IN THE EUROPEAN COURT OF HUMAN RIGHTS

APP NO. 931/13

BETWEEN:

SATAKUNNAN MARKKINAPÖRSSI OY AND SATAMEDIA OY

Applicant

V

FINLAND

Respondent

THIRD PARTY INTERVENTION SUBMISSIONS BY ARTICLE 19, ACCESS TO INFORMATION PROGRAMME AND TÁRSASÁG A SZABADSÁGJOGOKÉRT

INTRODUCTION

1. These submissions are submitted on behalf of ARTICLE 19: Global Campaign for Free Expression, the Access to Information Programme, and Társaság a Szabadságjogokért ("the Interveners"). The Interveners are all independent human rights organisations which aim to protect and promote the fundamental rights to freedom of expression and/or freedom of information, as well as privacy and data protection. The Interveners welcome this opportunity to intervene as a third party in this case, by leave of the President of the Court given on 24 March 2016 pursuant to Rule 44(3) of the Rules of Court. These submissions do not address the facts or merits of the applicant's case.

2. The core issue at stake in the present case is whether prohibiting the republication of information which contains personal information of citizens, where that information has previously been published by the State, is compatible with the Article 10 rights to free expression and freedom of information. We believe that this case presents the Court with an important opportunity to examine: (i) the evolving nature of journalistic activities and the ways in which those activities increasingly depend on effective data-sharing by social watchdog organisations and others (ii) the importance generally of protecting the Article 10 rights to receive and impart information and the implications of EU legislation on the re-use of public sector information; and (iii) the proper approach to be taken by the Court to the balancing of data privacy rights with Article 10 rights in the context of international, regional and national legislation.

1. CORE PRINCIPLES APPLYING TO FREEDOM OF EXPRESSION AND INFORMATION

3. As the Strasbourg organs have noted, Article 10 para. 2 (Article 10-2) does not give the Contracting States an unlimited power of appreciation, but the Court is empowered to give the final ruling on whether a "restriction" or "penalty" is reconcilable with freedom of expression as protected by Article 10. The domestic margin of appreciation thus goes hand in hand with a European supervision, which concerns both the aim of the measure challenged and its "necessity", covering not only the basic legislation but also the decisions applying it, even one given by an independent court.

4. The Court's supervisory functions oblige it to pay the utmost attention to the principles characterising a "democratic society". Freedom of expression constitutes one of the essential foundations of such a society, one of the basic conditions for its progress and for the development of every man. Subject to Article 10-2, 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 the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society". This means, amongst other things, that every "formality", "condition", "restriction" or "penalty" imposed in this sphere must be proportionate to the legitimate aim pursued.[1]

5. These principles are of particular importance as far as the press is concerned. Whilst the press must not overstep the bounds set, inter alia, for the "protection of the reputation of others", it is nevertheless incumbent on it to impart information and ideas on political issues just as on those in other areas of public interest. Not only does the press have the task of imparting such information and ideas: the public also has a right to receive them.[2] Therefore the Court has recognized that the function of the press includes the creation of forums for public debate. However, the realisation of this function is not limited to the media or professional journalists, but could be also conducted by a non-governmental organisation[3] or even an individual.[4] The purpose of the applicant's activities can therefore be said to have been an essential element of informed public debate.

6. In its practice also the Court has embraced the notion of "freedom to receive information" includes a right of access to information.[5] A restriction of national state bodies which limits such access, fails to comply with the three-part test as provided under Article 10-2, and is an interference in the right and amounts to an information monopoly as a form of censorship.[6]

7. As to the relationship between the right to access information as part of the general right to receive information and the right to impart the already available information the Court has held that a

[1] See Handyside v. United Kingdom, § 49.
[2] See Lingens v. Austria, § 41, Sunday Times v. United Kingdom, § 65.
[3] About the development of the concept of NGOs as "social watchdogs" see judgments of: Társaság a Szabadságjogokért v. Hungary, § 35, Youth Initiative for Human Rights v. Serbia, § 20, Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, § 34.
[4] See judgments of: Kenedi v. Hungary and Guseva v. Bulgaria.
[5] See Youth Initiative for Human Rights v. Serbia, ibid., Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, § 33.
[6] See Társaság a Szabadságjogokért v. Hungary, § 28, Österreichische Vereinigung zur Erhaltung, Stärkung und Schaffung eines wirtschaftlich gesunden land- und forstwirtschaftlichen Grundbesitzes v. Austria, § 47.

