



# Latest developments in the case-law of the European Court of Human Rights on freedom of expression

**Freedom of Expression and Freedom of the Media**

<http://horizontal-facility-eu.coe.int>  
<https://www.coe.int/en/web/freedom-expression>

Funded  
by the European Union  
and the Council of Europe



EUROPEAN UNION

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Implemented  
by the Council of Europe

**Bulletin No 3**  
**Latest developments in the case-law of**  
**the European Court of Human Rights on**  
**Freedom of Expression**  
Author: Velimir Delovski

The Bulletin was prepared in the framework of the European Union and Council of Europe joint programme “Horizontal Facility for the Western Balkans and Turkey 2019–2022”, and its action on “Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)”.

© Council of Europe, October 2021.

All rights reserved. Licensed to the European Union under conditions. No part of this publication may be translated, reproduced or transmitted, in any form or by any means, electronic (CD-Rom, Internet, etc.) or mechanical, including photocopying, recording or any information storage or retrieval system, without prior permission in writing from the Directorate of Communications (F-67075 Strasbourg Cedex or [publishing@coe.int](mailto:publishing@coe.int)).

This document was produced with the financial support of the European Union and the Council of Europe. The views expressed herein are responsibility of the author and can in no way be taken to reflect the official opinion of the either party.

# Contents

---

INTRODUCTION	5
REVIEW OF THE MOST IMPORTANT FREEDOM OF EXPRESSION CASES	6
<i>Handzhiyski v. Bulgaria</i> , judgment of 6 April 2021, application no. 10783/14	6
<i>Gachechiladze v. Georgia</i> , judgment of 22 July 2021, application no. 2591/19	7
<i>Sedletska v. Ukraine</i> , judgment of 1 April 2021, application no. 42634/18	9
<i>Yuriy Chumak v. Ukraine</i> , judgment of 18 March 2021, application no. 23897/10	10
<i>Kilin v. Russia</i> , judgment of 11 May 2021, application no. 10271/12	12
<i>Amaghlobeli and Others v. Georgia</i> , judgment of 20 May 2021, application no. 41192/11	13
IN-DEPTH ANALYSIS OF SELECTED CASES	15
<i>Big Brother Watch and Others v. the United Kingdom [GC]</i> , judgment of 25 May 2021, application nos. 58170/13, 62322/14 and 24960/15	15
<i>Budinova and Chaprazov v. Bulgaria</i> , judgment of 16 February 2021, application no. 12567/13 and <i>Behar and Gutman v. Bulgaria</i> , judgment of 16 February 2021, application no. 29335/13	18
<i>OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia</i> , judgment of 18 May 2021, application no. 43351/12	21



# Introduction

---

**T**he Bulletin is prepared within the framework of the joint initiative of the European Union and the Council of Europe “Horizontal Facility for the Western Balkans and Turkey 2019–2022” and its action on “**Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)**”.

In order to continue cooperation with the legal professionals and contribute to further improvement of knowledge in the field of freedom of expression and freedom of the media, we have prepared this Bulletin as an additional tool for sharing information on new trends and developments in the case-law of the European Court of Human Rights (the ECtHR; the Court).

While Bulletin No 1 covered the period April 2019–July 2020, and Bulletin No 2 the period August 2020–January 2021, this one, in front of you presents some of the relevant judgements delivered from February 2021–July 2021.

In the analysed period the European Court of Human Rights delivered a considerable number of relevant judgments on freedom of expression and the protection and safety of journalists. These judgments concerned different areas of Article 10 of the European Convention of Human Rights (the ECHR; the Convention). In a few of them, other Convention Articles have also been invoked. They either reaffirmed the principles which are part of the well-established case law or reinforced and further clarified already set standards in this field.

In the selected judgments which are elaborated in this Bulletin, the Court deals with the wider aspects of freedom of expression, with a focus on extending the scope of Article 10 to cover non-violent performance art protests, as a manifestation of political speech; advertising which contributes to a public debate concerning issues of general interest and might be considered as contrary to public morals and religious values; and restrictions on freedom of expression online, when it turns into offensive hate speech and incitement to violence.

When it comes to media freedom, the presented cases discuss the responsibilities of journalists in exercising their profession when carrying out news-gathering activities; access to information on matters of public interest and to official documents; the protection of journalistic sources in relation to the use of surveillance technologies and in mass surveillance operations, in particular; as well as the involvement of media outlets in electoral campaigning online.

All in all, the cases selected have underlined the obligation of the States parties to the Convention to uphold the Convention standards in line with the principle of subsidiarity, while in some cases the authorities are urged to contribute to the national implementation of the Convention by taking general measures to strengthen the existing legislative framework and to advance their administrative and judicial practices, with a view to preventing the occurrence of similar violations of the freedom of expression in the future.

In the first part of this Bulletin, you will be provided with a short description of six selected cases, while an in-depth analysis of four other, crucial cases, would be provided in its second part.

# Review of the most important freedom of expression cases

---

*Handzhiyski v. Bulgaria, judgment of 6 April 2021, application no. 10783/14*

## Facts of the case

The applicant, a local opposition politician, was convicted of minor hooliganism and fined for placing Santa Claus accessories, with the word “resignation” attached to it, on a statue of Mr Dimitar Blagoev. Mr Blagoev was the founder of the Social-Democratic Party that had operated during the communist regime, whose successor was the Bulgarian Socialist Party, which provided main parliamentary support to the ruling Government. The act took place on Christmas Day in 2013, in the context of nationwide anti-government protests. Mr Blagoev’s statue had earlier been painted by unidentified persons in red and white so as to resemble Santa Claus and spray-painted with the words “Father Frost”.

The applicant complained before the ECtHR that his conviction by the domestic courts amounted to a violation of Article 10 of the Convention.

## Court’s reasoning

The Court rejected the Government’s submission that the applicant had not suffered a significant disadvantage, finding that although the fine imposed against him had not been criminal in nature, its amount had been quite modest, and there was no indication that it had led to any serious adverse consequences for him, the case concerned a point of principle for him. Additionally, his complaint gave rise to

issues of general importance, namely whether a political protest carried out in the manner chosen by the applicant can amount to a legitimate exercise of the right to freedom of expression. Furthermore, this case appeared to have received wide media coverage and to have given rise to a public debate in Bulgaria.

The conduct which had led to the applicant’s conviction was regarded by the Court as an expression falling within the scope of Article 10 § 1, as a symbolic act by which the applicant had sought to engage in political protest, and “impart” his “ideas” about the government and the political party which had supported it. Therefore, it amounted to an interference with his freedom of expression which was prescribed by law and pursued the legitimate aim of protecting the rights of others, passers-by who might have been insulted. There was, however, no indication that there had been a risk to public safety, as the applicant’s actions had been entirely peaceful and unlikely to cause public disturbances.

In terms of proportionality, the sanction imposed on the applicant had been the mildest possible, consisting solely of an administrative fine equivalent to EUR 51, which the applicant had been able to pay almost immediately and apparently without any difficulty. Moreover, it had not been entered into his criminal record.

The ECtHR held that while measures designed to dissuade from committing acts that could destroy monuments or damage their physical appearance may be necessary in a democratic society, the applicant had not acted violently and

had not physically destroyed the monument in any way. It then turned to several factors to be considered in the assessment of the interference: the precise nature of the act, the intention behind it, the message sought to be conveyed by it, as well as the social significance of the monument. In the particular circumstances of the case, the Court held that the applicant's intention was to protest against the government and the political party which had supported it, rather than to condemn Mr Blagoev's historical role or to express contempt towards him. He simply used the monument as a symbol of the political party he had wished to criticise.

