Noot bij EHRM 7 december 2021, Standard Verlagsgesellschaft vs Oostenrijk (no. 3)

Hins, A.W.

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Bevel om gegevens van gebruikers van online forum af te geven in strijd met art. 10 EVRM

Europees Hof voor de Rechten van de Mens
7 december 2021, 39378/15,
ECLI:CE:ECHR:2021:1207JUD003937815
(Grozev, Eicke, Vehabović, Motoc, Harutyunyan, Kucsko-Stadlmayer, Vilanova)
Noot A.W. Hins

Persvrijheid. Der Standard. Hosting provider. Anonimiteit.

[EVRM art. 10]

Der Standard is een dagblad dat door verzoekster ook online wordt uitgegeven. Onderaan gepubliceerde online artikelen kunnen geregistreerde gebruikers reacties plaatsen. In deze zaak oordeelt het EHRM over de vraag of de Oostenrijkse rechter verzoekster mocht bevelen de gegevens van twee gebruikers af te geven, nadat deze gebruikers grievende reacties hadden geplaatst.
Verzoekster vindt dat een bevel om de gegevens bekend te maken in strijd is met art. 10 EVRM. De regering stelt dat verzoekster zich niet op haar persvrijheid kan beroepen, omdat zij hier handelde als 'hosting provider' van het forum en niet in haar rol als uitgever.
Het Hof beklemtoont om te beginnen dat verzoekster zich niet kan beroepen op het recht van journalisten om bronnen niet bekend te maken. De opmerkingen die door lezers op het forum zijn geplaatst, waren gericht aan het publiek en niet aan een journalist. De commentatoren kunnen daarom niet worden beschouwd als een 'bron' voor een journalist.
Vervolgens oordeelt het Hof dat verzoekster wordt beschermd door de persvrijheid. Of er sprake kan zijn van inmenging in art. 10 EVRM, hangt niet af van de juridische kwalificatie van een dienstverrichter als 'hosting provider' door de nationale rechter, zoals de regering stelt. Het is afhankelijk van alle omstandigheden van het geval. In dit geval was de rol van 'hosting provider' één van de verschillende rollen die verzoekster als mediabedrijf aannam. De redactie had daarbij een actieve rol in het modereren van de reacties. Het Hof oordeelt dat de algemene functie van verzoekster erin bestaat een open discussie te bevorderen en ideeën te verspreiden over onderwerpen van algemeen belang, en dat zij wordt beschermd door de persvrijheid.
Verzoekster kent haar gebruikers anonimiteit toe ter bescherming van haar persvrijheid en ter bescherming van de persoonlijke levenssfeer en de vrijheid van meningsuiting van de gebruiker. De bevelen van de nationale rechters vormen daarom een inmenging in het recht van persvrijheid.
Het Hof oordeelt voorts dat de inbreuk niet noodzakelijk is in een democratische samenleving, omdat de appelrechters hebben nagelaten een goede belangenafweging te maken. De reacties in kwestie betreffen politici en een politieke partij en behoorden tot de context van het publieke debat. Weliswaar zijn de reacties grievend, ze betreffen wel politieke uitlatingen die niet als duidelijk onrechtmatig konden worden beschouwd. De nationale rechterlijke instanties hadden in hun beoordeling een afweging moeten maken van de belangen van de auteurs van de specifieke commentaren, respectievelijk van verzoekster ter bescherming van die auteurs enerzijds, en de belangen van de betrokken eisers anderzijds. Door geen belangenafweging te maken gaat de nationale rechter voorbij aan de functie van anonimiteit als middel om represailles of ongewenste aandacht te vermijden en dus aan de rol van anonimiteit bij het bevorderen van het vrije verkeer van meningen, ideeën en informatie, in het bijzonder wanneer het gaat om politieke uitingen die geen haatzaaiende uitlatingen zijn of anderszins duidelijk onwettig zijn.

Standard Verlagsgesellschaft mbH
tegen
Oostenrijk (no. 3).

THE LAW

I. Alleged violation of Article 10 of the Convention
49. The applicant company complained that being ordered to disclose the data of users who had posted comments on its Internet news portal had infringed its freedom of expression, as provided by Article 10 of the Convention, which reads as follows:

"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."

A. Admissibility

50. The Government argued that the application should be rejected for being manifestly ill-founded, pursuant to Article 35 § 3 (a) and § 4 of the Convention.
51. The applicant company submitted that the application was admissible.
52. The Court considers, in the light of the parties' submissions, that the complaint raises serious issues of fact and law under the Convention, the determination of which requires an examination on the merits. The Court therefore concludes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 of the Convention and that the Government's objection must be dismissed. It also notes that the application is not inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The applicant company

53. The applicant company argued that the user data in question constituted journalistic sources. They were thus protected by editorial confidentiality in the same way as were data of authors of readers' letters published in a newspaper. It furthermore complained about the domestic courts characterising the user comments as possibly defamatory under Article 1330 of the Civil Code (see paragraph 34 above), arguing that, on the contrary, they in fact constituted permissible value judgments.
54. Authors of postings in online discussion forums, just as authors of readers' letters, had to be able to rely on their protection by media owners, as ensured by editorial confidentiality. Otherwise, they could be deterred from assisting the press in informing the public about matters of general interest. At the very least, users would adjust their behaviour by limiting their exercise of the right to open discussion in a way that would be at odds with the kind of free culture of discussion protected by Article 10. The applicant company's media operations had earned an excellent reputation for offering critical and reflective media coverage. That reputation would without a doubt be negatively affected by an absence of statements on its platform caused by a "chilling effect".
55. Owing to the difficult legal situation, operators of online discussion forums might limit or even shut down those forums for good. Thus, not only the author of the comment, but also the applicant company and the public had a legitimate interest in protecting the identity of people who posted such comments.
56. The domestic courts had forced the applicant company into the "corset" of a host provider with regard to user comments, without taking into consideration its obligation as a media company to exercise due diligence when disclosing sensitive data. The Supreme Court's view notwithstanding, the forum operated by the applicant company had been developed through significant investment and deployment of personnel, and had to be considered as one where some kind of action or review would be undertaken by specially trained employees (see paragraph 25 above), and where the right to editorial confidentiality was therefore legitimate.
57. Lastly, the Supreme Court had not considered the particular circumstances of users' comments, such as whether the person affected by the posting in question was a public figure or whether a comment had been posted in the course of a political discussion. It had not carried out an appropriate balancing test as required by the Court's case-law.

(b) The Government

58. The Government stated that in the absence of a sufficient connection between the publication of the comments and the applicant company's journalistic activities, the applicant company could not in the present case invoke its right to editorial confidentiality. The fact that a host provider filtered comments through a software program on the basis of keywords and subsequently manually reviewed those comments did not mean that the host provider's activities were journalistic in nature, and nor did the fact that a review was conducted after the publication of such comments. The applicant company's role as a host provider offering a discussion forum on its website differed from its role as a publisher of articles. As a publisher, the applicant company had to take full responsibility for its articles. As a host provider, on the other hand, it enjoyed the exemption from liability enshrined in section 16 of the E-Commerce Act (see paragraph 36 above). To counterbalance that privilege, the applicant company, as a host provider, had a duty to disclose certain data to persons who made credible an overriding legal interest. The aim of that duty was to enable persons whose rights had been violated (as a result of unlawful activity or information originating from a user unknown to them) to prosecute the offender. The applicant company could not at the same time invoke both the exemption of liability granted to host providers and the safeguards afforded to publishers with regard to their sources.

59. Moreover, the Supreme Court's decision had not restricted the applicant company's right to receive and impart information. The Supreme Court had not required the applicant company to delete the comments nor to pay compensation, and nor had it taken a final decision on the lawfulness of those comments.

60. Even assuming that there had been an interference with the applicant company's rights under Article 10, that interference had been provided for by law and had been proportionate. The legal framework applied by the Supreme Court had struck a fair balance between opposing points of view and interests in respect of the question of fundamental rights and had fallen within the wide margin of appreciation afforded by the Court in this field. As a positive obligation under Article 8 of the Convention, the State had to provide instruments enabling an individual to effectively combat defamation and personal violations by other private persons.

