the 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 setting fire to the photograph placed upside-down was a political critique of the institution of the monarchy and its symbolic representation of the Spanish state as an oppressor of the Catalonian independence movement. This political critique should be protected by the freedom of expression.

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

For all of these reasons, the 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 the 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 the national proceedings and therefore the Charter was not considered an applicable instrument.

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

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 Constitutional Court brought the hate speech/crime discourse to the case. In this context, the Court did not refer to the Council Framework Decision or the Charter to justify 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 reference to the ECtHR jurisprudence. The consistent interpretation approach directly linked the national jurisprudence on freedom of expression to the ECtHR. In particular, the court relied on decisions by the ECtHR in *Otegi v. Spain,* where the exercise of freedom of expression by a politician can allow resorting "*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 ECtHR jurisprudence, in the subsequent decision the latter qualified the facts of the case in a different manner.

Casesheet no. 7 – Portugal, Supreme Court of Justice, 48/12.2YREVR.S1, *5 June 2012*[108]

Core issues
Can limitation of freedom of expression be a justification for a refusal 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	• freedom of expression • hate speech	• Council Framework Decision 2002/584/JHA on the EAW • Council Framework Decision 2009/299/JHA • Council Framework Decision 2008/913/JHA	• Supreme court • first instance court	• consistent interpretation

Case description

a. Facts

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

To comply with the EAW, the Portuguese authorities detained AA on 11 April 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 of the main arguments presented by the appellant for the non-execution of the EAW by the 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 no. 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 the same opinion would be protected by the Constitution of the Portuguese Republic (Constituição da República Portuguesa, hereafter CRP), namely in Article 13 on the principle of equality and Article 37 on the 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)

[108] Casesheet drafted on the basis of a template provided by Marta Carmo.

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 took place he would not be granted a fair trial.

The Court advanced considerations on the concept and evolution of the EAW. However, the more relevant reasoning in the decision was 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 thoughts and opinions is a negative right of every citizen to not be prevented from expressing and disseminating his or her opinions. The STJ decision affirmed that this right cannot be restricted. This was such a pronounced constitutional protection that it encompassed a prohibition of censorship even if the opinion which is being expressed is unconstitutional. Nonetheless, the STJ found that 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 violation of such limits can result in criminal or administrative punishment.

The Court continued its reasoning by discussing article 240 of the Portuguese Criminal Code (Código Penal, hereafter CP) on discrimination and incitement to hatred and violence. The Court clarified that the legislator used denial of genocide, war crimes and crimes against peace and humanity as an example in article 240(2). In fact, according to the STJ, 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. This is the reason why article 240(2) requires that the denial of such crimes is accompanied by the offender intending to provoke acts of violence, inflict libel, threaten or incite violence and hatred against a person or a group of people, i.e. the act committed by the offender constitutes or is accompanied by hate speech.

The Court proceeded by mentioning Council Framework Decision 2008/913/JHA and agreeing that the mere dissemination of opinion on the occurrence or not of a certain fact without making any value judgement cannot be considered 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 by the applicant that crimes against Jews were not committed by the Third Reich and that such an idea was the "most profitable lie in the history of humanity" were a criminal offence under Portuguese national law, the STJ declared that AA's conduct can indeed be considered an offence under article 240(2) of the CP. To reach this conclusion, the Court noted that the applicant did not just deny the genocide but he also made a clear negative judgement which was offensive to the victims, their families and friends by declaring it was a "profitable lie."

The Court therefore considered that the statements made by AA in the context of his denial of the crimes committed by the Third Reich during World War II were offensive to the Jews and constituted hate speech. This meant, as the Court affirmed, that the act of the appellant exceeded the limits of the constitutional protection afforded to the right to freedom of expression and consequently was 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 by the Court of appeal.

Analysis

a. *Role of the Charter*

The case is highly relatable to 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, Article 11 on freedom of expression and Article 51(1) on the scope of guaranteed rights in the Charter are directly related to the case under analysis by the STJ. However, the Charter was not mentioned in the STJ's decision. The relevant point of reference in this case was instead the ECHR.

b. Judicial dialogue

Horizontal dialogue – consistent interpretation

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

Casesheet no. 8 – Greece, Council of State, Case 1901/2014 (Supreme Administrative Court)[109]

Reference case

ECHR, *Manole and Others v. Moldova*, of 17 September 2009.

Core issues
What is the role of a public media broadcaster in ensuring media pluralism?