continuation of restrictions to publish information after it was already available prevented media from exercising their right and duty to purvey information on a matter of legitimate public concern.[7]

2. JOURNALISM & DATA SHARING

Relationship between traditional media undertakings and others conveying information and ideas in the public interest

8. Article 10 embodies two distinct rights: the right to free expression and the right to receive and impart information. Both of these rights play a crucial role in enhancing democracy and entrenching constitutional values. This principle has been repeatedly confirmed by the Court in a number of cases.[8]

9. The development of the internet has dramatically affected the ways in which Article 10 rights are exercised in the modern world. Prior to the invention of the internet, only the traditional media and the State were in practice able to undertake mass communication with members of the public. The ascendance of the internet has had a heavily democratising and pluralising effect on speech, effectively enabling a wide range of persons and organisations to participate in the processes of informing the public and inspiring public debate.

10. These developments have in turn contributed to a fundamental reshaping of the ways in which all forms of journalism are undertaken. The decline in their oligarchical control over the tools of mass communications, has meant that traditional media organisations now frequently struggle to fund serious public interest journalism. Those organisations are accordingly increasingly under pressure to obtain information where they can from free open access sources, including social watchdog organisations and others publishing information in the public interest. At the same time, social watchdog organisations and others are increasingly seeking to publish information which may in turn be given prominence and exposed to public debate by the traditional media. In this way, traditional media organisations and other organisations publishing information in the public interest operate together in a symbiotic relationship which fundamentally contributes to the pursuit of public interest journalism. The imperative to protect Article 10 rights in connection with such journalistic output is inevitably particularly strong.

11. The Court has emphasized in its decisions repeatedly that “in the light of its accessibility and its capacity to store and communicate vast amounts of information the internet plays an important role in enhancing the public’s access to news and facilitating the dissemination of information generally.”[9] Because of the unique nature of the internet, the duties and responsibilities of online media publications “may differ to some degree from those of a traditional publisher”.[10]

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[7] See Observer and Guardian v. the United Kingdom, § 69.
[8] Von Hannover v Germany (No. 2) (nos. 40440/08 and 60641/08) and Társaság a Szabadságjogokért v. Hungary (application no. 37374/04).
[9] Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2, par. 27), Neij and SundeKolmisoppi v. Sweden, p. 10; Ahmet Yildirim v. Turkey, par. 48; Annen v. Germany, par. 66.
[10] ECtHR Delfi AS v. Estonia, par. 113.

12. International law also places strong limits on restrictions on internet based communications. The UN Human Rights Committee in General Comment 34 has stated that:

> Any restrictions on the operation of websites, blogs or any other internet-based, electronic or other such information dissemination system, including systems to support such communication, such as internet service providers or search engines, are only permissible to the extent that they are compatible with paragraph 3 [of Article 19 of the ICCPR]. Permissible restrictions generally should be content-specific; generic bans on the operation of certain sites and systems are not compatible with paragraph 3.[11]

3. THE DEFINITION OF JOURNALISM

13. Importantly, EU law specifically recognises that, where data privacy is in issue, particular protection must be given to 'journalistic activities' (Article 9 of Directive 95/46/EC protection of individuals with regard to the processing of personal data and on the free movement of such data - "the Directive"). Relevantly, the European Court of Justice ("ECJ") adopted a very wide definition of 'journalism' in this context. Thus, in *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy* ("*Satamedia 2008*")[12], the ECJ held that, for the purposes of Article 9 of the Directive, an organisation which publishes data drawn from documents placed in the public domain under national legislation: *'may be classified as "journalistic activities" if their object is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They are not limited to media undertakings and may be undertaken for profit-making purposes*' (§61). This wide approach is clearly warranted in view of the contribution made to the journalistic endeavour by organisations other than traditional media undertakings.