61. Experience had shown that users' anonymity on the Internet was often abused to defame individuals or to disseminate hatred. Such behaviour did not contribute to a meaningful public debate. It was rather a hindrance to it. Users' anonymity contributed considerably to an "online disinhibition effect" which could deter other users who valued respectful communication. It had to be ensured that the legitimate interest in anonymity did not eventually reduce the pluralism of opinions and thus restrict freedom of expression.

2. The third-party intervener

62. The Media Legal Defence Initiative (a non-governmental organisation based in the United Kingdom that provides legal support to journalists, bloggers and independent media) submitted that anonymity was of crucial importance to the right to freedom of expression online as people's willingness to engage in debate on controversial subjects in the public sphere had always been linked to the possibility of doing so anonymously. The disclosure of journalistic sources and surveillance could have negative consequences for the right to freedom of expression, given a breach of the right to confidentiality of an individual in respect of his or her communications. The same applied to cases concerning the disclosure of anonymous user data.

3. The Court's assessment

(a) Existence of an interference

63. The Government disputed that the applicant company's right to enjoy freedom of the press, as guaranteed under Article 10 of the Convention, had been interfered with by the domestic courts' decisions (see paragraphs 58–59 above). The Court will first examine whether there was in fact such an interference – either in the light of the need to protect journalistic sources or on other grounds.

(i) General principles

64. The fundamental principles concerning freedom of expression and the protection of journalistic sources are well-established in the Court's case-law (see *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, §§ 50 and 51, 14 september 2010; and *Goodwin v. the United Kingdom*,

27 March 1996, § 39, *Reports of Judgments and Decisions* 1996-II).
65. Regarding journalistic sources, the Court's understanding of the concept of a journalistic "source" is "any person who provides information to a journalist"; it understands the term "information identifying a source" to include, in so far as they are likely to lead to the identification of a source, both "the factual circumstances of acquiring information from a source by a journalist" and "the unpublished content of the information provided by a source to a journalist" (see *Telegraaf Media Nederland Landelijke Media B.V. and Others v. the Netherlands*, no. 39315/06, § 86, 22 november 2012, and the cases cited therein).
66. In the case of *Schweizerische Radio- und Fernsehgesellschaft and Others v. Switzerland* ((dec.) no. 68995/13, § 71, 12 november 2019) the Court has provided an overview of its case-law regarding situations that are considered to constitute an interference with the right to freedom of expression under Article 10 of the Convention. Among other factors, a conviction or an order to pay damages in a situation that can have a limiting impact on the enjoyment of freedom of expression is seen to constitute an interference (ibid.). In *Nordisk Film & TV A/S v. Denmark* ((dec.), no. 40485/02, ECHR 2005-XIII) the Court held that the decision of the Danish Supreme Court to compel the applicant company to hand over unedited footage which could not be regarded as sources of journalistic information nevertheless constituted an interference within the meaning of Article 10 § 1 of the Convention. It found however that the degree of protection under Article 10 to be applied in that situation could not reach the same level as that afforded to journalists when it came to their right to keep their sources confidential.
67. The Court has previously ruled on cases concerning the liability of providers of online debate forums on which users had posted comments. In none of those cases was the interference with the rights of the provider under Article 10 called into question (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 118, ECHR 2015; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, § 45, 2 February 2016). In *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* (§ 61), the Court explicitly stated that the second applicant in that case, as a large news portal, provided a forum for the exercise of freedom of expression, thus enabling the public to impart information and ideas. Accordingly, the Court concluded that the second applicant's conduct had to be assessed in the light of the principles applicable to the press.

(ii) Application of the above principles to the present case
68. The Court notes at the outset that the instant case does not concern the liability as such of the applicant company but its duty as a host provider to disclose user data in certain circumstances, under section 18 of the E-Commerce Act (see paragraph 37 above), despite its role as an editor of journalistic work. In this role, it runs a news portal which carries discussion forums and allows users to post comments relating to articles published by the applicant company (see paragraph 5 above). It thus uses these forums to participate in the dissemination of ideas with regard to topics of public interest (see paragraphs 73 and 78 below). The comments at issue in the instant case referred to two articles published by the applicant company (see paragraphs 13 and 18 above).
69. In this regard, during the domestic proceedings the applicant company relied on the argument that the authors of the comments in question constituted journalistic sources and that their identities were therefore protected. The domestic courts, on the other hand, concluded that owing to the fact that no kind of journalistic activity was involved, the applicant company could not invoke editorial confidentiality with respect to the user comments. In the Government's view, the applicant company could not at the same time invoke both the exemption of liability granted to host providers and the safeguards afforded to publishers with regard to their sources (see paragraph 58 above). According to the Government, there had in any event been no interference with the right to receive and impart information, as the applicant company had not been held liable, and nor had it been obliged to delete any content (see paragraph 59 above).
70. The Court's understanding of a journalistic "source" (see paragraph 65 above) is in line with the Recommendation on the right of journalists not to disclose their sources of information (which was adopted by the Committee of Ministers of the Council of Europe) and the definitions given in the Appendix thereto (cited in *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no.

38224/03, § 44, 14 september 2010). According to the definitions set out in this Appendix, the term "information" means any statement of fact, opinion or idea in the form of text, sound and/or picture (ibid.).

71. In the instant case, the Court concludes that the comments posted on the forum by readers of the news portal, while constituting opinions and therefore information in the sense of the Recommendation, were clearly addressed to the public rather than to a journalist. This is sufficient for the Court to conclude that the comments' authors could not be considered a source to a journalist. The Court therefore agrees with the Government that the applicant company could not rely on editorial confidentiality in the instant case. However, an interference with Article 10 may also occur in ways other than by ordering the disclosure of a journalistic source (see paragraph 66 above).

72. In the cases of *Delfi AS* and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* it was undisputed that the liability of providers of online debate forums interfered with their rights under Article 10 (see paragraph 67 above). In *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt* (§ 25), the Hungarian Constitutional Court had applied the principles of freedom of the press to the applicants. The Court shared this view (see paragraph 67 above). The Court does not overlook the fact that in the case of *Delfi AS* it accepted the domestic courts' classification of the applicant as a publisher (ibid., § 128), whereas in the instant case the domestic courts considered, in respect of the comments at issue, the applicant company to be a host provider (see paragraphs 24 and 30 above). However, whether there may be an interference with Article 10 cannot depend on the legal categorisation of a provider by the domestic courts. Rather, the Court finds that it must take into account the circumstances of the case as a whole.

73. While the Court accepts that the applicant company acted as a host provider with regard to the publication of the comments at issue, this was only one of its roles as a media company. It publishes a daily newspaper (and an online version thereof) and maintains a news portal on which it initiates conversations regarding its articles by inviting users to post comments (see paragraph 5 above). It does not only provide a forum for users but takes an active role in guiding them to write comments, describing those comments as an essential and valuable part of the news portal (see paragraph 7 above). User-generated content on the applicant company's portal is at least partly moderated (see paragraphs 8-12 above). The Court finds that these activities are closely interlinked. This is supported by the fact that there is no separate editorial office for the portal, which is described as a platform for dialogue as a whole – including both articles and discussions on those articles (see paragraphs 5 and 7 above). It is thus apparent that the applicant company's overall function is to further open discussion and to disseminate ideas with regard to topics of public interest, as protected by freedom of the press (see paragraph 68 above).

74. In the light of the Declaration on freedom of communication on the Internet adopted by the Committee of Ministers of the Council of Europe (see *Delfi AS*, cited above, § 44), which emphasises the principle of anonymity for Internet users in order to enhance the free expression of opinions, information and ideas (see also the UN Special Rapporteur's report cited above in paragraph 46), the Court has no doubt that an obligation to disclose the data of authors of online comments could deter them from contributing to debate and therefore lead to a chilling effect among users posting in forums in general. This affects, indirectly, also the applicant company's right as a media company to freedom of press. It invites users to comment on its articles in order to further discussion on its journalistic work (see paragraphs 5 and 65 above). To achieve this goal, it allows authors of comments to use usernames (see paragraph 7 above); upon registration, users are informed that their data will not be seen publicly and will only be disclosed if required by law (see paragraphs 6 and 7 above). The forums' rules dictate that certain content is not accepted, and that comments are screened by a keyword system, may be subject to a manual review and will be deleted if they are not in line with the rules (see paragraphs 7-12 above).