At a glance

Country	Legal area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Greece	• freedom of expression • media freedom and pluralism	• Protocol no. 29 to the TFEU on the system of public broadcasting in the Member States	• Supreme court • ECHR (indirect)	• consistent interpretation

Case 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 publishing, of the operation of websites and of any other activity of ERT after the end of its programme on 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, by means of a temporary injunction the President of the Council of State ordered the partial suspension of the joint ministerial decision. This was confirmed in 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 organisational measures, including the hiring of personnel, for broadcasting by an interim public organisation, as soon as possible, of the necessary radio and television programmes 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 programme transmission.

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

[109] Casesheet drafted on the basis of a template provided by Evangelia Psychogiopoulou.

d. Reasoning of the CJEU

The Council of State (CS) started its reasoning by interpreting relevant constitutional provisions. The provisions of Article 14(1) and (2) of the Constitution 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) 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.

Regarding radio and television broadcasters, having regard to the wide scope, immediate effects and power of influence they have, the constitutional legislator has determined in Article 15(2) of the Constitution that their operation falls under the direct control of the State. This direct control involves both the granting of licences and ensuring that broadcasters' operations serve certain public interest objectives such as transmission on equal terms of information, news, products of speech and art, the quality of the programmes 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 youths. Licensing responsibilities and 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) of the Constitution provides for the adoption of laws on the disclosure of ownership, the financial situation and the 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 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) of the Constitution, 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 and the rules preventing ownership concentration, at the same time refraining from interfering with the content of the broadcasting organisations' programmes. 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 the 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) of the Constitution. Although the applicants argued that Article 15(2) should be interpreted as safeguarding the uninterrupted continuous operation of the PSB, the CS took the position that it did not require the establishment of a public broadcasting body. The position of the CS was influenced by the fact that besides being driven by budgetary considerations the abolition of ERT 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

the shutdown of ERT (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 nationwide 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 and breach of Protocol No. 29 of 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 competence to establish and organise 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 authorising 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 therefore 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 programmes. Considering that in Greece there were other media organisations that ensured the quality and balance of programmes 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, were 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 the closure of ERT to be a purely internal measure and rejected the argument for a 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, but 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 (and therefore 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 for a breach of Article 10 ECHR, the CS cited the ECtHR judgment in *Manole and Others v. Moldova* of 17 September 2009. This was a mere citation. The CS did not analyse 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 programmes exist.

Casesheet no. 9 – Slovakia, Constitutional Court II. ÚS 152/08, 15 December 2009 [110]

Reference case

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

Core issues
What is the balance between freedom of expression and reputation in the case of press articles?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Slovakia	• freedom of expression • defamation	• none	• Constitutional court • ECHR (indirectly)	• consistent interpretation • comparative reasoning

Case description

a. Facts

In 2007, the tabloid weekly magazine Plus 7 published an article addressing the issue of proportionality between 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 in the judicial system. In particular, one example provided was of a judge who at that time awarded a sizeable amount of 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 in Art. 26 and Art. 10 ECHR and its interpretation by the ECtHR.

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

The constitutional court provided a detailed analysis of each criterion:

Who is criticised?

[110] Casesheet based on a template provided by Jan Stiavinicki

"The result of the effort to support discussion about topics interesting for the public is 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 'ordinary' people are criticised. The Constitutional Court accepts the trend that is moving judges, who stand somewhere in between, closer to politicians (...)."

Who criticises?

"Just like 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's 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 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 not only based on its authority but mostly because of the fact that the arguments of the ECHR are convincing. (...)"

What is criticised?

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

Where was it done?

The place where the expression was orally expressed or published is also a useful criterion for assessment of the interference with 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 the expression. If the author is a journalist, his or her privileged position partially neutralises the criterion of location. (...)?

When was it done?

When criticising judicial decisions, it is of importance whether they are criticised during the proceedings of a trial or after the end of it. The timing of the criticism should be seen not only in terms of the phase of the trial but also in terms of social timing. The magazine criticised a 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 second instance (see also the decisions of the Constitutional Court nos. II. ÚS 23/00, II. ÚS 13/02 (...)). In this case, it is generally necessary to raise the demand for more accurate reporting. In the present case there was no report about the judicial decision but selected cases and decisions served as examples to illustrate the current problem of the number of cases before courts initiated by public figures who were provided with high amounts of money as non-pecuniary damage in those cases. The social topicality is also linked to historical actuality. While building the judiciary into the rule of law, countries in transition can protect the judiciary against public discussion with perhaps defamatory aspects or on the other hand they can open discussion about the judiciary. The Constitutional Court is inclined to accept the second of these alternatives, taking into account the fact that changes in the judiciary have been under way for two decades already. (...)"

How was it done?