14. The Committee of Ministers of the Council of Europe has broadly defined journalists from a functional standpoint as "any natural or legal person who is regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication"[13]. It also states that the protections (in a resolution relating to sources but equally applies to all freedom of expression related matters) that "other persons who, by their professional relations with journalists, acquire knowledge of information identifying a source through the collection, editorial processing or dissemination of this information, should equally be protected".

15. The Committee of Ministers confirmed this approach in its Recommendation CM/Rec (2011)7 on a new notion of 'media'. In that Recommendation, the Ministers called on member states to:[14]

> – adopt a new, broad notion of media which encompasses all actors involved in the production and dissemination, to potentially large numbers of people, of content (for example

[11] UN Human Rights Committee, General comment No. 34 Article 19: Freedoms of opinion and expression, CCPR/C/GC/34, July 2011.
[12] ECJ, Case C-73/07, 16 December 2008
[13] Council of Europe Committee of Ministers, Recommendation No. R (2000) 7 of the Committee of Ministers to Member States on the Right of Journalists not to Disclose Their Sources of Information, March 2000.
[14]The Recommendation is available here: https://wcd.coe.int/ViewDoc.jsp?id=1835645&Site=COE

information, analysis, comment, opinion, education, culture, art and entertainment in text, audio, visual, audiovisual or other form) and applications which are designed to facilitate interactive mass communication (for example social networks) or other content-based large-scale interactive experiences (for example online games), while retaining (in all these cases) editorial control or oversight of the contents;

– review regulatory needs in respect of all actors delivering services or products in the media ecosystem so as to guarantee people's right to seek, receive and impart information in accordance with Article 10 of the European Convention on Human Rights, and to extend to those actors relevant safeguards against interference that might otherwise have an adverse effect on Article 10 rights, including as regards situations which risk leading to undue self-restraint or self-censorship

16. In addition, the Council provided a set of indicators for determining whether a particular criterion is fulfilled. For example, a particular organisation or individual engaged in the dissemination of information will fully meet the public expectation criterion if it is available, reliable, provides content that is diverse and respects the value of pluralism, respects professional and ethical standards, and is accountable and transparent. At the same time, the Ministers highlighted that each of the criterion should be applied flexibly.

17. In the case of *Steinmetz & Others v Global Witness* ("*Steinmetz*"), the United Kingdom Information Commissioner (who is the statutory regulator in respect of UK data protection laws) was required to determine whether Global Witness, an organisation which campaigns and reports on natural resource corruption and human rights abuses, had been engaged in 'journalism' when it published reports online on a particular natural resource corruption. In line with the COE Recommendations and the ECJ judgment in *Satamedia 2008*, the Commissioner readily concluded that Global Witness had been engaged in journalism. Notably, the Commissioner went on to conclude that Global Witness was exempted from complying with various provisions of the UK data protection legislation in connection with its ongoing reporting activities."

18. In Ireland, the High Court extended the journalistic privilege to bloggers finding that "A person who blogs on an internet site can just as readily constitute an 'organ of public opinion' as those which were more familiar in 1937".[15] The court found that there was a high constitutional value in ensuring the blogger's right to contribute to public discourse, and that being compelled to reveal his sources would compromise the "right to educate (and influence) public opinion, [which] is at the very heart of the rightful liberty of expression."

19. The UN Special Rapporteur on Freedom of Expression in his 2015 report to the UN General Assembly has noted that "Article 19, which protects freedom of expression through any media, requires that States take into account a contemporary environment that has expanded well beyond

[15] Cornec v Morrice&Ors [2012] IEHC 376 (18 September 2012), available at: http://www.bailii.org/ie/cases/IEHC/2012/H376.html

traditional print and broadcast media…..Persons other than journalists inform the public and carry out a "vital public watchdog role". International bodies increasingly use terms more general than "journalist", such as "media professionals" or "media workers." The report highlights in particular new types of media including non-profit organisations and online commentators.