As a result, the interference had not been deemed necessary in a democratic society, notwithstanding the margin of appreciation enjoyed by the national authorities in this area.

**Note:** This judgment reaffirms that the protection of Article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed (*Oberschlick v. Austria (no. 1)*, judgment of 23 May 1991, application no. 11662/85, § 57; *Animal Defenders International v. the United Kingdom* [GC], judgment of 22 April 2013, application no. 48876/08, § 100) and the expressive conduct, which shocks, offends or disturbs is also protected under Article 10 (*Handyside v. the United Kingdom*, judgment of 7 December 1976, application no. 5493/72, § 49).

It could also be considered as a continuation of the previous case law on expression that had elements of satire and political protest which involved acts against statues, monuments, and sacred places as a common way of expressing discontent, disagreement and rejection towards the political ideas they represent (*Mariya Alekhina and Others v. Russia*, judgment of 17 July 2018, application no. 38004/12, also known as the Pussy Riot case; *Murat Vural v. Turkey*, judgment of 21 October 2014, application no. 9540/07; and *Tatár and Fáber v. Hungary*, judgment of 12 June 2012, application nos. 26005/08 and 26160/08). In all aforementioned cases the Court focused on the necessity of the imposition of criminal sanctions, while it was for the first time that in the present

case the Court introduced criteria for a nuanced assessment of the non-criminal sanctions.

Indeed, this judgment widens the scope of freedom of expression to ensure the protection of non-violent artistic performances targeting monuments as long as such performances caused no damage to a particular monument.

### *Gachechiladze v. Georgia, judgment of 22 July 2021, application no. 2591/19*

#### Facts of the case

The applicant, an individual entrepreneur, produced condoms with various designs on the packaging, to be sold online and via vending machines. Four of her designs became the subject of administrative-offence proceedings in which she was fined and ordered to cease using and disseminating the relevant designs, and to issue a product recall in respect of those products already distributed on the basis that they constituted unethical advertising under the Advertising Act.

The Tbilisi City Court found that the advertisements breached universally accepted human and ethical norms and encroached on religious symbols, national and historical treasures and monuments. The Tbilisi Court of Appeal upheld the lower court's judgment, stating that the applicant could not present any evidence which would prove that she produced the condoms not for commercial purposes but to raise awareness on issues important to society. It noted that in Georgia the depiction of figures and religious symbols on items of a sexual nature – condoms – would have been perceived as an action aimed against public morals and as an insult to religion and religious symbols which would target a large part of society.

Subsequently, the applicant lodged an application before the ECtHR, complaining that there had been an unjustified interference with her right to freedom of expression under Article 10 ECHR.

## Court's reasoning

**A**t the outset, the Court rejected the Government's preliminary objection that the applicant had suffered no significant disadvantage, after it had taken into consideration what had been at stake for her. Even though the fine of approximately EUR 165 did not seem particularly onerous, she had also claimed to have suffered a loss of income and she had been banned from using those designs in the future. As a result, the impugned measures had been of such nature and magnitude that, potentially, they could have caused her to suffer an important financial impact.

Assuming that the impugned measures had a basis in domestic law, the Court accepted that the interference had pursued the legitimate aims of protecting the religious rights of others and/or protecting public morals.

Unlike the domestic courts, the Court considered that the applicant's "expression" could not be treated as having been made solely in a commercial context, as it appeared to have aimed at initiating and/or contributing to a public debate concerning various issues of general interest and indeed, the declared objective of the brand had been to shatter stereotypes and "to aid a proper understanding of sex and sexuality".

Regarding the first design, which had referred to a former female ruler of Georgia, who had been canonized as a saint, the Court held that canonizing a public figure could not of itself exclude a discussion of his or her persona in public debate. It also noted the absence of convincing arguments raised by the applicant why or how the use of that persona on condoms had either started or contributed to any public debate on a matter of general interest. As a result, it was difficult for the Court to accept that the domestic authorities had erred in finding that the design could be seen as a gratuitous insult to the object of veneration of Georgians following the Orthodox Christian faith.

As to the remaining three designs, the reasons adduced by the domestic courts had not been

relevant and sufficient to justify an interference under Article 10 § 2. While the appellate court considered that the image and accompanying text of the second design featuring a panda face and referencing a Christian holy day had unjustifiably insulted the lifestyle of practicing Orthodox Christians and the religious teaching that sexual relations should be avoided during the fast related to important religious holidays, the design had merely replicated a popular, pre-existing piece of artistic expression by an anonymous group called Panda and it appeared to constitute criticism of various ideas, including those relating to religious teachings and practices. The applicant's argument about the absence of any religious connotation of the third design that had featured a female left hand with a condom placed over two raised fingers had been left unaddressed by the domestic courts. Likewise, it had remained unclear why they had considered that the image of a crown apparently made from a condom with a caption referring to a historical event featured on the fourth design could fall within the definition of unethical advertising, nor had it been explained whether there had existed any "pressing social need" to limit its dissemination.

Finally, the Court concluded that the apparent implication in the domestic courts' decisions that the views on ethics of the members of the Georgian Orthodox Church took precedence in the balancing of various values protected under the Convention and the Constitution of Georgia went against the views of the Constitutional Court and was at odds with relevant international standards.

**Note:** This judgment is quite important for several reasons. First of all, it reiterates that there is little scope under Article 10 § 2 for restrictions on the debate on matters of public interest. Secondly, it makes clear that in the context of religious beliefs, the exercise of the freedom of expression carries with it duties and responsibilities to ensure the peaceful enjoyment of the religious freedoms including a duty to avoid as far as possible an expression that is, in regard to objects of veneration, gratuitously offensive to others and profane. Thirdly, it conveys a strong message that in a pluralist democratic society those who



have chosen to exercise the freedom to manifest their religion have to tolerate and accept the denial by others of their religious beliefs and even the propagation by others of doctrines hostile to their faith.

## *Sedletska v. Ukraine, judgment of 1 April 2021, application no. 42634/18*

### Facts of the case

The case concerned a judicial authorisation being given to the investigative authorities to access the mobile phone communication data of the applicant, an investigative journalist with Radio Free Europe/Radio Liberty, which could lead to information about her journalistic sources.

The applicant had supposedly been present at the closed meeting with S., the head of the National Anticorruption Bureau, during which he had disclosed confidential information about some ongoing criminal investigations, including the one launched against a prosecutor, K. At the end of 2017 the applicant was summoned for questioning during the criminal proceedings initiated against S. for violation of privacy and disclosure of confidential information. She confirmed that she communicated with S., but she refused to answer questions related to the alleged meeting with S., claiming that, under section 65 of the Code of Criminal Procedure, she could not be interviewed as a witness if this would lead to the identification of her journalistic sources.

On 27 August 2018, an investigating judge of the District Court issued an order authorising the collection of the data requested by the investigator of the Prosecutor General's Office. The applicant challenged the order and requested its suspension before the Kyiv City Court of Appeal, which quashed the District Court's order and made a new one authorizing access exclusively to data about the dates and time of presence of the applicant's mobile telephone on six specified streets and places in Kyiv. Both orders concerned a sixteen-month period.