"Not only what is said needs to be taken into account. Also how it is said is of importance in assessment of the acceptability of the criticism. In this case, the criticism is indirect general criticism of judicial decisions, and implicitly it is also criticism of a judge who has been successful in these cases before the courts. The magazine article was published on the last but one page of the magazine in the column 'Word of the Publisher' with a caricature of a prickly hedgehog. This means that it was a commentary, not a reporting section of the magazine. A reader hence counts 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. The form of criticism is therefore disagreement with judicial decisions but there are no offensive, incursive or indecent formulations. In its overall context the magazine article refers to a systematic problem of high satisfaction of non-pecuniary damages granted to judges in 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. (...)."[111]

After the thorough evaluation of the six criteria, the court held that the right to freedom of expression should have prevailed over the right to privacy. Therefore, the decisions of the lower courts should be overruled as they were in violation of the freedom of expression of the magazine (the 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 to adapt such standards into the national legal discourse.

Moreover, the court provided a rich comparative reasoning exercise taking into account several decisions by 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 but their content was directly quoted as a supporting argument.

[111] 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.

Casesheet no. 10 – Romania, High Court of Cassation and Justice, decision no. 359/2014 of 28 January 2014 [112]

Reference case

ECHR, *Lingens v. Austria*

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

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Romania	• freedom of expression • defamation	• none	• Supreme court • ECHR (indirectly)	• consistent interpretation

Case 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 the sanction public by the National Council for Audiovisuals (CNA), the Romanian regulatory authority in the field of audiovisual programmes.

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 by another television channel, A.1, which had also displayed them. 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 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

Deciding on a special appeal by the plaintiff O.T.V., the High Court of Cassation and Justice rejected 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.

[112] Casesheet based on a 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 in article 10 ECHR and those in article 11 CFREU.

First, 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 each television channel could be held liable for the type of images that it presented.

Second, the Court rejected the argument of the plaintiff regarding public interest justifying 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 in 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."

Third, with respect to the argument of the plaintiff that the affirmations of the show's 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 by 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 this capacity, such a 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 channel and the commentaries of the show's 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 the 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 in 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 with reference to the ECHR framework and to the relevant case law of the ECtHR.

b. Judicial dialogue

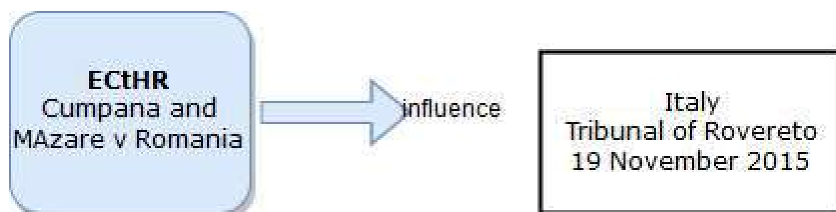
Vertical dialogue – consistent interpretation

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

Casesheet no. 11 – Italy, Tribunal of Rovereto, 19 November 2015

Core issues
What is the balance between freedom of expression and reputation in the case of press articles?
What are the proportionate remedies in the 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	• Freedom of expression • defamation	• Art. 10 ECHR	• first instance court • ECtHR (indirect)	• consistent interpretation

Case description

a. Facts

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

The article was entitled "B.: update the country (with paedophilia)." The article included several quotations from previous writings by and interviews with 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 addressed in detail the legal issues emerging in the case of defamation disseminated on the 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 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 affirmed 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 cannot 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 it is for his counterparty. As long as the conflict is held at the level of a debate between ideas we cannot 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 a detailed justification regarding the sanction to be applied in this case. First, the court explicitly affirmed that a custodial sanction may not be imposed according to the ECtHR jurisprudence on defamation cases. In particular, the national court referred to the decisions in *Cumpana and Mazare v Romania* and *Belpietro v Italy*, where the European court affirmed that prison sentences for crimes committed by the press must be relegated to cases of exceptional gravity. Accordingly, the Italian court ordered 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 sentences in the case of defamation by the press may raise doubts about compliance with ECHR provisions and with the 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 doubts.

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 to adapt these standards into the national legal discourse.

However, the court did not go forward with a more direct vertical debate with the Italian Constitutional Court, although it hinted at the potential issue of constitutionality of national provisions regarding sanctions to be applied in cases of defamation by the press.

Casesheet no. 12 – Romania, High Court of Cassation and Justice, decision no. 3216/2014, 19 November 2014 [113]

Reference case

ECHR, *Delfi v Estonia*

Core issues
What is the balance between freedom of expression and reputation in the case of comments on online articles?
Who is responsible in the case of comments on online articles?
What are the remedies for a breach of reputation rights?