75. The Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of such information once disclosed, which may considerably aggravate the effects of unlawful speech compared to traditional media (see *Delfi*, cited above, § 147). It therefore agrees with the Government (see paragraph 61 above) that the Conven-

tion does not provide for an absolute right to anonymity on the Internet.
76. At the same time, the Court is mindful of the interest of Internet users in not disclosing their identity. Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of opinions, ideas and information in an important manner, including, notably, on the Internet (see *Delfi*, cited above, § 147). Thus, it can indirectly also serve the interests of a media company (see paragraph 74 above).
77. The Court observes that different degrees of anonymity are possible on the Internet. An Internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of verification. A service provider may also allow an extensive degree of anonymity for its users, in which case users are not required to identify themselves at all and they may only be traceable – to a limited extent – through the information retained by Internet access providers. The release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to restrictive conditions. It may nevertheless be required in some cases in order to identify and prosecute perpetrators (see *Delfi*, cited above, § 148).
78. In the instant case, the applicant company, as a media company, awards its users a certain degree of anonymity not only in order to protect its freedom of the press but also to protect users' private sphere and freedom of expression – rights all protected by Articles 8 and 10 of the Convention (see paragraphs 68 and 73 above). The Court observes that this anonymity would not be effective if the applicant company could not defend it by its own means. It would be difficult for users to defend their anonymity themselves should their identities have been disclosed to the civil courts.
79. The Government's argument that no final decision on the lawfulness of the comments has been taken (see paragraph 59 *in fine* above) does not change the evaluation, as the interference lies in the lifting of anonymity and the effects thereof, irrespective of the outcome of any subsequent proceedings. Such an interference with the media company's rights will weigh less heavily than the interference in a case in which the media company is held liable for the content of a particular comment by being fined or obliged to delete it. The weight of a given interference is however a matter to be examined in a proportionality test when balancing the interests at stake (see paragraphs 92-95 below).
80. The Court therefore finds that the domestic courts' orders in the two sets of proceedings to disclose the requested user data constituted an interference with the applicant company's right to enjoy freedom of the press under Article 10 § 1 of the Convention. Such interference will be incompatible with Article 10 § 2 of the Convention unless it is "prescribed by law", pursues one or more legitimate aims and is "necessary in a democratic society" in order to achieve the aim concerned.

(b) Lawfulness and legitimate aim
81. It was not disputed between the parties that the interference was prescribed by law (namely, by section 18(4) of the E-Commerce Act – see paragraph 37 above), nor that it served a legitimate aim (namely, the protection of the reputation and rights of others).

(c) Necessary in a democratic society
82. It remains to be determined whether the impugned interference was "necessary in a democratic society".

(i) General principles
83. Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to information or ideas that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, for example, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 88, ECHR 2015 (extracts) and the cases cited therein).
84. The relevant principles concerning the balancing of interests when examining an interference with freedom of expression have been summa-

rised as follows (see *Delfi AS*, cited above, §§ 138 and 139):
"138. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the "protection of the reputation or rights of others", the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other he right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; and *Axel Springer AG* [*v. Germany* [GC], no. 39954/08,] § 84[, 7 February 2012]).
139. The Court has found that, as a matter of principle, the rights guaranteed under Articles 8 and 10 deserve equal respect, and the outcome of an application should not vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher of an offending article or under Article 8 of the Convention by the person who has been the subject of that article. Accordingly, the margin of appreciation should in principle be the same in both cases (see *Axel Springer AG*, cited above, § 87, and *Von Hannover v. Germany*(no. 2) [GC], nos. 40660/08 and 60641/08, § 106, ECHR 2012, with further references to *Hachette Filipacchi Associés (*ICI PARIS*)*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011). Where the balancing exercise between those two rights has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Axel Springer AG*, cited above, § 88, and *Von Hannover* (no. 2), cited above, § 107, with further references to *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, ECHR 2011). In other words, there will usually be a wide margin afforded by the Court if the State is required to strike a balance between competing private interests or competing Convention rights (see *Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I; *Chassagnou and Others v. France* [GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III; and *Ashby Donald and Others v. France*, no. 36769/08, § 40, 10 January 2013)."
85. The Court has identified a number of relevant criteria that must guide its assessment when balancing Article 8 and Article 10, of which particularly pertinent to the present case are: whether a contribution is made to a debate of public interest; the subject of the report in question; the prior conduct of the person concerned and how well he or she is known; the content, form and consequences of the publication in question; and the gravity of the penalty imposed on the journalists or publishers (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 109 to 113, ECHR 2012; and *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 90 to 95, 7 February 2012).
86. In this regard, the Court reiterates, that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see, for example, *Ceylan v. Turkey* [GC], no. 23556/94, § 34, ECHR 1999-IV; *Wingrove v. the United Kingdom*, 25 november 1996, § 58, *Reports of Judgments and Decisions* 1996-V; and, more recently, *Couderc and Hachette Filipacchi Associés*, cited above, § 96).
87. As to the limits of acceptable criticism, the Court has repeatedly held that freedom of the press affords the public one of the best means of discovering and forming an opinion on the ideas and attitudes of political leaders. The limits of acceptable criticism are accordingly wider in respect of a politician than in respect of a private individual. Unlike the latter, the former inevitably and knowingly lays himself open to close scrutiny of his every word and deed by both journalists and the public at large, and he must consequently display a greater degree of tolerance, especially when he himself makes public statements that are susceptible of criticism (see, for example, *Oberschlick v. Austria (no. 1)*, 23 May 1991, §§ 58-59, Series A no. 204; *Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103; and, more recently, *Couderc and Hachette Filipacchi Associés*, cited above, § 121).
88. Moreover, the Court has clearly stated that speech that is incompatible with the values proclaimed and guaranteed by the Convention is not protected by Article 10, by virtue of Article 17 of

the Convention. The examples of such speech examined by the Court have included statements denying the Holocaust, justifying a pro-Nazi policy, linking all Muslims with a grave act of terrorism, or portraying the Jews as the source of evil in Russia (see *Delfi AS*, cited above, § 136 and the cases cited therein).

(ii) Application of those principles to the present case

89. The instant case concerns the applicant company's duty as a host provider to disclose personal data of its users, not its own civil (or criminal) liability for the users' comments (see paragraph 68 above; compare and contrast *Delfi*, cited above, § 128). Moreover, the comments made about the plaintiffs (see paragraphs 14, 15 and 19 above) although offensive and lacking in respect, did not amount to hate speech or incitement to violence (see the case-law quoted in paragraph 88 above), nor were they otherwise clearly unlawful (compare and contrast *Delfi*, cited above, § 128).

90. The comments in question concerned two politicians and a political party, respectively, and were expressed in the context of a public debate on issues of legitimate public interest, namely the conduct of those politicians acting in their public capacities and their own comments published on the same news portal (see paragraphs 13 and 18 above).

91. Although anonymity on the Internet is an important value (see paragraphs 76-78 above), the Court is aware that it must yield on occasion to other legitimate imperatives, such as the prevention of disorder or crime or the protection of the rights and freedoms of others (see *K.U. v. Finland*, no. 2872/02, § 49, ECHR 2008).

92. The importance of a sufficient balancing of interests arises from this awareness, in particular if political speech and debates of public interest are concerned. This issue is not only reflected in the Court's longstanding case-law (see paragraphs 86-87 above), but also in the above mentioned international-law material concerning Internet intermediaries: the relevant documents of the Council of Europe and the United Nations Human Rights Council state that requests for the disclosure of user data must be necessary and proportionate to the legitimate aim pursued (see paragraphs 45-48 above). As the Government has pointed out (see paragraph 60 above), a potential victim of a defamatory statement must be awarded effective access to a court in order to assert his or her claims before that court. In the Court's view this means that the domestic courts will have to examine the alleged claim and weigh – in accordance with their positive obligations under Articles 8 and 10 of the Convention – the conflicting interests at stake, before deciding whether the data relating to the author's identity are to be disclosed. In the instant case, those conflicting interests do not only comprise the plaintiffs' right to protect their reputation and the applicant company's right to freedom of press, but also its role in protecting the personal data of the comment's authors and the freedom to express their opinions publicly (see paragraph 78 above).