Relying in particular on Articles 10 and 13 of the Convention, the applicant complained of an unjustified interference with the protection of journalistic sources and lack of effective remedies in that respect and requested interim relief.

### Court's reasoning

Following a thorough examination of the case under Article 10, the Court considered that it was not necessary to address the applicant's complaint under Article 13.

The Court accepted that the interference at issue pursued the legitimate aim of the prevention of crime and protection of the reputation or rights of others listed in Article 10 § 2 of the Convention.

In considering whether the interference was prescribed by law, the Court noted that it had some basis in domestic law, in particular in section 163 of the Code of Criminal Procedure. When examining whether the interference was necessary in a democratic society, the Court noted that the initial District Court's order of 27 August 2018 authorised the prosecutor's office to collect a wide range of the applicant's protected communications data concerning her personal and professional contacts over a sixteen-month period. This could possibly include identifiable information concerning the applicant's confidential sources which had no relevance to the criminal proceedings against S., thus posing a greater risk of detriment to the interests protected by Article 10, as the focus of the applicant's work as a journalist had been on investigating high profile corruption. Additionally, the order contained no safeguards excluding the possibility that the obtained information could be potentially used for purposes unrelated to the criminal investigation concerning S. Consequently, its scope was grossly disproportionate to the legitimate aims of investigating a purported leak of classified information by S. Even though the new data access authorisation of 18 September 2018 was limited essentially to the collection of her geolocation data which could remove the threat of identification of the applicant's sources unrelated to the proceedings

against S., S. was himself treated by the prosecution authorities as a journalistic source, whom the applicant had met to be provided with confidential information relevant to her activity as an investigative journalist.

In the Court's view, the Court of Appeal had failed to: indicate why the interest in obtaining the applicant's geolocation data was of a vital nature for combatting serious crime; ascertain whether there were no reasonable alternative measures for obtaining the information sought, and; to demonstrate that the legitimate interest in the disclosure clearly outweighed the public interest in non-disclosure. Accordingly, the authorisation given by the domestic courts to access data was not justified by an "overriding requirement in the public interest" and, therefore, necessary in a democratic society, which led to a breach of Article 10 of the Convention.

Prior to the delivery of the judgment, on 18 September 2018 the Court granted the applicant's request for an interim measure under Rule 39, indicating that the Government should ensure that the public authorities abstain from accessing any of the data specified in the order of 27 August 2018. The interim measure was discontinued with the judgment delivered in this case, regard being had that the authorisation to access the applicant's communications data had expired.

**Note:** This judgment is based on the standards embodied in the relevant international instruments, and it is a confirmation of the Court's well-established case law concerning the protection of journalistic sources as one of the cornerstones of freedom of the press, without which sources may be deterred from assisting the press in informing the public about matters of public interest, the vital public watchdog role of the press may be undermined, and the ability of the press to provide accurate and reliable information may be adversely affected ([Goodwin v. the United Kingdom](#), judgment of 27 March 1996, application no. 17488/90, § 39, and [Sanoma Uitgevers B.V. v. the Netherlands](#) [GC], judgment of 14 September 2010, application no. 38224/03, §

50). In particular, it should be underlined that the judgment extends the protection of journalistic sources to geolocation data stored on the server of a mobile telephone operator.

### [Yuriy Chumak v. Ukraine](#), judgment of 18 March 2021, Application no. 23897/10

#### Facts of the case

**O**n 5 May 2005, the applicant, a journalist and a member of a non-governmental organisation, submitted a written request for information to the President of Ukraine concerning the practice of unlawful restrictions of access to normative legal acts.

On 1 June 2006, the Secretariat of the President of Ukraine apologized for the delay in answering "caused by technical reasons" and informed the applicant that access to legal documents could be made via the Unified State Register of Legal Acts administered by the Ministry of Justice and that formal security clearance was necessary under the State Secrets Act in order to access official documents which contained information classified as State secrets or other confidential information.

In its turn, the Ministry of Justice refused to provide the applicant with the list of the documents of the President of Ukraine with restrictive labels "not for publication" and "not for printing", referring to their status as confidential information not subject to disclosure per the limitations on the right of access to information under sections 30 and 37 of the Information Act.

On first instance, the competent local court rejected the applicant's request for a declaration recognizing that the President's reply amounted to an unlawful refusal and an order for the President to provide him with the information requested. It reasoned that such information did not concern him personally and, therefore, was not required for the implementation of his rights and interests.

His further appeals were rejected by the Regional Administrative Court of Appeal and the Higher Administrative Court of Ukraine.

The applicant complained before the ECtHR under Article 10 of the Convention about the refusal of the domestic authorities to provide him with the information he had requested.

### Court's reasoning

**W**hen addressing of its own motion the applicability of Article 10, the Court noted that while Article 10 does not confer on the individual a right of access to information held by a public authority, nor oblige the Government to impart such information to the individual, such a right or obligation may arise where access to the information is instrumental for the individual's exercise of his or her right to freedom of expression, in particular "the freedom to receive and impart information" and where its denial constitutes an interference with that right ([Magyar Helsinki Bizottság v. Hungary](#) [GC], judgment of 8 November 2016, application no. 18030/11, § 156).

Furthermore, it relied on the criteria laid down in *Magyar Helsinki Bizottság*: (i) the purpose of the information request; (ii) the nature of the information sought; (iii) the role of the applicant; and (iv) whether the information was ready and available, to conclude that the applicant's complaint is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 ECHR, given that the applicant was a journalist and a member of a non-governmental human rights organisation, he wished to exercise the right to impart information on a matter of public interest and sought access to information to that end under Article 10 of the Convention. The refusal of access constituted, therefore, an interference with the applicant's rights under that article.

In its assessment of the merits, the Court observed that both the administrative authorities

and the courts neither addressed the main issue raised by the applicant throughout the domestic proceedings, that is, the unlawfulness of the use of the restrictive labels (the Government expressly stated in their observations that their use had not been prescribed by national legislation), nor they provided any more detailed information about the conditions and procedure for classifying the particular requested legal documents as confidential.

The Court took note of the lack of analysis by domestic courts of the proportionality of the interference, as they did not address any of the applicant's arguments. Their findings were based on a short statement that the information in question did not have any implications for his rights and freedoms and it was of confidential nature. The Court found that the domestic authorities did not adduce relevant and sufficient reasons that could justify the interference, which was not in conformity with the standards embodied in Article 10 of the Convention and discloses a procedural dysfunction or fault on the part of the Ukrainian authorities and courts. There had accordingly been a violation of Article 10 of the Convention.

**Note:** The case upholds the principles laid down in the Grand Chamber judgment in *Magyar Helsinki Bizottság* which presents a key precedent as it introduced a new right of access to information held by private authorities. Moreover, it is a step forward in the application of the evolving principles established in this regard, that denotes a progressive broadening of the scope of the right of access to information, whereby the new principles are applied retroactively to facts which took place when such right had not yet been recognised by the Court. Lastly, in this judgment the Court clearly sets out a requirement for the domestic authorities to provide further reasons to a journalist or to the general public, why any given document or any given set of aggregated information related to a group of documents, are classified, and hence cannot be made publicly available.

### Facts of the case

The applicant was convicted for public calls to violence and ethnic discord on account of video and audio files that he made accessible via an online social network account (VKontakte) and sentenced to a suspended term of eighteen months' imprisonment. On appeal, the appellate court quashed the judgment of the first-instance court and issued a new one confirming the applicant's conviction. The applicant then filed an unsuccessful cassation appeal with the Regional Court.