At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Romania	• freedom of expression • defamation		• Supreme court • ECHR (indirect)	• consistent interpretation

Case(s) description

a. Facts

The case concerned defamatory statements against several persons who were running financial activities. Their full names were given in several statements published on an online website administered by the defendant related to complaints regarding the security market. Several articles were posted by 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 could be accused of having committed illegal acts such as evasion, money laundering and deception. These were supported by few legal arguments but contained excessive value judgments, such as "scam," "bullet jumble," the "screaming of charlatans" etc., which were not proven to be in good faith and which were of a nature to affect the complainant's dignity, honour and self-esteem – values that are 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. The administrator then filed a complaint before the last instance court, the High Court of Cassation and Justice. In a very detailed judgment or approximately 20 pages, the Court set out guidelines on how to balance the freedom of expression with the right to reputation, where to strike the balance, and the remedies in the case that a manifestation of freedom of expression in an online forum endangers the reputation of a person. Its judgment was heavily based on the

[113] Casesheet drafted on the basis of a template provided by Bodgan Christea and Madalina Moraru.

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

b. Reasoning of the court

The High Court of Cassation and Justice addressed the case by first 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 affects his dignity, honour and self-esteem, which are values to be respected and protected.

Against this background, while recognising 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, and neither can it become a tribunal for insults against natural persons, insults that have acquired racial connotations, which is also unacceptable.

The overall evaluation of the articles posted on the website brought 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 with respect to the existence of an unlawful act (the disclosure on the website of information liable to infringe the right to image of an individual) and 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 image caused to the latter, the Court addressed the admissibility of civil liability for the defendant's guilt. Here, the court referred to the case law of the European Court of Human Rights (*Delfi AS v. Estonia* and *Őztürk v. Turkey*), in which 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 and 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 referred to the ECtHR jurisprudence on duties and responsibilities applicable to journalists and 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 affirmed that the fact that the articles posted were based on articles published on other websites did not exonerate the defendant from the duties and responsibilities provided in Art. 10 of the Convention, including respecting the right to good repute guaranteed by Art. 8 of the Convention.

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

The court then concluded that since on the website administered by the defendant a series of defamatory articles were posted by the site's readers with regard to the complainant, some even with

criminal connotations, the webmaster was not only responsible for failing to fulfil his positive censor obligations or to prevent the publication of messages with defamatory content, but he also encouraged the expression of insulting opinions on 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* regarding whether there is a public interest in the debated issue (*Bugan v Romania*), the good faith of the journalist (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, exaggeration of artistic language, the proportionality of the sanction with the deed and the motivation for the judgment (*Bugan v Romania*, *Dumitru v Romania*).

The Court of first instance also analysed *Delfi v Estonia* (judgment of 10 October 2013) in a broad and coherent manner. In assessing the existence of interference with the right to free expression the ECtHR considered the following issues relevant: 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 in identifying them, given that a large part of the messages were anonymous and the postings were made without the authors being obliged to reveal their identities.

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

Regarding the existence of damage, as an essential element of the civil liability in question, the Court agreed with the first instance court and 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 in the capital market and the applicant's young age as 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. The ECtHR noted that young people are obviously included in this category and have 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

Consistent interpretation with relevant judgments by the ECtHR.

Casesheet no. 13 – CJEU, Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, Case C-73/07.