93. The Court agrees with the appeal courts that the comments in questions could be understood as seriously offensive. However, while the first-instance courts in both sets of proceedings did conduct a balancing test (see paragraphs 24 and 30 above), the appeal courts and the Supreme Court did not give any reasons why the plaintiffs' interests in the disclosure of the data were "overriding" the applicant company's interests in protecting their authors' anonymity. This is of particular concern in a case like the present one where the comments could be characterised as political speech that could not be considered as being clearly illegal. Referring to the Supreme Court's case-law they only argued that the balancing of interests was not a matter to be examined in proceedings against the relevant service provider, but rather should be carried out during proceedings against the author of the allegedly defamatory comments. According to the appeal courts and the Supreme Court, it was sufficient that "a layperson was capable of perceiving that a finding of liability under Article 1330 of the Civil Code could not be ruled out". If that was the case, the person concerned would have an overriding interest in the disclosure of the user data (see paragraphs 25-26, 27, 31-32 and 39 above). They thus concluded directly from the refusal of editorial confidentiality, the comments' offensive nature and the requirement that a finding of liability could not be ruled out to the applicant company's duty to disclose the data.

94. The Court finds that the Supreme Court's case-law does not preclude a balancing of interests. In fact, this case-law would have provided for a certain balancing between the opposing interests in respect of fundamental rights when requi-

ring an assessment whether a finding of liability under Article 1330 of the Civil Code could not be ruled out. This applied all the more to the instant case, as it was obvious that the comments at issue were part of a political debate. However, the appeal courts and the Supreme Courts did not base their assessment on any balancing between the interests of the authors of the particular comments and of the applicant company to protect those authors, respectively, on the one side, and the interests of the plaintiffs concerned on the other side.

95. As stated above (see paragraphs 68 and 89), the Court does not overlook that the instant case did not concern the applicant company's liability for the comments (by contrast, see *Delfi AS*, cited above, § 142; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, cited above, § 71). In this regard, the Court accepts that for a balancing exercise in proceedings concerning the disclosure of user data, a prima facie examination may suffice (see paragraph 66 above). In fact, section 18(4) of the E-Commerce Act (see paragraph 37 above) allows for the establishment of prima facie evidence. This was not disputed by the Government (see paragraph 58 above). Furthermore, the courts enjoy a certain margin of appreciation, even if it is narrow when political speech is concerned (see paragraph 86 above). However, even a prima facie examination requires some reasoning and balancing. In the instant case, the lack of any balancing between the opposing interests (see paragraph 94 above) overlooks the function of anonymity as a means of avoiding reprisals or unwanted attention and thus the role of anonymity in promoting the free flow of opinions, ideas and information, in particular if political speech is concerned which is not hate speech or otherwise clearly unlawful. In view of the fact that no visible weight was given to these aspects, the Court cannot agree with the Government's submission that the Supreme Court struck a fair balance between opposing interests in respect of the question of fundamental rights (see paragraph 60 above).

96. The Court finds that in the absence of any balancing of those interests the decisions of the appeal courts and of the Supreme Court were not supported by relevant and sufficient reasons to justify the interference. It follows that the interference was not in fact "necessary in a democratic society", within the meaning of Article 10 § 2 of the Convention.

97. There has accordingly been a violation of Article 10 of the Convention.

II. Application of Article 41 of the Convention

98. Article 41 of the Convention provides:

"If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

A. Damage

99. The applicant company claimed a total amount of 17,882.38 euros (EUR) in respect of pecuniary damage. This sum is composed of EUR 12,254.80 for the costs of legal representation (including VAT) and court fees, which it had to pay to K.S. and FPK in the first set of proceedings, and EUR 5,627.58 for the costs of legal representation (including VAT) and court fees, which it had to pay to H.K. in the second set of proceedings.

100. The Government did not contest this claim.

101. The applicant company also claimed EUR 6,000 in respect of non-pecuniary damage.

102. The Government contested this claim, arguing that the applicant company had failed to set out the basis of its calculation and that the finding of a violation of a Convention right often constituted in itself sufficient reparation.

103. The Court reiterates that it cannot speculate what the outcome of the proceedings would be if they were in conformity with the requirements of Article 6 § 1 of the Convention (see *Osinger v. Austria*, no. 54645/00, § 57, 24 March 2005 and the references cited therein). The same applies in the instant case in which a procedural violation of Article 10 is found (see paragraph 96 above). Accordingly, the Court dismisses the applicant company's claim for pecuniary damage. As regards the claim for non-pecuniary damage, the Court finds that given the circumstances of the present case the finding of a violation constitutes in itself sufficient just satisfaction for any non-pecuniary damage the applicant company may have sustained (see, for example and *mutatis mutandis*, *Vereinigung Bildender Künstler v. Austria*, no. 68354/01, § 44, 25 January 2007).

B. Costs and expenses
104. The applicant company claimed EUR 22,780.96 for the costs and expenses incurred before the domestic courts and EUR 4,894 for those incurred before the Court. These sums include VAT.
105. The Government considered these claims excessive and disputed the assertion that the procedural steps taken by the applicant company had been effective. The applicant company could not claim more than it would have been awarded had it been successful in the domestic proceedings. As regards the costs of the proceedings before the Court the Government argued that the applicant company had been able to rely in part on the written submissions presented in the domestic proceedings when preparing the submissions to the Court.
106. According to the Court's case-law an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these were actually and necessarily incurred and are reasonable as to quantum (see *Associated Society of Locomotive Engineers and Firemen (ASLEF) v. the United Kingdom*, no. 11002/05, § 58, 27 February 2007, and the cases cited therein). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 15,000 for costs and expenses incurred in the domestic proceedings and EUR 2,000 for the proceedings before the Court, plus any tax that may be chargeable to the applicant company.

C. Default interest
107. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

For these reasons, the Court
1. *Declares*, by a majority, the application admissible;
2. *Holds*, unanimously, that there has been a violation of Article 10 of the Convention;
3. *Holds*, unanimously, that the finding of a violation constitutes in itself sufficient just satisfaction for the non-pecuniary damage sustained by the applicant company;
4. *Holds*, unanimously,
(a) that the respondent State is to pay the applicant company, within three months from the date on which the judgment becomes final, in accordance with Article 44 § 2 of the Convention, EUR 17,000 (seventeen thousand euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period, plus three percentage points;
5. *Dismisses*, unanimously, the remainder of the applicant company's claim for just satisfaction.

Partly dissenting opinion of Judge Eicke

I. Introduction
1. To my regret, I find myself unable to agree with my colleagues that the Applicant Newspaper's Article 10 rights were engaged in this case and I therefore voted against the admissibility of this application *ratione materiae* (Operative Part, paragraph 1). In fact, on the evidence (or better absence of any relevant evidence) before us, the application of Article 10 to this Applicant seems to me to constitute an unnecessary and unwarranted further extension of the scope of Article 10.
2. That said, once the majority decided that the complaint under Article 10 was admissible (and therefore fell to be balanced) I agreed with my colleagues that, on the merits, there had been a failure to balance the competing interests before the domestic courts.

II. The wider context
3. In cases like the present, the Court is, of course, confronted with three groups of actors whose respective rights and interests fall to be considered.
(a) the *first* such group consists of the authors of the relevant user comments. Their user comments plainly attract the protection of Article 10 and the disclosure of their identity and any (consequent) legal action against them is likely to interfere with their right to freedom of expression as does, arguably, the prompt deletion of their comments by the Applicant. However, they are not the applicants before this Court (nor were they parties – directly or indirectly – in the domestic proceedings);