The applicant alleged before the ECtHR that the criminal conviction had violated Article 10 and that the appeal hearing in his criminal case had been held *in camera* infringing Article 6 of the Convention.

### Court's reasoning

At the outset, the Court rejected the Government's contention that the complaint had to be declared incompatible *ratione materiae* with reference to Article 17 of the Convention (prohibition of abuse of rights), stating that Article 17 is only applicable on an exceptional basis and in extreme cases. In cases concerning Article 10 of the Convention, it should only be resorted to if it is immediately clear that the impugned statements sought to deflect this Article from its real purpose by employing the right to freedom of expression for ends clearly contrary to the values of the Convention (see [Perinçek v. Switzerland](#) [GC], judgment of 15 October 2005, application no. 27510/08, § 114).

*Article 10 (freedom of expression):* Although the applicant had denied that he had been the user of the relevant social-network account and alleged that the impugned content had been published by others, the Court proceeded on the assumption that there had been an "interference" with his right to freedom of expression, which had been prescribed by law.

As to the legitimate aim for the interference, the Court was not satisfied that the interests of national security, territorial integrity, and public safety had been shown to be pertinent in the present case. It considered, however, that the applicant's criminal prosecution could be regarded as having been intended for the prevention of disorder and crime and the protection of the "rights of others", specifically the dignity of people of non-Russian ethnicity, in particular Azerbaijani.

When determining whether the interference had been "necessary in a democratic society", the Court took into account various relevant factors, including: the social and political background against which the statements were made; whether the statements, seen in their immediate or wider context, can be seen as a direct or indirect call to violence or as a justification of violence, hatred or intolerance; the manner in which they were made; and their capacity to lead to harmful consequences.

Special emphasis in the Court's analysis was placed on the nature of the impugned content. In particular, it was noted that the impugned video titled *Russia 88 (Granny)* was a "mockumentary" as a form of artistic expression and satirical social commentary. However, the video being presented in isolation from the overall context of the film originally used to unmask nationalistic propaganda techniques had in fact produced the effect of inciting to ethnic hatred and violence.

The Court found that the domestic courts' reasoning based on the applicant's criminal intent to incite violence by uploading third-party content online can be regarded as both relevant and sufficient to justify his prosecution. Given the racist nature of the material and the absence of any commentary uncovering the applicant's attitude towards such content, the domestic courts had convincingly demonstrated that it had incited ethnic discord and, foremost, the applicant's clear intention of bringing about the commission of related acts of hatred or intolerance.

The Court had no reason to consider that by making the impugned material accessible to

other users the applicant had contributed or at least intended to contribute to any debate on a matter of public interest. Even though only some fifty people could have accessed that material and the applicant did not appear to have been a well-known or popular user of social media, which could have attracted public attention to the material and thus have enhanced its potentially harmful impact, the Court did not exclude that the sharing of the content in such a manner within an online group of like-minded persons might have the effect of reinforcing and radicalising their ideas without being exposed to any critical discussion or different views.

The Court also considered the nature and severity of the penalties imposed that had been deemed proportionate in the specific circumstances, before it concluded that there was no violation of Article 10 ECHR.

*Article 6 (right to a fair trial):* The Court observed that it was not shown that the decision to hold the appeal hearing *in camera* had been strictly required in the circumstances of the present case and that the exclusion of the press and public from the appeal hearing was not justified. The appeal court had not pointed to any factual elements or legal arguments to justify the hearing *in camera*. Lastly, it was also noted that the alleged violation of the applicant's right to a public hearing on appeal had not been redressed in the cassation-instance proceedings before the Regional Court. There has, therefore, been a violation of Article 6 § 1 of the Convention.

**Note:** This judgment is a continuation of the Court's jurisprudence on freedom of expression online. Unlike many previous cases which dealt with the liability of Internet portals for comments posted on their sites by anonymous third parties ([Delfi AS v. Estonia](#) [GC], judgment of 16 June 2015, application no. 64569/09; [Magyar Tartalomsgátlatók Egyesülete and Index.hu Zrt v. Hungary](#), judgment of 2 February 2016, application no. 22947/13) or for example, for posting hyperlink leading to defamatory content ([Magyar Jeti Zrt v. Hungary](#), judgment of 4 December 2018, application no. 11257/16), this case raises issues concern-

ing the individual responsibility of each user of online social-media platforms for the content he or she shares in his or her social interaction with the others, especially where a person did not accompany it with any comment or otherwise signify his or her attitude toward the content.

### *Amaghlobeli and Others v. Georgia, judgment of 20 May 2021, application no. 41192/11*

#### Facts of the case

**O**n 15 August 2009, two of the applicants, who were journalists, entered the restricted customs-control zone of a border checkpoint, where new arrivals were filling in customs declarations and duties were being levied on imported goods, after they had received some reports of arbitrary customs clearance practices being conducted by border police officers. They interviewed travellers and took photographs, and refused to leave when requested to do so by customs officers, referring to their freedom to carry out their profession as journalists as they saw fit. As a result, they were each fined 1,000 Georgian laris (GEL) for disobeying the customs officers' orders and were escorted out of the restricted zone. Neither their recording equipment nor recorded interviews were confiscated. The following week their newspaper featured a comprehensive article on the customs procedures, which also included the interviews recorded.

The court action for annulment of the administrative sanction had been dismissed as ill-founded. In early February 2010 the Tbilisi City Court found that the two journalists had disrupted customs procedures and had breached the Customs Code by entering the zone without prior permission and disobeying the repeated orders of the customs officers to leave. It stressed that it was why they had been fined, not for exercising their profession as journalists, as well as that journalists had to abide by the same rules that apply to the general public. This ruling was upheld by the Tbilisi Court of Appeal and the Supreme Court.



The applicants complained before the ECtHR that the imposition of a fine for engaging in news-gathering activities in a restricted State-controlled zone had constituted an interference with their rights under Article 10 of the Convention, arguing that the interference with their journalistic freedom could not be said to have been “prescribed by law” as the wording of the relevant domestic provisions did not meet the “foreseeability” requirement and that the amount of the fine had been high enough to have a “chilling effect” on investigative journalism.

### Court’s reasoning

As to the lawfulness of the interference, the Court considered that the applicants’ argument that the effects of the domestic law were not foreseeable had been duly examined by the domestic courts, whose reasoning was not arbitrary. The Court had no doubt that the interference complained of was prescribed by law and pursued the legitimate aim of preventing disorder in the State-controlled customs zone.

The Court’s assessment of the circumstances of the case then focused on the value of the news-gathering activities and the concept of “responsible” journalism.

It was pointed out that a restriction on a journalist’s research and investigative activities called for close scrutiny because of the risk to the vital role played by the media in a democratic society as “public watchdogs” and to their ability to provide accurate and reliable information. Nevertheless, it was highlighted that paragraph 2 of Article 10 did not guarantee wholly unrestricted freedom of expression, even with respect to media coverage of matters of serious public concern. The concept of responsible journalism meant that journalists could not, in principle, be released from their duty to obey ordinary criminal law on the sole basis that they were journalists, but they had to behave lawfully, including when acting publicly with the authorities when carrying out journalistic work.