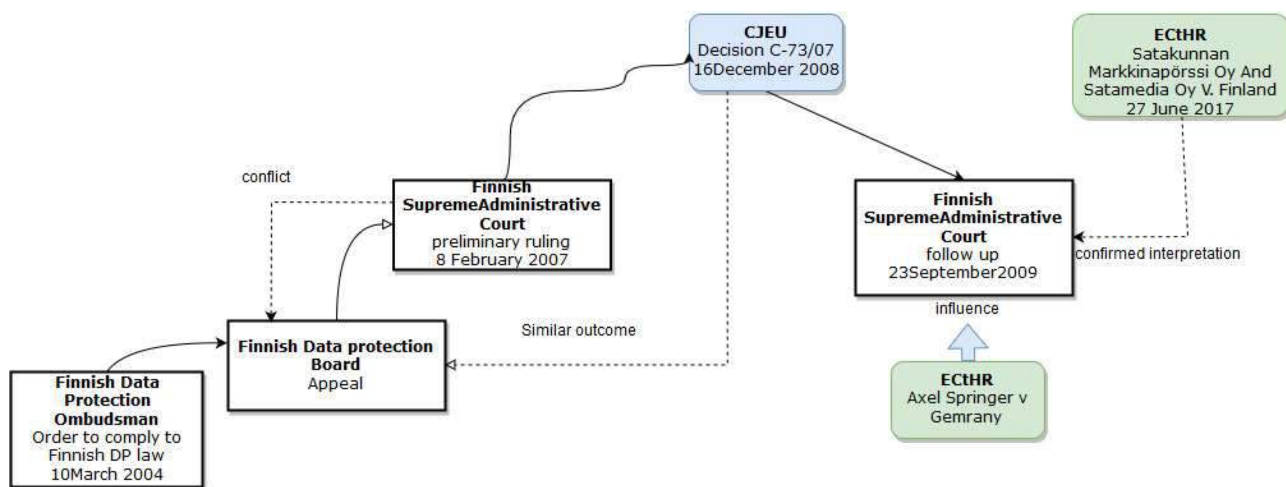
Reference cases

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
What is the balance between freedom of expression and data protection in the case of journalistic 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
• Finland	• freedom of expression • data protection	• Art. 11 CFR • Art. 10 ECHR • Dir. 95/46	• Data protection authority • first instance court • supreme court • CJEU • ECtHR	• preliminary reference • proportionality • consistent interpretation

Case 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.[114] The first company in particular published a magazine entitled '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 a 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. Therefore, the Ombudsman requested the Data Protection Board to issue a ban on the two companies collecting and publishing tax data, both in Veropörssi magazine and on 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. An appeal against 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 with the Finnish Supreme Administrative Court.

The Supreme court then decided to stay its proceedings in order to present a preliminary reference to the CJEU. It is important to follow the reasoning of the Finnish court. It presented these questions 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 a 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 Questions 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

[114] 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 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 that could be used to check whether the activity carried out by the two companies fell 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 facts of the case.

The balancing exercise carried out by the CJEU revolved around the right to privacy and freedom of expression, taking into account that derogations to the data protection rules based on freedom of expression are only allowed when strictly necessary. Although the analysis by the CJEU was based on the narrow construction applicable to derogations, it ended up with 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.[115] This was also supported by the fact that the dissemination of information is no longer strictly linked to the type of medium used to transmit such data. Moreover, a commercial justification can also be at the basis of professional journalistic activity. The CJEU's test resulted in the fact that the activities in question were 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 it completely to the national courts to verify whether this was the case.[116]

This test, however, differed from that provided by the ECtHR in the *Hannover* and *Axel Springer* cases, where the court set out seven criteria relevant in 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 the national level

The Finnish Supreme Administrative Court decision was delivered on 23 September 2009.[117] 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 standards of protection of the other fundamental right at issue – the 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 freedom of speech, the information provided to the audience must be important for society and not only serve curiosity. Therefore, greater attention should be given to the protection of private life in the light of the capacity of new communication technologies to maintain and reproduce personal information.

[115] 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.
[116] Ibid. at para. 62.
[117] KHO:2009:82.

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 at a discussion of a social interest necessary in a democratic society it could not qualify as processing for journalistic purposes under the Data Protection Act. The Supreme Administrative Court directly applied 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 ban to Satamedia on their continued publishing of the data. The ban covered both the publications and the SMS service. The Court stated in its judgement that Article 2.4 of the Finnish Personal Data Act was not in line with the way in which the CJEU had interpreted the scope of application of the Directive.[118]

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

The ECtHR decided the case in the Grand Chamber 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, was to be considered a legal, legitimate and necessary interference with the applicants' right to freedom of expression and information. The ECtHR approved the approach of the Finnish authorities denying the applicants' claim to rely on the exception for journalistic activities within the law on protection of personal data.

The most relevant issue was whether the interference was necessary in a democratic society, sufficiently and pertinently motivated and proportionate in its dimension or impact. In this case, the ECtHR confirmed the approach taken by the national courts, which was based on the criteria laid down in ECtHR jurisprudence. Moreover, the court affirmed 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 continued by 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.*"[119] In this sense, the ECtHR implied that if a publication does 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.

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[118] 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."

[119] § 175.

Analysis

a. Role of the Charter

Although the Charter was not mentioned in the decisions, as it was not binding at the time of the proceedings, the Satamedia case is illustrative of the different approaches of the CJEU and the ECtHR regarding balancing between freedom of expression and the right to data protection. At the same time, it shows an attempt by 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 for 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 a need to present the preliminary reference 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 the case of processing of data for journalistic purposes.

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 no. 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 cases

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

France, Tribunal de Grand Instance Paris (ord. réf.), 24 November and 19 December 2014 - Marie-France M. cl Google France et Google Inc.