(b) the *second* such group consists of the alleged victims of the content of the user comments, in this case K.S., the FPK and H.K., who were seeking to exercise their right of access to court under Article 6 in order to protect the right to their reputation under Article 8. In order to be able to do so and bring civil proceedings for defamation against the anonymised authors of the respective user posts they sought the assistance of the courts under the E-Commerce Act to order disclosure of their identity and sufficient identifying user data to enable them to initiate such proceedings; and
(c) finally, the *third* actor is the service provider who in this case happens to be a newspaper but who, on the evidence before the domestic courts, had not established any manual review of the users' comments by the Applicant's employees before publication or any other connection between the applicant's journalistic activities and the user comments.
4. The necessary balance between these multiple competing rights and interests in the context of the provision of information society services on the internet requires careful calibration; something which has, at least at the EU level, been sought to be achieved – with express reference to Article 10 of the Convention – by Directive 2000/31/EC *on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market* ("the E-Commerce Directive").
It is also the transposition of this Directive into Austrian law, in the form of the E-Commerce Act (*Bundesgesetz, mit dem bestimmte rechtliche Aspekte des elektronischen Geschäfts- und Rechtsverkehrs geregelt werden (E-Commerce-Gesetz – ECG)*), which provided the cause of action for the application of the alleged victims against the Applicant.
5. Section 16(1) of the ECG, transposing almost verbatim Article 14 of the E-Commerce Directive, exempts a host or "service provider" from liability for the content of the information stored under two conditions, namely: (a) the service provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or (b) the service provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.
6. The resulting limitation on the users' right of access to court (Article 6) and a victim's ability to protect their right to their reputation (Article 8) is compensated under Article 18(4) of the ECG (utilising the enabling power in Article 15(4) of the E-Commerce Directive) by imposing on service providers who are exempt from liability under Article 16 a duty to
"... transmit the name and address of a user of their service, with whom they have concluded agreements concerning the storage of information, to third parties at the request [of those third parties] if they demonstrate (*glaubhaft machen*) an overriding legal interest in determining the identity of [that] user and in [establishing the existence of] a particular illegal situation, and furthermore demonstrate that knowledge of such information constitutes an essential prerequisite for the pursuit of legal remedies (*Rechtsverfolgung*)."
7. There are three things worth noting about the legislative scheme under the ECG/E-Commerce Directive:
(a) for the exemption from liability to apply and for the qualified duty of disclosure to apply, it requires the courts to be satisfied that the service provider has not played an active role allowing it to have knowledge or control of the message posted or data stored (see CJEU in Joined cases C-236/08 to C-238/08 *Google France SARL and Google Inc. v Louis Vuitton Malletier SA et al* [2010] ECR I-02417, ECLI:EU:C:2010:159, § 120; Case C-324/09 *L'Oréal SA and Others v eBay International AG and Others* [2011] ECR I-06011, ECLI:EU:C:2011:474, § 123 and Joined Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc.v Cyando AG* ECLI:EU:C:2021:503, § 117), such as by providing assistance to the user which entails, in particular, optimising the presentation or promoting the post (see *mutatis mutandis* the CJEU in *L'Oréal SA and Others* at § 123);
(b) it requires there to be a service agreement between the provider and the user; and
(c) it requires the alleged victim to demonstrate (i) an overriding legal interest (according to the domestic jurisprudence the required standard is that of not being able to rule out the possibility of a finding of liability) and (ii) that knowledge of

this information is an essential (*wesentlich*) pre-requisite for the pursuit of legal remedies.
8. In resisting the proceedings for disclosure of the users' identity under the ECG before the domestic courts (as well as before this Court – see paragraph 53), the Applicant relied on their right to editorial secrecy/ protection of journalistic sources (*Redaktionsgeheimnis*) as protected in domestic law by section 31(1) of the Media Act (see paragraph 35), a provision which seeks to give effect in domestic law the requirements of Article 10 of the Convention (see *inter alia* the Austrian Supreme Court's discussion in decisions 13 Os 130/10g and 6 Ob 133/13x).
9. In the inter-play between these two provisions the Austrian Supreme Court's consistent case-law has been that:
"... information obtained by one of the persons referred to in section 31(1) of the Media Act [i.e. Media owners, editors, copy editors and employees of a media company or media service] without it having been deliberately made available to that person by someone by reference to his or her activity does not qualify as a communication protected by editorial secrecy."
(see 13 Os 130/10g cited as authority in 6 Ob 133/13x which, in turn, is cited as authority in the judgment of 15 december 2014 in the present case (6 Ob 188/14m)).
10. In reaching this conclusion, it is clear from the Austrian Supreme Court's judgments that it has had full regard to the particular importance of the press in the context of the right to freedom of expression under Article 10 as well as to the fact that the protection of journalistic sources is one of the cornerstones of freedom of the press; and it has done so by reference to Article 10 and the Court's case-law thereunder (including *Goodwin v. the United Kingdom*, 27 March 1996, *Reports of Judgments and Decisions* 1996-II; *Financial Times Ltd and Others v. the United Kingdom*, no. 821/03, 15 december 2009; *British Broadcasting Corporation v. the United Kingdom*, no. 25794/94, Commission decision of 18 January 1996; *Sanoma Uitgevers B.V. v. the Netherlands* [GC], no. 38224/03, 14 september 2010).
However, drawing on this Court's decision in *Nordisk Film & TV A/S v. Denmark* (dec.), no. 40485/02, ECHR 2005-XIII, the Supreme Court also made clear that the applicability of Article 10 in this context is limited to posts/information connected to the journalist's exercise of his or her function as a journalist. As the Austrian Supreme Court made clear in its decision in the present case (6 Ob 188/14m):
"Editorial secrecy cannot be invoked where a posting has no connection whatsoever with a journalistic activity. There must therefore be at least some intended activity, control or knowledge of a media employee for the protection of section 31 of the Media Act to be invoked."
11. In *Nordisk Film & TV A/S v. Denmark*, the Court was concerned with an order compelling a television producer to hand over unpublished programme material to the prosecution. In its decision, the Court, having reiterated that "[f]reedom of expression constitutes one of the essential foundations of a democratic society and the safeguards to be afforded to the press are of particular importance" and that "[t]he protection of journalistic sources is one of the cornerstones of freedom of the press" made clear that:
"... there is a difference between the case before it and previous case-law. In the present case,.... In fact, the majority of the persons participating in the programme were not freely assisting the press to inform the public about matters of public interest or matters concerning others, on the contrary. Nor did they consent to being filmed or recorded and thus providing information in that way. Consequently, those participants cannot be regarded as sources of journalistic information in the traditional sense (see for example the definition set out in the explanatory notes to Recommendation No. R (2000) 7, above).
Seen in this light, the applicant company was not ordered to disclose its journalistic source of information."
12. The basis on which the Court concluded that Article 10 "may" nevertheless apply in such a context was that, in the circumstances of that case, the applicant "was ordered to hand over part of its own research-material. The Court does not dispute that... a compulsory hand over of research material may have a chilling effect on the exercise of journalistic freedom of expression". The posts/ information concerned in the present case were significantly further removed from any "journalistic freedom of expression" by the Applicant. In fact, the domestic courts clearly found that the Applicant had failed to establish "any connection with [its] journalistic activity".

III. The specific circumstances of this case

13. In light of the above and the Court's established case-law, the following aspects of the present case are, in my view, of particular relevance to the assessment of the question whether the Applicant's Article 10 rights are engaged at all:

(a) as the majority recognises, the domestic courts were expressly and only seized of and concerned with an application under the ECG for disclosure of the names of the users to enable the alleged victims to bring legal proceedings for defamation in defence of their right to respect for their reputation under Article 8 of the Convention;

(b) it is difficult to see how such proceedings would ever be/have been possible to initiate by a victim without, at least, disclosure of sufficient identifying information of the user/author to enable a claim to be addressed to him or her;

(c) unlike in *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015; and *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016; et al,

(i) the domestic proceedings were never about the liability of the Applicant/service provider for the statements made by the users who had posted the comments (paragraph 68); and

(ii) the domestic courts made very clear findings that the Applicant was not a publisher but rather that it was acting as a host or "service provider" for the purposes of the ECG/E-Commerce Directive; a finding made on the basis that it had failed to establish "any connection with journalistic activity".