The Court observed that while the news-gathering activities had been capable of contributing meaningfully to a public debate on a matter of public interest, the journalists could have used alternative and less intrusive means to gather the desired information, in particular as they had not shown that only first-hand and direct knowledge of the customs procedures, based on their personal experience and presence in the zone, could have the value and reliability to the extent necessary for their journalistic activities.

In light of the applicant’s conduct, the fact that the domestic authorities had not objected to the applicants making full use of the interviews recorded in the customs-control zone and publishing the article on their journalistic investigation, the amount of the fine (approximately EUR 320) that had not been considered excessive, as well as the fact that the domestic courts had had themselves conducted a fully-fledged balancing exercise, duly acknowledging the applicants’ status as journalists and had provided solid reasons for their decisions which were in line with the Court’s case-law, the Court found no violation of Article 10 of the Convention.

**Note:** This judgment is a further development of the Court’s previous case law concerning the access to specific sites and localities, and presence therein, for the purpose of gathering information, for instance, in the cases of [Karácsony v. Hungary](#) [GC] (judgment of 17 May 2016, application no. 37494/02); [Selmani and Others v. “the former Yugoslav Republic of Macedonia”](#) (judgment of 9 February 2017, application no. 67259/14); [Szurovecz v. Hungary](#) (judgment of 8 October 2019, application no. 15428/16) and [Mándli and Others v. Hungary](#) (judgment of 26 May 2020, application no. 63164/16). In particular, it is relevant because it recalls the duty of journalists to be aware of and accept the legal consequences of unlawful conduct, including the risk of being subject to legal sanctions, already elaborated in detail in the case of [Pentikäinen v. Finland](#) [GC] (judgment of 20 October 2015, application no. 11882/10).

# In-depth analysis of selected cases

---

***Big Brother Watch and Others v. the United Kingdom [GC], judgment of 25 May 2021, application nos. 58170/13, 62322/14 and 24960/15***

## Facts of the case

The three applications were introduced to the Court in 2013 by 16 organisations and individuals, including the UK NGO Big Brother Watch, following the revelations by Edward Snowden concerning the electronic ‘mass surveillance’ practices operated by the intelligence services of the United States of America and the United Kingdom, including the bulk interception of communications through the use of Tempora, PRISM, and Upstream programs.

After the applicants’ claims were dismissed at domestic level, they complained before the ECtHR about the scope and magnitude of the electronic surveillance programs operated by the Government of the United Kingdom.

Cumulatively, the applicants in the three joined cases complained about the compatibility with Articles 8 (right to respect for private life) and 10 (freedom of expression) of three discrete regimes: the regime for the bulk interception of communications under section 8(4) of the Regulation of Investigatory Powers Act (RIPA); the regime for the receipt of intelligence from foreign intelligence services; and the regime for the acquisition of communications data from communications service providers.

In a judgment of 13 September 2018, the Chamber found that the bulk interception regime un-

der section 8(4) of the Regulation of Investigatory Powers Act (RIPA) and the regime for obtaining data from communications service providers under Chapter II of RIPA had violated Articles 8 and 10. It found no violation of Article 8 in respect of the intelligence-sharing regime which was deemed to be Convention compliant. The case was referred to the Grand Chamber at the applicants’ request.

## Court’s reasoning

**A**rticle 8 (right to respect for private and family life): The Grand Chamber largely confirmed the Chamber judgment, where mass surveillance of foreign communications was recognised as an indispensable tool for states to safeguard national security, provided that it is undertaken in accordance with the adequate safeguards and oversight mechanisms. In this context, it also confirmed that national authorities enjoy a wide margin of appreciation in choosing how best to achieve the legitimate aim of protecting national security and that the decision to operate a bulk interception regime does not of itself violate Article 8 rights.

The Court made a clear distinction between targeted and bulk interception, which is generally directed at international communications and predominantly used for foreign intelligence gathering, as well as early detection and investigation of new threats from both known and unknown actors, including cyberattacks, counterespionage, and counter-terrorism (§ 345). The Court then outlined the approach that must be followed in

bulk interception cases, having as its departure point the six minimum safeguards developed in *Weber and Saravia v. Germany* (decision of 29 June 2006, application no. 54934/00) on targeted interception. According to those safeguards, the domestic law authorising surveillance must specify: (1) the nature of the offences which may give rise to an interception order; (2) a definition of the categories of people liable to have their telephone tapped; (3) a limit on the duration of the telephone tapping; (4) the procedure to be followed for examining, using and storing the data obtained; (5) the precautions to be taken when communicating the data to other parties; and (6) the circumstances in which recordings may or must be erased, or the tapes destroyed.

Furthermore, the Court set out a new conceptual framework comprising of eight criteria which need to be taken into account in addition to the six Weber safeguards when assessing whether the respondent State had acted within its narrow margin of appreciation and whether its operations were lawful and necessary: (1) the grounds on which bulk interception may be authorised; (2) the circumstances in which an individual's communications may be intercepted; (3) the procedures to be followed for granting authorisation; (4) the procedures to be followed for selecting, examining and using intercept material; (5) the precautions to be taken when communicating the material to other parties; (6) the limits on the duration of the interception, the storage of the intercept material and the circumstances in which such material must be erased or destroyed; (7) the procedures and modalities for supervision by an independent authority of compliance with the above safeguards and its powers to address non-compliance; and (8) the procedures for independent *ex post facto* review of such compliance and the powers vested in the competent body in addressing instances of non-compliance (§ 361).

Following its thorough assessment, the Court held that viewed as a whole, the regime had not contained sufficient "end-to-end" safeguards to provide adequate and effective guarantees against arbitrariness and the risk of abuse. While the Interception of Communications Commissioner provided independent and effective oversight

of the regime, and the Investigatory Powers Tribunal offered a robust judicial remedy to anyone who suspected that his or her communications had been intercepted by the intelligence services, those important safeguards were not sufficient to counterbalance the identified shortcomings. The bulk interception of communications regime under section 8(4) of the RIPA did not meet the "quality of law" requirement and was therefore incapable of keeping the "interference" to what was "necessary in a democratic society".

Accordingly, the Grand Chamber unanimously upheld the earlier findings of the breach of Article 8 rights in respect to bulk interception and the obtaining of data from communications service providers, while, also in line with the earlier decision, it found that there had been no violation of the right to respect for private and family life in respect to the UK intelligence-sharing arrangements.

*Article 10 (freedom of expression):* The Court also examined the complaints under Article 10 brought by some applicants in relation to the section 8(4) regime. They argued that the protection afforded by Article 10 to privileged communications was of critical importance to them as journalists and NGOs respectively. In particular, they alleged that the bulk interception regime was in breach of Article 10 because the large scale interception and the maintaining of large databases of information had a chilling effect on freedom of communication for journalists.

The Grand Chamber referred to the reasoning provided by the Chamber which held that as the surveillance measures under the section 8(4) regime were not aimed at monitoring journalists or uncovering journalistic sources the interception of such communications could not, by itself, be characterized as a particularly serious interference with freedom of expression. However, it considered that the interference would be greater if those communications were selected for examination and it could only be "justified by an overriding requirement in the public interest" if it was accompanied by sufficient safeguards as to the circumstances in which such communications could be selected intentionally for examination



that would have to be set out sufficiently clearly in domestic law, and the adequate measures that would have to be put in place to ensure the protection of confidentiality. In the absence of any publicly available arrangements limiting the intelligence services' ability to search and examine confidential journalistic material other than where it was justified by an overriding requirement in the public interest, the Chamber found that there had also been a violation of Article 10 of the Convention.