Netherlands, Rechtbank Amsterdam, 18 September 2014, ECLI:NL:RBAMS:2014:6118

Netherlands, Rechtbank Amsterdam, 11 March 2015, C/13/563401/HA ZA 14-413, ECLI:NL:RBAMS:2015:1958

Netherlands, Rechtbank Den Haag, 12 January 2017, ECLI:NL:RBDHA:2017:264

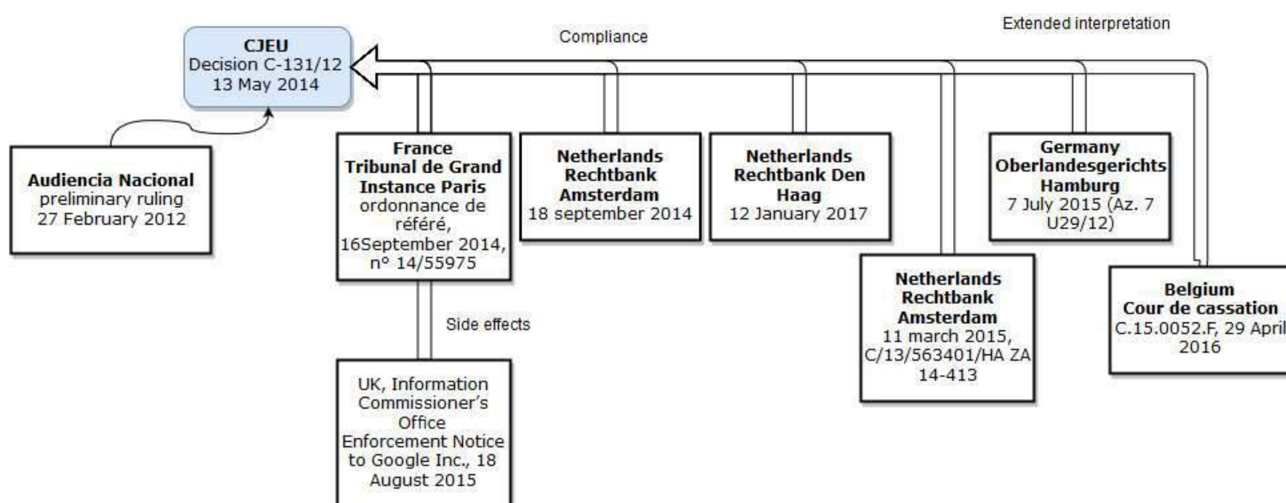
Germany, Urteil des Oberlandesgerichts Hamburg vom 7 July 2015 (Az. 7 U 29/12)

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

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

Core issues What is the balance between freedom of expression and data protection in the case of past press publications? Is there a different proportionality test in the case of search engines and news outlets? What are the available remedies in the case of violation of the right to data protection?

Graphical representation



At a glance

Country	Area	Reference to EU law	Legal and/or judicial body	Judicial Interaction Technique
• Spain	• freedom of expression • data protection	• Art. 11 CFR • dir. 95/46	• data protection authority • supreme court • first instance court • CJEU	• preliminary ruling • consistent interpretation

Case 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 for the links to the announcements to be removed. Google Spain forwarded the request to Google Inc., the registered office of which 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 for the newspaper to be required to remove the data and for Google Spain or Google Inc. to 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 orients 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 to the processing of data relating to him at any time on compelling legitimate grounds relating to his particular situation, 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 a request may be made directly to 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) and (f) of the directive, relating to data quality, the information and links in the list of results must be erased. It is not necessary for the information to be prejudicial to the data subject.

c. Outcome at the national level

The decision by 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 case law 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 with a delisting request by an individual who in 2006 was subject 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 the fact that the sanction was not indicated on the person's criminal record, decided that the request for delisting was legitimate and did not interfere with the public's right to information.

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

defamatory."[120] The court went on with a balancing exercise between the right to privacy of the plaintiff and the freedom of information of the search engine together with 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.

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

Application of the Google Spain decision to online archives

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

In a case dated 7 July 2015, the Hamburg Court of Appeal addressed the case of an individual seeking an injunctive relief against the publisher of a printed and online newspaper regarding a set of articles reporting on 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's personality rights perpetuated by the online availability of the information and its easy retrievability through search engines was serious, and at the same time the public interest in the case no longer existed. 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 a decision of the Court of Appeal of Liège which granted a request by an individual to anonymise an article in 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's availability after several years may cause disproportionate harm to the applicant vis-à-vis the newspaper's freedom of expression.