Even if, as the majority asserts "[u]ser-generated content on the applicant company's portal is at least partly moderated" (paragraph 73), the domestic courts were very clear in their finding that, in the circumstances of the posts relevant to this particular case, they had not been so moderated. Contrary to the suggestion by the majority (paragraph 72), this is plainly an essential criterion for the applicability of Article 10 because a finding that the Applicant had been a publisher would have been the foundation for possible (joint or several) liability in relation to the statements made and any "chilling effect" arising therefrom would also have affected the Applicant directly;

(d) none of the "situations" identified in *Schweizerische Radio- und Fernsehgesellschaft and Others v. Switzerland* ((dec.) no. 68995/13, § 71, 12 november 2019 (cited by the majority at paragraph 66) are relevant or engaged in this case. This is especially so as the majority recognises that the posts in issue "could not be considered a source to a journalist" (paragraph 71) and the Applicant "could not rely on editorial confidentiality in the instant case" (*ibid.*);

(e) the service agreement between the users and the Applicant as a host/service provider (in the form of the Applicant's general terms and conditions) made absolutely clear that the Applicant would disclose user data if (but only if) required to do so by law (see paragraph 7). The users were, therefore, aware that their anonymity when using the platform provided by the Applicant was at best qualified and that they could only rely on the protection provided by such anonymity as long as the disclosure of their identity was not required by law;

(f) the applications to the courts for disclosure of the identities of the relevant users, and the subsequent orders by the domestic courts, were made on the basis of a clearly established legal basis both as a matter of legislation, domestic and EU, as well as the established case-law of the Austrian Supreme Court;

(g) there was no evidence at all, either before this Court or (as far as I am aware) before the domestic courts which would indicate the attitude of the relevant users (and, therefore, the primary Article 10 rights holders) to the request for disclosure of their identities (or even the prompt take-down of their posts by the Applicant), whether before or during the proceedings which are the issue of this application or following the execution of the orders made by the Austrian Supreme Court (of which there is also no direct evidence);

(h) there is neither a suggestion that the Applicant was acting for or on behalf of the relevant users in resisting the application for disclosure nor a suggestion (and even less evidence) that, even if they had been acting to protect the users interests, the domestic courts could not have found a means of protecting the user in question/proposed defendant if s/he (or the service provider on his or her behalf) had advanced a case asserting the users' need for protection. No such case was made. Furthermore, there seems to me to be no reason to suggest (contrary to the assertion of the majority in paragraph 78) that the Applicant could not have sought the views of the relevant users and, if the users so wished, sought to assert their rights and their interests for anonymity before the domestic courts; and

(i) finally, there is also no evidence at all of the alleged "indirect effect" on the Applicant's "rights" (or even on any identifiable interests of the Applicant) caused by the asserted deterrence of users "from contributing to debate" or the asserted "chilling effect" among users posting in forums in general (paragraph 74). Considering that the consistent case-law of the Austrian Supreme Court goes back at least to January 2014 (6 Ob 133/13x) there would have been ample opportunity for such evidence to be obtained.

IV. Conclusion

14. In light of the above there is, in my view, no basis either in the Court's case-law or in principle why the protection of Article 10 should be yet further extended to a "service provider" under the E-Commerce Directive who, by definition (and on the clear findings of the domestic courts) has not played an active role at all allowing it to have knowledge or control of the content of the posts in question.

15. The majority's justification by reference to the – co-incidental – identity of this service provider as a "media company" and its purported right to "freedom of the press" is also not persuasive. After all,

(a) "freedom of the press", as such, is not a term one finds as separately guaranteed right/freedom under Article 10; it is a term primarily used by the Court as shorthand for the right to "freedom of expression" as exercised by the press which is, for that reason, subject to heightened protection by the Court (i.e. the "journalistic freedom of expression" referred to in *Nordisk Film & TV A/S v. Denmark*). That right can, however, only be so protected once it has been found to be engaged. On the other hand, there is, in my view, no support for the proposition that there is a residual right to "freedom of the press" which can be invoked solely by reason of the very identity of an applicant as a journalist or member of the press, irrespective of whether the act complained of or the information sought has any connection at all to his or her activity as a "journalist" exercising their right of freedom of expression. The protection provided by Article 10 is functional not personal; and

(b) it is also not sufficient, in my view, to rely solely on the assertion that "the applicant company's overall function is to further open discussion and to disseminate ideas with regard to topics of public interest" (paragraph 73). After all, it is no longer possible to limit this recognised "function" to the traditional press (even where they are using non-traditional means of publication). At least since the judgment in *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 168, 8 november 2016, the Court has made clear that "given the important role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015), the function of bloggers and popular users of the social media may be also assimilated to that of 'public watchdogs' in so far as the protection afforded by Article 10 is concerned".

16. This latter point, of course, also carries with it a very real risk that the extension of Article 10 in this context will not be capable of being limited to service providers under the E-Commerce Directive who are also media companies but will ultimately have to be applied to any "bloggers and popular users of the social media", with the consequent (negative) impact on the ability of victims of abusive posts to seek access to court for the purposes of protecting themselves and their reputation.

17. It is for these reasons that, in the circumstances of this case, I voted against the admissibility of this application and against the applicability of Article 10 to the Applicant.

NOOT

Vaak botsen de vrijheid van meningsuiting en het recht op privacy met elkaar. Soms lopen de twee grondrechten echter parallel, zoals in deze casus. De klager bij het Europees Hof voor de Rechten van de Mens is het Oostenrijkse mediabedrijf Standard Verlagsgesellschaft, dat niet alleen een krant uitgeeft, maar ook een online discussieforum exploiteert. Daar kunnen lezers reageren op in de krant gepubliceerde artikelen. Zij moeten zich laten registreren, zodat de uitgever altijd weet wie verantwoordelijk is voor welke reactie. Voor de buitenwereld is de werkelijke identiteit lang niet altijd kenbaar, want op het discussieforum mag men een pseudoniem gebruiken. De ervaring leert dat mensen dan meer het achterste van hun tong durven te laten zien. Wel heeft de uitgever zich contractueel het recht voorbehouden in bijzondere gevallen de geregistreerde per-

soonsgegevens aan een derde bekend te maken. Dat kan gebeuren wanneer een bepaalde reactie onrechtmatig is jegens iemand anders en het slachtoffer er voldoende belang bij heeft de auteur persoonlijk te kunnen aanspreken.
De klacht bij het EHRM volgde op twee civiele procedures in Oostenrijk. Op het online discussieforum van Standard Verlagsgesellschaft hadden de deelnemers 'Tango Korrupti2013', 'rrrn' en 'try_error' gepeperde commentaren geleverd bij twee artikelen over uiterst rechtse politici. De genoemde politici voelden zich door de commentaren beledigd en eisten de persoonsgegevens van de drie auteurs op. De uitgever kwam hen in zoverre tegemoet dat de geplaatste teksten werden verwijderd, maar hij was niet bereid naam, adres en emailadres van de betrokkenen te onthullen. Anonimiteit was volgens de uitgever een belangrijke voorwaarde om een levendig debat op het discussieforum in stand te houden. Bovendien was de inhoud van de commentaren niet evident onrechtmatig. Bij de hoogste rechter in Oostenrijk had Standard Verlagsgesellschaft echter geen succes. De uitgever werd veroordeeld tot het verstrekken van de gevorderde persoonsgegevens. Men had zich kunnen voorstellen dat 'Tango Korrupti2013', 'rrrn' en 'try_error' vervolgens bij het EHRM zouden klagen over een schending van hun privacy ex art. 8 EVRM, maar dat is – voor zover bekend – niet gebeurd. In plaats daarvan klaagt Standard Verlagsgesellschaft over een schending van de vrijheid van meningsuiting ex art. 10 EVRM.