The Grand Chamber applied a very similar approach. It began by recalling the importance of the protection of journalistic sources as one of the cornerstones of freedom of the press and noted the detrimental impact which the disclosure of sources might potentially have, not only on the source, whose identity may be revealed, but also on the media outlet disclosing it and on members of the public, who have an interest in receiving information imparted through anonymous sources. It also referred to [Sanoma Uitgevers B.V. v. the United Kingdom](#) [GC] (judgment of 14 September 2010, application no. 38224/03) and other cases to highlight the need for putting in place legal procedural safeguards, including a judicial review, capable of preventing identification of sources, unless a less intrusive measure can suffice to serve the overriding public interests established.

The Court then outlined that if the confidential journalist material was accessed by the intelligence services intentionally, through the deliberate use of selectors or search terms connected to a journalist or news organisation, there is a high probability that that material will be selected for examination. Such interference will be commensurate with that occasioned by the search of a journalist's home or workplace and that would very likely result in the acquisition of significant amounts of confidential journalistic material and could undermine the protection of sources to an even greater extent than an order to disclose a source. Therefore, before the intelligence services search the intercepted material by using selectors or search terms known to be connected to a journalist, the selectors or search terms must have

been authorised by a judge or other independent and impartial decision-making body vested with the power to determine whether they had been "justified by an overriding requirement in the public interest" and, in particular, whether a less intrusive measure might have sufficed to serve the public interest.

It was further noted that same authorisation would also be required when confidential journalist material is accessed unintentionally, as a "bycatch" of the bulk interception operation; in such case, the degree of interference with journalistic communications and/or sources could not be predicted at the outset.

The Grand Chamber took note of the Court's stance in *Weber and Saravia*, where the Court accepted that the initial interception, without examination of the intercept material, did not constitute a serious interference with Article 10. Nevertheless, given that, owing to technological developments, surveillance which was not targeted directly at individuals had the capacity to have a very wide reach, it was imperative that domestic law contained robust safeguards regarding the storage, examination, use, onward transmission and destruction of such confidential material.

The Court noted the presence of some additional safeguards in respect of confidential journalistic material in the Interception of Communications Code of Practice (IC Code) which aimed at reducing the extent of the collateral intrusion, if the interception was likely to give rise to a collateral infringement of privacy, including where journalistic communications were involved. While accepting that the safeguards in the IC Code concerning the storage, onward transmission, and destruction of confidential journalistic material were adequate, the Court concluded that the additional safeguards in the IC Code did not address the weaknesses identified by the Court in its analysis of the regime under Article 8 of the Convention, nor did they satisfy the requirement that the use of selectors or search terms known to be connected to a journalist be authorised by a judge or other independent and impartial decision-making body, in the case where access to

confidential journalistic material was intentional or highly probable in view of the use of selectors connected to a journalist. On the contrary, all that was required in such cases was that the reasons, including necessity and proportionality for doing so are clearly documented.

Moreover, there were insufficient safeguards in place to ensure that once it became apparent that a communication which had not been deliberately selected for examination contained confidential journalistic material, it could only continue to be stored and examined by an analyst if authorised by a judge or other independent and impartial decision-making body. Instead, all that was required in such situations was that “particular consideration” be given to any interception which might have involved the interception of confidential journalistic material.

In view of both of these weaknesses, and those identified by the Court in its consideration of the complaint under Article 8 of the Convention, the Court found that there has also been a breach of Article 10 of the Convention by virtue of the operation of the section 8(4) regime.

Additionally, the Court found a violation of Article 10 in relation to the acquisition of communications data from communications service providers on account of the fact that the operation of the regime under Chapter II of RIPA was not “in accordance with the law”. No violation of Article 10 was established in respect of the receipt of intelligence from foreign intelligence services.

### General comments

The present case is of vital importance because it scrutinizes the legality of the use of mass surveillance regimes and it has embraced the utility of bulk interception of foreign communications as a valuable means to achieve the legitimate aims pursued, particularly the fight against global terrorism and serious crime, thus being a continuation of its previous practice which dates back to the landmark cases of *Weber and Saravia v. Germany* and *Liberty and*

*Others v. the United Kingdom* (judgment of 1 July 2008, application no. 58243/00).

It appears that the Court’s approach differs from its earlier case-law on bulk interception of communications where the Court set out a stringent requirement for the existence of ‘reasonable suspicion’ against a citizen before the surveillance can be authorised (*Roman Zakharov v. Russia* [GC], judgment of 4 December 2015, application no. 47143/06 and *Szabó and Vissy v. Hungary*, judgment of 12 January 2016, application no. 37138/14).

The case at hand also lays down for the first time new procedural safeguards that all national legislation must adhere to. A similar approach in the assessment of the legality of national regimes for bulk interception of communications was also taken in the Court’s judgment in the case of *Centrum för rättvisa v. Sweden* [GC] (judgment of 25 May 2021, application no. 35252/08).

Apart from its Article 8 aspects, this judgment is also to a certain extent relevant for the protection of journalistic sources given that it identifies a serious risk of their disclosure when carrying out mass surveillance operations, which might have an adverse impact on the freedom of the press.

***Budinova and Chaprazov v. Bulgaria, judgment of 16 February 2021, application no. 12567/13 and Behar and Gutman v. Bulgaria, judgment of 16 February 2021, application no. 29335/13***

### Facts of the cases

In January 2006, the applicants in these two cases, of Roma (in *Budinova and Chapzarov*) and Jewish (in *Behar and Gutman*) ethnicity, brought proceedings under the Protection from Discrimination Act against Mr Siderov, a well-known journalist and a leader of the far-right nationalist party Ataka. The applicants maintained that some xenophobic statements made in public

by the defendant constituted harassment against them as members of the ethnic minorities that were attacked, as well as incitement to discrimination. These statements were made in two books (in *Behar and Gutman*) and in television broadcasts, interviews, speeches, and a book (in *Budinova and Chapzarov*). The applicants argued that each of them, as member of a minority, had been personally affected and sought a court injunction against Mr Siderov compelling him to apologize publicly and refrain from making such statements in the future.

The applicants' claims were dismissed by the domestic courts in the first instance and on appeal.

In *Budinova and Chapzarov* the Sofia District Court observed that statements were not phrased in a correct manner and were revealing of a negative attitude towards Roma. However, they had touched upon the integration of Roma: by calling for the investigation and punishment of offences committed by Roma, and for them to abide by the laws, Mr Siderov's public manifestation of his negative views about the conduct of the Roma community did not in itself amount to discrimination. Indeed, they had not been aimed at placing that community in a less favorable position, but were rather directed towards the equal treatment of the members of the various ethnic groups.

In *Behar and Gutman*, the Sofia District Court held that it had not been demonstrated that by making the impugned statements, Mr Siderov had sought to impinge on the applicants' dignity or honor or to create an intimidating, hostile or offensive environment. Nor was it shown that Mr Siderov had willfully encouraged anyone to carry out discrimination. Moreover, his statements had not caused any of their recipients to treat the applicants less favorably than others owing to their ethnicity.

On appeal, the Sofia City Court upheld the two lower courts' judgments, while the Supreme Court of Cassation declined to accept the appeal on points of law for examination as there was no indication that there was any inconsistent case-law regarding the matter.