Publication of delisting requests

In the UK, the Information Commissioner's Office decided a case where an individual, who had successfully requested delisting to Google, requested a further delisting in relation to search results linking to articles published by a news outlet focused on successful and unsuccessful procedures run

[120] Note that the terminology is slightly different from the CJEU's, which spoke about "inadequate, irrelevant or no longer relevant, or excessive" information.

by Google in the application of the right to be forgotten where his name was included. Given that the request was refused by Google, the individual lodged a claim before the ICO.

The independent authority disregarded the claim by Google that the delisting itself was a story in the public interest and addressed the balance between the data subject's rights and public interest on the basis of the criteria identified in Art. 29 WG in the guidelines on the application of the *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 information regarding the applicant was not.

Analysis

a. The role of fundamental rights

The EU Charter was very relevant in the CJEU's decision. However, the court only addressed the articles dedicated to data protection and privacy, namely Articles 7 and 8. The Court did not refer on any occasion to freedom of expression or to Art. 10. Neither did it provide the necessary 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 contexts. In some cases, the courts did not limit themselves to literal application of the criteria to similar cases. Instead they extended the application of these criteria to different categories of defendants, such as news outlets.

Part III - Hypotheticals

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

It is important to highlight that the purpose of the hypotheticals is to give trainees a chance to critically analyse the provisions in their own legal systems regarding the fields covered in this handbook and verify their compliance with the standards of protection of fundamental rights guaranteed by the EU Charter. Thus, the scenarios presented in each of the hypotheticals do not have a 'correct' answer. Instead, they allow different answers and (hopefully) trigger new questions and doubts that shall improve the level of protection of fundamental rights at the national and the European levels.

The hypotheticals address:

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

Hypothetical no. 1 – The conflict between freedom of expression and data protection

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 included the article, allowing any internet user to find it through the newspaper's search engine.

Level I.A - Lawyers

Mr Angelis consulted a lawyer regarding the possible avenues to erase the reference to that period of his life available through free online searching. As the lawyer suggested, 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 that decided by the ECtHR in *times newspapers ltd v united kingdom (nos. 1 and 2)*? Note that in this case the ECtHR affirmed that internet archives made a substantial contribution to preserving and making available news and information. 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 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.*"

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 could hardly be considered public interest – if not followed by a 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 to be an impermissible interference with the freedom of expression of the publisher of the web page?
3. Which criteria would you use to evaluate the request by Mr Angelis?
    a. Which information would you request from the claimant in order to evaluate his position?
        i. Would you refer to the criteria identified in Art. 29 WP in the Guidelines to the implementation of the *Google Spain* decision?
4. How would you balance the two fundamental rights?
5. Which decision would you provide in order to ensure a proportionate remedy to the claimant?
    a. Update of news content
    b. Anonimysation of the news item (see the decision of the Belgian Court of Cassation, 2016 in Casesheet no. 14)
    c. Complete deletion of the news item
    d. Damages (see decision of the Romanian High Court of Cassation and Justice, 2014 in Casesheet no. 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 was the one linking to the news article, allowing any internet user to find it through the Google search engine.

Level II.a – Lawyers

Mr Angelis consulted a lawyer regarding the possible avenues to request the erasure of the Google link. As suggested by the lawyer, Mr Angelis presented a request for an injunction 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 the journalistic exemption ex Art. 85 GDPR?
    b. Would you address the issue of freedom of information of users (see the decision of The Hague district court, 2017 in Casesheet no. 14)?

Level II.b – Judges

Mr Angelis requested an injunction before the same court 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 the automatic link an impermissible interference with the freedom of expression of the search engine?
3. Would you consider the request to suppress the automatic link an impermissible interference with the freedom of information of users?
4. Which criteria would you use in order to evaluate the request by Mr Angelis?
5. Which decision would you provide in order ensure a proportionate remedy to the claimant?
    a. If 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]

The first instance court issued the injunction to delist the result limited to Mr Angelis's country of origin. Google complied with the injunction. However, it directly informed the webmasters of the newspaper about the delisting decision, and the general public through a line regarding the delisting request.

Mr Angelis presented a complaint against Google as both activities in practice nullified 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 Google's position?
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 make a preliminary reference to the CJEU regarding the lack of fair trial guarantees for users in the 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 the information regarding the delisting as an unlawful interference with webmasters' freedom of expression?
2. Would you consider the presentation of a preliminary reference to the CJEU regarding the lack of fair trial guarantees in the case of delisting?
3. Which criteria would you use to evaluate the request by Mr Angelis?
4. What decision would you provide in order ensure a proportionate remedy to the claimant?