Lycos/Pessers

De zaak doet op het eerste gezicht denken aan het Nederlandse arrest *Lycos/Pessers* (HR 25 november 2005, ECLI:NL:HR:2005:AU4019, *NJ* 2009/550, m.nt. Hugenholtz). Lycos was een hosting provider die ruimte had geboden aan een anonieme websitehouder. Op de desbetreffende website waren ernstige beschuldigingen geuit jegens de postzegelhandelaar Pessers. In kort geding had Pessers weten te bereiken dat Lycos veroordeeld werd hem de naam, het adres en de woonplaats van de websitehouder te verstrekken, de zogeheten NAW-gegevens. Het vonnis van de voorzieningenrechter werd door het hof Amsterdam bekrachtigd, waarna Lycos in cassatie ging bij de Hoge Raad. De Hoge Raad verwierp het cassatieberoep na onder meer te hebben overwogen: 'Ook indien de op een website gepubliceerde informatie niet onmiskenbaar onrechtmatig is, kan een serviceprovider onder omstandigheden onrechtmatig handelen door de bij haar bekende NAW-gegevens van de desbetreffende websitehouder niet op verzoek aan een belanghebbende derde bekend te maken' (par. 4.10).
De weigering van een provider om de NAW-gegevens van een websitehouder te verstrekken aan een belanghebbende kan volgens dezelfde rechtsoverweging 'met name' in strijd komen met de zorgvuldigheid indien de volgende omstandigheden zich voordoen:
'a. de mogelijkheid dat de informatie, op zichzelf beschouwd, jegens de derde onrechtmatig en schadelijk is, is voldoende aannemelijk;
b. de derde heeft een reëel belang bij de verkrijging van de NAW-gegevens;
c. aannemelijk is dat er in het concrete geval geen minder ingrijpende mogelijkheid bestaat om de NAW-gegevens te achterhalen;
d. afweging van de betrokken belangen van de derde, de serviceprovider en de websitehouder (voor zover kenbaar) brengt mee dat het belang van de derde behoort te prevaleren.'
Deze vier criteria staan nu bekend als de 'Lycos-criteria', al is niet uitgesloten dat de NAW-gegevens ook in andere situaties moeten worden verstrekt. De woorden 'met name' bieden daarvoor een mogelijkheid.
Een overeenkomst tussen Lycos en Standard Verlagsgesellschaft is dat zij beide hosting providers zijn in de zin van art. 14 EU Richtlijn inzake elektronische handel (Richtlijn 2000/31/EG van het Europees Parlement en de Raad van 8 juni 2000 betreffende bepaalde juridische aspecten van de diensten van de informatiemaatschappij, met name de elektronische handel, in de interne markt, *PbEG* L 178). Bovendien hadden zowel Lycos als Standard Verlagsgesellschaft ruimte gegeven aan een auteur die anoniem beledigende en/of smadelijke uitingen over een derde publiceerde. Ten slotte zijn beide bedrijven door de nationale rechter veroordeeld tot het verstrekken van de NAW-gegevens. Er zijn echter ook een paar verschillen. Zo was Lycos een internetbedrijf zonder journalistieke ambities, terwijl Standard Verlagsgesellschaf primair een journalistiek bedrijf is. Ook de overwegingen van de Hoge Raad en van het Oberste Gerichtshof verschillen. De Hoge Raad benadrukt de noodzaak van een belangenafweging, zoals blijkt uit het vierde 'Ly-

cos-criterium'. Het Oberste Gerichtshof legt art. 18 lid 4 Oostenrijkse E-Commerce-wet aldus uit, dat een verdedigbare claim uit hoofde van smaad voldoende is om een recht op de NAW-gegevens te laten ontstaan (zie par. 39 van het EHRM-arrest).

Belangenafweging

Sedert het arrest *Lycos/Pessers* van 2005 is een aanzienlijke hoeveel jurisprudentie ontstaan over het vorderen van NAW-gegevens bij internettussenpersonen. Meestal is daarbij sprake van een beweerde schending van intellectuele eigendomsrechten. Een betrekkelijk recent voorbeeld is de zaak *Dutch Filmworks/Ziggo* (hof Arnhem-Leeuwarden 5 november 2019, ECLI:NL:GHARL:2019:9352, «JBP» 2019/135, m.nt. Reus). Het cassatieberoep dat Dutch Filmworks (DFW) instelde tegen dit arrest is door de Hoge Raad verworpen met toepassing van art. 81 lid 1 Wet op de rechterlijke organisatie (HR 25 juni 2021, ECLI:NL:HR:2021:985, «JBP» 2021/88). DFW bezat het auteursrecht op een film die door verscheidene abonnees van de internet access provider Ziggo illegaal was gedownload. DFW wilde deze abonnees aanspreken wegens schending van de Auteurswet en hen een financiële vergoeding laten betalen. Na een technische monitoring van zogeheten 'BitTorrent'-netwerken had DFW de IP adressen van 174 mogelijke daders weten te verzamelen, maar voor de bijbehorende NAW-gegevens was zij aangewezen op de administratie van Ziggo. Dat bedrijf weigerde echter medewerking te verlenen, omdat het zijn abonnees niet wilde blootstellen aan intimiderende 'blafbrieven'. Een complicatie is bovendien dat de houder van een IP-adres niet automatisch dezelfde persoon is als degene die de aansluiting heeft misbruikt voor illegaal downloaden.
Evenals de voorzieningenrechter in eerste aanleg was het hof Arnhem-Leeuwarden van oordeel dat Ziggo de NAW-gegevens niet hoefde te verstrekken. Het vierde Lycos-criterium, dat een belangenafweging voorschrijft, werd door het Hof geïnterpreteerd in het licht van art. 6 lid 1 onder f Algemene verordening gegevensbescherming. In het onderhavige geval moest het recht op gegevensbescherming zwaarder wegen dan de handhaving van het auteursrecht, onder meer omdat DFW niet duidelijk wilde maken hoe zij met de verkregen NAW-gegevens zou omgaan. Welke financiële compensatie zou zij gaan eisen? In zijn noot voor «JBP» vond J.G. Reus het arrest 'verrassend', maar de Hoge Raad oordeelde dat het cassatieberoep 'niet noopte tot beantwoording van rechtsvragen in het belang van de rechtseenheid of de rechtsontwikkeling'.
Informatiever dan het arrest van de Hoge Raad is de conclusie van advocaat-generaal Drijber (Conclusie 29 januari 2021, ECLI:NL:PHR:2021:83, «JBP» 2021/88). Hierin treffen we een handzame samenvatting van relevante jurisprudentie van het Hof van Justitie van de Europese Unie. Drijber bespreekt zeven arresten van dit Hof, te beginnen bij HvJ EU 29 januari 2008, C-275/06, ECLI:EU:C:2008:54, *NJ* 2009/551, m.nt. Hugenholtz (*Promusicae*) en eindigend met HvJ EU 9 juli 2020, ECLI:EU:C:2020:542, *AMI* 2020/6, nr. 10, m.nt. Kingma (*Constantin Film Verleih/YouTube en Google*). Daarna is door het Hof van Justitie nog een achtste arrest gewezen over het opvragen van NAW-gegevens. Dat betreft HvJ EU 17 juni 2021, C-597/19, ECLI:EU:C:2021:492, *IER* 2021/30, m.nt. Dijkman (*Mircom International Content Management Consulting/Telenet*).
In paragraaf 3.29 van zijn conclusie komt Drijber tot de slotsom dat bij de afweging van de betrokken belangen zorgvuldig gekeken moet worden naar de omstandigheden van het geval. Voor automatismen is geen plaats:
'Uit vorenstaand overzicht blijkt dat voor het antwoord op de vraag of een tussenpersoon verplicht is persoonsgegevens van zijn klanten door te geven aan een IE-rechthebbende, grote betekenis toekomt aan een zorgvuldige afweging van de belangen. Nationale rechtsregels die aan een van die betrokken belangen onvoorwaardelijke of onbeperkte bescherming toekennen zijn met dit uitgangspunt van belangenafweging niet verenigbaar. Hoe een afweging precies moet worden uitgevoerd is afhankelijk van de omstandigheden van het geval. Daarover bevatten de besproken arresten weinig concrete aanknopingspunten.'

Geen bronbescherming

Hoewel het recht op bescherming van de persoonlijke levenssfeer als bedoeld in art. 8 EVRM op de achtergrond een rol speelt, valt te betwijfelen of Standard Verlagsgesellschaft enige kans zou maken met een klacht over schending van dit grondrecht. Op grond van art. 34 EVRM kan een individuele klacht alleen worden ingediend door het slachtoffer zelf. In beginsel kan een dienstver-

lenend bedrijf niet klagen over onrecht dat zijn klanten wordt aangedaan. Dat zullen de slachtoffers zelf moeten doen. Een grondrecht dat wel aan het bedrijf toekomt is de vrijheid van ondernemerschap, genoemd in art. 16 Handvest van de grondrechten van de Europese Unie. Men zou kunnen redeneren dat de verplichting om NAW-gegevens af te staan het business model van het online platform bemoeilijkt. Art. 16 Handvest kent echter geen evenknie in het EVRM, waartoe het Straatsburgse Hof zich moet beperken. Het is om die reden dat de klacht van Standard Verlagsgesellschaft gebaseerd is op art. 10 EVRM, in het bijzonder de persvrijheid. Reeds in de nationale procedure had Standard Verlagsgesellschaft een beroep gedaan op het recht op bronbescherming. Journalisten hebben op grond van art. 10 EVRM het recht hun bronnen geheim te houden, omdat bronnen anders zouden zwijgen en belangrijke informatie niet ter kennis van het publiek zou komen.