Subsequently, the applicants complained before the ECtHR under Articles 8 (right to respect for private and family life) and 14 (prohibition of discrimination) of the Convention, alleging that by dismissing their claims the Bulgarian courts had failed in their positive obligation to ensure respect for the applicants' private life.

### Court's reasoning

The Court applied an identical reasoning in both cases, while introducing a stringent admissibility test to address the issue of whether negative public statements about a social group could be seen as affecting the private life of individual members of that group to the point of triggering the application of Articles 8 and 14.

In this respect, the Court referred to its position taken in [Aksu v. Turkey](#) [GC] (judgment of 15 March 2012, application nos. 4149/04 and 41029/04), which laid down that the negative stereotyping of the group had to reach a certain level that could only be decided on the basis of the entirety of the circumstances of the specific case, and in [Denisov v. Ukraine](#) [GC] (judgment of 25 September 2018, application no. 76639/11), where it was stated that the negative effect of a statement or an act on someone's private life had to rise above a "threshold of severity".

The Court took into account several relevant factors, including: 1) the characteristics of the target group (for instance, its size, its degree of homogeneity, its particular vulnerability or history of stigmatization and its position *vis-à-vis* society as a whole); 2) the precise content of the negative statements (in particular, the degree to which they could convey a negative stereotype, and the specific content of that stereotype); 3) the form and context in which the statements had been made, their reach, the position and status of their author, and the extent to which they could be considered to have affected a core aspect of the group's identity and dignity. Applying these factors to the present cases, the Court noted that both groups targeted by the content of the pol-

itician's statements could be seen as being in a vulnerable position.

In *Budinova and Chaprazov*, the statements appeared to have been deliberately couched in inflammatory terms, visibly seeking to portray Roma in Bulgaria as exceptionally prone to crime and depravity. They had been systematic and characterized by their extreme virulence.

In *Behar and Gutman*, the statements had been virulently anti-Semitic and they had rehearsed timeworn anti-Semitic narratives, also by denying the Holocaust and casting it as a story contrived as a means for financial extortion.

In view of the fact that Mr Siderov was a well-known figure in Bulgarian society with considerable media presence, who also became the chairman of an ascendant political party and won second place in a presidential election, and that the applicants had lodged their claims against him at the time when his political career had been on the rise, the Court concluded that the impugned statements had been capable of having a sufficient impact on the sense of identity of Jews and Roma in Bulgaria, and on their feelings of self-worth and self-confidence, reaching "certain level" or "threshold of severity" required for the applicability of Articles 8 and 14.

Further, the Court held that in their assessment the Bulgarian courts had downplayed the capacity of the impugned statements to stigmatize both groups and arouse hatred and prejudice against them. While apparently ascribing considerable weight to freedom of expression, they had failed to carry out a proper balancing exercise between the politicians' right to freedom of expression and the applicants' right to respect for their private life in line with the Court's case-law.

In particular, in *Budinova and Chaprazov*, the politician's statements had gone beyond being a legitimate part of a public debate about ethnic relations and crime in Bulgaria, amounting as they did to extreme negative stereotyping meant to vilify Roma in that country and stir up prejudice and hatred towards them. Similarly, in *Behar and Gutman*, the impugned statements in his two

books had meant to vilify Jews and stir up prejudice and hatred towards them.

Consequently, the Court found a violation of Article 14 in conjunction with Article 8 of the Convention on account of the failure of the domestic courts to discharge their positive obligation to grant adequate redress to the applicants in respect of the politician's discriminatory public statements.

In both cases, the ECtHR held that finding of violation would be sufficient just satisfaction in respect of any non-pecuniary damage suffered by the applicants and accordingly, the ECtHR dismissed their separate claims for damages.

### General comments

The judgments at hand set a precedent as the Court for the first time found violations in cases of general anti-minority hate speech, even if it did not seem that the individual members of a certain community were personally targeted. Moreover, the Court clarified the criteria to be applied to assess whether certain speech is sufficiently prejudicial to affect a community's sense of identity/ its members' self-worth. Thus, the Court has finally recognised the impact of identity abuse on individual dignity. In doing so, it also relied on [Recommendation No. R \(97\) 20 on "hate speech" of the Committee of Ministers](#) and the findings of the European Commission against Racism and Intolerance (ECRI) contained in its reports issued in respect of Bulgaria.

It is also worth noting that in its previous similar cases the Court had consistently held that sweeping statements attacking or casting in a negative light entire ethnic, religious or other groups deserved no or very limited protection under Article 10, read in the light of Article 17, the decisive point being whether the speaker sought to stir up hatred or turned the virulent expression into a call for hatred or intolerance (*Perinçek v. Switzerland* [GC], judgment of 15 October 2015, application no. 27510/08, §§ 115, 231). On the contrary, in the cases at hand, the Court was reluctant to apply Article 17 and did not exclude extreme speech from the scope of Article 10.

Overall, the present judgments mark a significant development in the Court's jurisprudence on the protection of victims of impersonal hate, demonstrating a quite different position than the one in several similar cases: [Pirali v. Greece](#) (decision of 15 November 2007), application no. 28542/05); [L.Z. v. Slovakia](#) (decision of 27 September 2011, application no. 27753/06); [Aksu v. Turkey](#) (mentioned above); [Lewit v. Austria](#) (judgment of 10 October 2019, application no. 4782/18) and [Panayotova and Others v. Bulgaria](#) (decision of 7 May 2019, application no.12509/13)– all of which had an unsuccessful outcome in front of the Court.

### [OOO Informatsionnoye Agentstvo Tambov-Inform v. Russia](#), judgment of 18 May 2021, application no. 43351/12

#### Facts of the case

The applicant is a limited liability company incorporated in 2001 which is involved in radio and television broadcasting. In November 2001 the applicant founded a mass-media outlet in the form of an information agency under the same name which operated through an Internet site. The case concerns their conviction for the publication of two articles and an online poll of voting preferences for the elections to the national legislature, the State Duma, on its website during an election period.

Namely, on 2 December 2011 the applicant company was convicted of production, dissemination or placement of campaigning material in breach of the electoral legislation as it had failed to comply with certain formalities for pre-election campaigning, in particular to provide certain details about that material (the number of copies and the date of its publication, and whether it had been paid for from the electoral fund of a candidate or a party, etc.) and fined 50,000 Russian roubles (RUB). In 2012 it was separately convicted and fined RUB 30,000 for publishing “campaigning material” prior to the official pre-election

campaigning period regarding the articles that were held to essentially concern one party and contain negative comments which incited voters to form a negative opinion of that party.

With respect to the poll, the company was convicted and fined RUB 30,000 for omitting to provide information on the organisation that had run the poll and when it had been taken, the number of people who had participated, as well as to specify the region for the polling and the methodology, the margin of error, and other relevant information as regards the people who had commissioned the poll and paid for its dissemination.

The judgments convicting the applicant company in first instance were subsequently upheld on appeal and following judicial review.

Relying on Article 10 of the ECtHR, the applicant company complained about the classification of the information on its website as pre-election campaigning and the fines imposed on it in the administrative-offence cases.

#### Court's reasoning

As to the admissibility, the Court recalled that pre-election campaigning falls within the scope of the right to freedom of expression as protected by Article 10, a provision which applies not only to the content of information but also to the means of its dissemination ([Ahmet Yıldırım v. Turkey](#), judgment of 18 December 2012, application no. 3111/10).