Hypothetical no. 2 - The liability of ISPs in the case of illegal content and its effect on the freedom of expression principle

Level I

Facts:

John Doe is a journalist working for the online registered newspaper NewsToday.com. He published an uncut video documenting his investigative activity regarding a terrorism threat at the local level. The video was uploaded to the website of the online press.

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

Online users start to complain about the video and inform the authorities of 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 to evaluate the criminal liability of the journalist in this case?
2. What is the weight of the freedom of expression principle vis-à-vis public order in this case? Is a limitation to freedom of expression legitimate in the case of incitement to crime?
3. What is the impact of good faith or compliance with 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 in the local community. The article is a blog post on Smith's personal blog. The blog is regularly updated by the student (with an average of one blog post every other day). The content includes commentary on news content published in newspapers from several European countries and personal research and articles dedicated to security. The blog is written in English and is widely followed abroad.

The article includes a video recorded on Smith's personal phone where several people praise jihad and terrorist attacks that occurred abroad and foresee new ones against major buildings in the local city.

Online users start to comment on the blog post and complain about the video, and inform the authorities about 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 journalism in your country? What are the criteria to evaluate the qualification of bloggers as journalists?

2. Is the liability regime applicable to a blogger the same as for journalists?

3. What is the weight of the freedom of expression principle vis-à-vis public order in this case? Is a limitation to freedom of expression legitimate in the case of incitement to crime?

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

However, at the national level differences occur between the way in which the profession of journalism (and consequently its privileges and obligations) is interpreted, in particular regarding new media. The proportionality tests regarding the distinction between value judgements and factual statements, and the obligations of completeness and consistency of 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 the social platform]

After the publication of the video on the online press, several Facebook users upload the video to the social platform, making it go viral. After several notices regarding the unsuitability of the content provided by other users, the platform deletes 80% of the instances of the video. As soon as the local criminal court decides to try the journalist for criminal liability, imposing the seizure of the video with the justification of public order, the public prosecutor starts a connected investigation into Facebook for liability in disseminating illegal content online.

1. What are the relevant criteria that should be taken into account to evaluate the liability of the social platform in this case?
2. Is the social platform exempted from liability according to Art. 15 of the e-Commerce directive?
3. Are the criteria set by the ECtHR in *Delfi v Estonia* applicable so as to impose a monitoring obligation on 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 elaborates information (face and language recognition, geographical location, age, ethnic origin, etc.) so as to create a set of profiles that can be qualified according to different levels of critical risk. Under high risk, the AI includes profiles that disseminate terrorist 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 it will not be publicly available to his/her network contacts. The user is not aware of the fact that his/her content is not visible on his/her friends' newsfeeds and to those who live in the nearby area.

John Doe uses the social platform as a means of communication to disseminate his articles on security. Given the content of the articles linked to his posts, the AI system puts him in the high risk category and qualifies him as a potential terrorist. Therefore, he is subject to limitation of 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. What are the relevant criteria that should be taken into account 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 no. 3 – Limitation of 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 cost of Italy. Slightly after his arrival a local politician went to visit the camp to check the local conditions.

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

Level I

A few days after the publication, a politician from the opposite party gave a speech in front of the refugee camp to a group of supporters of his party. During the speech, the politician held up a copy of the article and showed the selfie of Mr Antar and the local politician.

The speech included statements like "*on a daily basis these immigrants are coming here to rob, rape and kill our citizens! We must stop this! We must throw them out of our country!*"

The public prosecutor then started a criminal proceeding against the politician for incitement to hatred.

1. Is the speech by 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 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 stricter interpretation of the freedom of expression guarantee?
    d. Can the speech be considered to present a concrete threat?
2. What jurisprudence would you refer to in order to support your argument/reasoning in the case?
3. How would you distinguish your case from that decided by the ECtHR in *Feret v Belgium*?

Level II

The selfie photo was subsequently re-posted by online users. Some cut and pasted Mr Antar's photo into 'wanted' posters, presenting him as a terrorist. These posters were then posted on social networks triggering subsequent threads of comments and threats against Mr Antar by users.

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 obliging it to actively search out and delete the hate speech content.

1. What are the relevant criteria that should be taken into account in order to 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 the 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, regarding claims for damages, is not aware of facts or circumstances from which illegal activity or information is apparent; or

(b) the provider, on 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, to require the service provider to terminate or prevent an infringement. Neither does it affect the possibility for Member States to establish 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, or a general obligation to actively seek facts or circumstances indicating illegal activity.

2. Member States may establish obligations for information society service providers to promptly 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.