Zou het EHRM van oordeel zijn dat de anonieme deelnemers aan het discussieforum inderdaad bronnen zijn waarop het recht op bronbescherming van toepassing is, dan was de zaak snel beslist. Theoretisch kan een bevel tot bekendmaking van de identiteit van journalistieke bronnen gerechtvaardigd worden op grond van art. 10 lid 2 EVRM, maar in de praktijk wordt zo'n beperking vrijwel nooit geaccepteerd door het EHRM. Dit uitgangspunt is al te vinden in het arrest EHRM (GK) 27 maart 1996, ECLI:CE:ECHR:1996:0327JUD001748890, *NJ* 1996/577 (*Goodwin/United Kingdom*). Hierin overwoog het EHRM dat de bescherming van journalistieke bronnen een basisvoorwaarde is voor de persvrijheid.

'Having regard to the importance of the protection of journalistic sources for press freedom in a democratic society and the potentially chilling effect an order of source disclosure has on the exercise of that freedom, such a measure cannot be compatible with Article 10 (art. 10) of the Convention unless it is justified by an overriding requirement in the public interest' (Goodwin, par. 39).

Het begrip 'journalistieke bronnen' wordt door het EHRM echter beperkt uitgelegd. Hoewel Standard Verlagsgesellschaft een journalistiek bedrijf is – anders dan Lycos, dat in 2005 bij de Hoge Raad ook tevergeefs een beroep deed op bronbescherming – slaagt het beroep niet. In par. 70 en 71 van het arrest legt het EHRM uit waarom. Overeenkomstig een aanbeveling van het Comité van Ministers van de Raad van Europa verstaat het EHRM onder een 'bron' een persoon die informatie aan een journalist verschaft. Dankzij de mogelijkheid om geheimhouding toe te zeggen aan klokkenluiders kan de journalist gelekte informatie vervolgens gebruiken om het publiek voor te lichten over mogelijke misstanden. De anonieme deelnemers op het online discussieforum richtten zich echter rechtstreeks tot het publiek. De vertrouwensrelatie tussen een journalist en zijn of haar bronnen is daarom niet in het geding.

Art. 10 EVRM toch geschonden

De vrijheid van meningsuiting en de persvrijheid omvatten veel meer dan het recht op bronbescherming. Het is vaker voorgekomen dat informatie weliswaar niet afkomstig was van een 'journalistieke bron', maar dat het achterhalen van de identiteit van de informatieleverancier volgens het EHRM een beperking opleverde van de persvrijheid. Deze beperking moest dus getoetst worden aan de criteria van art.10 lid 2 EVRM. Een voorbeeld, dat in paragraaf 66 van bovenstaand arrest wordt genoemd, is EHRM 8 december 2005, ECLI:CE:ECHR:2005:1208DEC004048502 (*Nordisk Film & TV A/S/Denemarken*). Het EHRM had ook kunnen verwijzen naar EHRM 27 mei 2014, ECLI:CE:ECHR:2014:0527DEC000840606 (*Ostade Blade/Nederland*). In het eerste geval ging het om mensen die zich er helemaal niet van bewust waren geweest dat zij spraken met een journalist. In het tweede geval had een terreurgroep de verantwoordelijkheid opgeëist voor een misdrijf dat zij zelf had gepleegd. Daarvoor is de bronbescherming echter niet bedoeld. Staande voor de vraag of de beperking noodzakelijk was in een democratische samenleving liet het EHRM de staten een ruime beoordelingsvrijheid. Dat is een belangrijk verschil met echte bronbescherming, maar een belangenafweging kan niet geheel achterwege blijven.

Over de vraag of Standard Verlagsgesellschaft handelde als een persorgaan of als een gewone hosting provider verschillen het EHRM en de Oostenrijkse rechters van mening. Volgens het Oberste Gerichtshof was het laatste het geval. Zes van de zeven rechters van het EHRM oordelen evenwel dat het rechterlijk bevel om de

NAW-gegevens bekend te maken wel een beperking opleverde van de persvrijheid. Eén rechter is het daar niet mee eens, omdat de commentaren van de deelnemers aan het discussieforum te ver af zouden staan van het journalistieke werk. Naar mijn mening sluit de redenering van de meerderheid echter goed aan bij het arrest *Magyar Tartalomszolgáltatók Egyesülete en Index.hu Zrt/Hongarije* (EHRM 2 februari 2016, ECLI:CE:ECHR:2016:0202JUD002294713). De twee klagers exploiteerden elk een eigen online nieuwsportaal, waar gebruikers commentaren onder artikelen konden plaatsen. Zij waren in Hongarije veroordeeld tot het betalen van schadevergoeding omdat enkele commentaren beledigend zouden zijn geweest voor een bepaalde ondernemer. Het Hof achtte toen ook art. 10 EVRM van toepassing, waartoe het overwoog: 'For the Court, the conduct of the applicants providing platform for third-parties to exercise their freedom of expression by posting comments is a journalistic activity of a particular nature' (par. 79).

Nadat is vastgesteld dat art. 10 EVRM beperkt is, rijst de vraag of deze beperking voldoet aan de eisen van het tweede lid. Wat dit onderdeel betreft is het Hof unaniem: uitgaande van de toepasselijkheid van art. 10, was het rechterlijk bevel niet noodzakelijk in een democratische samenleving. Het Oberste Gerichtshof in Oostenrijk heeft namelijk niet gemotiveerd waarom het belang van de beledigde politici om de gegevens te ontvangen zwaarder moest wegen dan het belang van Standard Verlagsgesellschaf om deze geheim te houden. Een goede belangenafweging is onmisbaar, zeker nu de gewraakte teksten betrekking hadden op een onderwerp van algemeen belang en zij niet evident onrechtmatig waren. Het EHRM erkent dat de Oostenrijkse rechters een zekere margin of appreciation hadden, maar het geheel achterwege blijven van een belangenafweging is ontoelaatbaar (par. 95 en 96). Deze gedachtegang doet sterk denken aan die van het Hof van Justitie van de EU, zoals samengevat door advocaat-generaal Drijber in zijn conclusie voor de zaak *DFW/Ziggo*.

Hoe zou de zaak zijn afgelopen als het om een platformaanbieder was gegaan zonder journalistieke doelstellingen, zoals Facebook of TikTok? In zijn 'partly dissenting opinion' waarschuwt rechter Eicke dat de opvatting van de meerderheid de deur openzet voor een te ver opgerekte toepassing van art. 10 EVRM. Kan straks elke hosting provider met een beroep op de vrijheid van meningsuiting weigeren NAW gegevens te verstrekken? Ik denk dat deze vrees onterecht is. Op nationaal niveau kunnen hosting providers in alle EU-landen zich sowieso verweren met een beroep op de Algemene verordening gegevensbescherming. Als vervolgens ook een beroep wordt gedaan op art. 10 EVRM, geeft bovenstaand arrest alleen steun aan hosting providers die beschermd worden door de persvrijheid. Het is weliswaar niet altijd makkelijk een scheiding te maken tussen de persvrijheid en de gewone vrijheid van meningsuiting – wat zijn precies 'journalistieke activiteiten'? – maar dat is een probleem dat zich vaker voordoet (o.a. J. Oster, *Media Freedom as a Fundamental Right,* Cambridge: Cambridge University Press 2015).

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2

Kredietregistratie bij BKR dient te worden getoetst aan maatstaf art. 6 lid 1 onder f AVG

Hoge Raad (Civiele Kamer)
3 december 2021, 21/00241,
ECLI:NL:HR:2021:1814
(mr. Polak, mr. Du Perron, mr. Kroeze, mr. Wattendorff, mr. Makkink)

CKI. Codering. Wettelijke plicht. Gerechtvaardigd belang.

[AVG art. 6, 17, 21; Wft art. 4:32, 4:34; BGfo art. 113, 114; Richtlijn 2008/48/EG art. 8, 9]

Deze prejudiciële beslissing gaat over de vraag aan welke van de in art. 6 AVG genoemde gronden een registratie bij de Stichting Bureau Kredietregistratie (hierna: het BKR) moet worden getoetst. Nederlandse kredietaanbieders moeten op grond van art. 4:32 lid 1 Wft deelnemen aan een stelsel van kredietregistratie en hebben op grond van art. 4:34 lid 1 Wft een zorgplicht ter voorkoming van overkreditering. Het stelsel van kredietregistratie waaraan de kredietaanbieders