On the merits, the Court noted that the relevant statutory provisions did not specifically regulate in express terms pre-election campaigning through an Internet-based media outlet, like the website in the present case. Without giving a definitive answer to the question of whether it was prescribed by law, the Court observed that the prosecutions in this case were related to the domestic regulations on pre-election campaigning examined by the Court in [Orlovskaya Iskra v. Russia](#) (judgment of 21 February 2017, application no. 42911/08).



In that case, a violation had been found due to a restriction of a privately-owned print media outlet to publish critical articles about a candidate in the elections, independently of any political advertising or campaigning paid from another candidate's electoral fund. The Court had held that the domestic regulations had restricted the activity of the print media on the basis of a criterion (whether the content in relation to a candidate should be perceived as a mere "negative comment" or whether it had a "campaigning" goal) that had been vague and had left too much discretion to the authorities and that it had not been convincingly demonstrated that the print media had to be subjected to rigorous requirements of impartiality during an election period. It was concluded that the applicable regulatory framework had restricted, excessively and without any compelling justification, the number of participants in the political discourse during an election period, thus impinging upon the applicant organisation's freedom to impart information and ideas during the election period and it was not shown to achieve, in a proportionate manner, the legitimate aim of running fair elections.

In the present case, the Court further stressed that it concerned the exercise of the right to freedom of expression via an Internet-based media outlet, as well as the important role that the Internet plays in enhancing the public's access to news and facilitating the dissemination of information in general. It emphasised the role of the media as "public watchdogs", especially in the election periods. In addition, the Court reminded that the exercise of the freedom of expression online carries with it duties and responsibilities and thus could be subject to restrictions or penalties.

According to the Court, the domestic courts' approach toward the regulations on pre-election campaigning and related formalities appeared to be the same irrespective of whether the information was disseminated through a print media outlet or an online media outlet and therefore, the findings in *Orlovskaya Iskra* should be also applicable in the present case.

The Court also found that the applicant company had not acted in bad faith in order to provide accurate and reliable information in accordance with the ethics of journalism when publishing the articles. On the contrary, the domestic courts had failed to examine if any harm had been caused by the content of the articles to the exercise and enjoyment of human rights and freedoms in the electoral context even though such harm caused by content and communications on the Internet, particularly to the right to respect for private life, is potentially greater than that caused by publications in the press ([Delfi AS v. Estonia](#) [GC], judgment of 16 June 2015, application no. 64569/09, § 133). As a result, the Court concluded that it had not been "necessary in a democratic society" to subject the impugned articles to the regulations concerning pre-election campaigning and to prosecute the applicant company for non-compliance with certain formalities prescribed in those regulations.

Similarly, the prosecutions of the applicant company for not providing certain information when disseminating opinion polls had not been "necessary in a democratic society" since the polling methodology should have been self-evident from the presentation on the website and certain other formal requirements, such as indicating a region for polling, seemed to be inapplicable to online polling.

## General comments

**T**his judgment is an important step in the Court's case law on political speech and media coverage of elections since it establishes high standards that need to be followed by the States parties to the Convention, which should guarantee the right of the media to report on politics in election times and to ensure the public's right to be adequately informed. It follows the same line of argumentation as in the case of *Orlovskaya Iskra*, which highlighted that "[a]t election time the press assists the "free expression of the opinion of the people in the choice of the legislature". The "public watchdog" role of

the press... is not limited to using the press as a medium of communication, for instance by way of political advertising, but also encompasses an independent exercise of freedom of the press by mass media outlets such as newspapers on the basis of free editorial choice aimed at imparting information and ideas on subjects of public interest. In particular, discussion of the candidates and their programs contributes to the public's right to receive information and strengthens voters' ability to make informed choices between candidates for office." (§ 130).

Lastly, the judgment reveals the lack of compatibility of the relevant regulatory framework with the Convention standards and the absence of any specific regulation of election-related on-line publications by media outlets, as well as the extensive substantive and temporal reach of

the general regulations based on the notions of "pre-election campaigning" and "campaigning material" and the overall uncertainty of the existing legal framework for media outlets (§ 126). Accordingly, the Court send an explicit message to the Russian authorities when it indicated that under Article 46 of the Convention (binding force and execution of judgments) it is for them to choose and implement, consistently with the conclusions and spirit of the Court's findings and subject to supervision by the Committee of Ministers, the appropriate legislative or judicial measures to (i) protect the right to freedom of expression exercised by the print and online media and their editorial independence during an electoral campaign, and (ii) to mitigate any chilling effect arising on account of the application of the electoral legislation on pre-election campaigning (§ 128).

## Freedom of Expression and Freedom of the Media in South-East Europe (JUFREX)

The action is part of the “Horizontal Facility for the Western Balkans and Turkey 2019–2022” and it builds upon the results achieved during a previous regional European Union and Council of Europe Joint programme “Reinforcing Judicial Expertise on Freedom of Expression and the Media in South-East Europe (JUFREX)”. The regional action is strongly interconnected with the six Beneficiary-specific JUFREX actions in: Albania, Bosnia and Herzegovina, Kosovo\*, Montenegro, North Macedonia and Serbia.

JUFREX activities are implemented with the aim to:

- promote freedom of expression and freedom of the media in line with European standards;
- improve the application of those standards by engaging a range of actors responsible to apply such standards in their daily work, namely: judges, prosecutors, lawyers, police officers, representatives of media regulatory authorities, media actors and students;
- consolidate a platform for regional cooperation, discussion and exchange of good practices.

Where an enabling environment for freedom of expression and freedom of the media exists and the right to seek, impart and receive information is well protected, citizens can genuinely participate in the democratic processes. National training institutions for legal professionals (Judicial Academies and Bar Associations) play a vital role to make this become a reality.

All JUFREX activities are based on innovative and modern learning tools on freedom of expression and freedom of the media and adopt a dynamic methodology for adult learning and a peer-to-peer model.

The “Horizontal Facility for the Western Balkans and Turkey 2019-2022” is a joint initiative of the European Union and the Council of Europe that enables the Beneficiaries to meet their reform agendas in the fields of human rights, rule of law and democracy and to comply with the European standards, including where relevant within the framework of the EU enlargement process.

This document was produced with the financial support of the European Union and the Council of Europe. The views expressed herein are responsibility of the author and can in no way be taken to reflect the official opinion of the either party.

\* This designation is without prejudice to positions on status, and is in line with UNSCR 1244 and the ICJ Opinion on the Kosovo Declaration of Independence.

The Council of Europe is the continent’s leading human rights organisation. It comprises 47 member states, including all members of the European Union. All Council of Europe member states have signed up to the European Convention on Human Rights, a treaty designed to protect human rights, democracy and the rule of law. The European Court of Human Rights oversees the implementation of the Convention in the member states.

[www.coe.int](http://www.coe.int)

The Member states of the European Union have decided to link together their know-how, resources and destinies. Together, they have built a zone of stability, democracy and sustainable development whilst maintaining cultural diversity, tolerance and individual freedoms. The European Union is committed to sharing its achievements and its values with countries and peoples beyond its borders.

[www.europa.eu](http://www.europa.eu)

Funded  
by the European Union  
and the Council of Europe



EUROPEAN UNION

COUNCIL OF EUROPE



CONSEIL DE L'EUROPE

Implemented  
by the Council of Europe