20. The Interveners contend that it is incumbent on the Court to strive to achieve an interpretation of Convention rights which is in harmony with the standards set by the COE in Resolution R (2000) 7 as well as by the ECJ in *Satamedia 2008* and international law. Consequently, the Court should not set a lower standard of protection for Article 10 rights than those established under EU law. The Interveners submit that do so would give rise to a breach of Article 53 of the Convention.

Public interest value of open access sources

21. Inevitably some information which is published via open access sources will have privacy implications for individuals. However, in assessing the legality of such publications it is important to have in mind the ways in which disclosures of personal data may contribute to the social good, particularly by creating transparency and accountability around the actions of those who wield power within society or alternatively who may be engaged in unlawful conduct.

22. By way of illustration, in the United Kingdom there was initial reluctance on the part of the authorities to release information under freedom of information legislation concerning the expenses incurred by UK Members of Parliament. It was alleged that such disclosures would constitute an unjustified interference with the privacy rights of MPs. However, once the disclosures were effected following various tribunal and court rulings, it became apparent that there had in fact been wide-spread abuse of the expenses system by elected officials. This has led to wide-scale reform of the expenses regime. Similarly the recent disclosures of information held by the Panamanian law firm, Mossack Fonseca (the "Panama Papers"), has facilitated important public interest reporting and public debate around the extent to which those who wield power in society are structuring their tax arrangements so as to avoid or evade the tax burdens placed on their fellow countrymen and women.

23. In practice however, it is often not these kinds of dramatic one-off disclosures which facilitate the pursuit of public interest journalism. More commonly, such journalism proceeds through a quiet, painstaking analysis of ostensibly innocuous data compiled and published through open access sources. Thus, for example, the NGO Open Corporates collects and publishes data relating to individuals drawn from records published by State authorities, currently over 99 million companies worldwide.[16] The compiling and publication of such data substantially assists investigative journalists in piecing together a clearer picture of an individual's corporate activities, thus contributing to an awareness of their overall corporate power and revealing whether the individual may be acting unlawfully (for example by holding office as a company director despite a relevant court

[16] https://opencorporates.com

disqualification order).[17] Similarly, the leaders of the G-8 in the 2013 Lough Erne Leaders' Communiqué stated that public registers of owners was a key promise. The release of the Panama Papers has resulted in a worldwide cry for the open availability of information on beneficial owners

24. It follows that the publication and reuse of information of this nature is not a form of publication which merely satisfies the curiosity of readers. It is often a form of publication which contributes very substantially to the pursuit of public interest journalism. In this sense, the publication of such information is wholly distinguishable from the publication of mere trivial 'tittle-tattle' concerning an individual. Whilst the imperative to afford Article 10 protection to the publication of the latter type of information may lesser,[18] the imperative to afford Article 10 protection to the former type of information is particularly acute.

25. The arguments outlined above become even stronger in circumstances where the personal data in issue has itself previously been published by the State or is otherwise deemed to be public under national legislation. In the United Kingdom, the State publishes information concerning the corporate offices held by individuals through the agency of Companies House. Such information is currently readily available to any member of the public on payment of a fee, although plans are afoot to convert the access system into one which does not require payment. Companies registrations are also available in a number of other countries including Sweden, Serbia, Estonia, Ukraine, Russia, Moldova, the Netherlands, Slovenia, Denmark, and Romania.[19] In fact, all the EU countries are bound by EU law to maintain public companies' registers[20] including data of persons who manage, supervise, control or represent them.[21] In turn, all these countries passed and enforced national laws ensuring the general accessibility of such data by electronic means.[22]

26. There are many other public records' databases with personal information publicly available for reuse including court documents, land ownership records, and public subsidies. In Ireland, the records of Births, Deaths and Marriages are open to the public. A recent investigation by the Ombudsman of Ireland found that limits on access to those records was a maladministration.[23]

27. The European Union has recognised the inherent public interest value of permitting the re-use of information generated by the public sector in the context of the discharge of public functions. Directive 2003/98/EC on the re-use of public sector information ("the PSI Directive") itself was enacted in

[17] See e.g. Global Witness, Jade: Myanmar's "Big State Secret", Oct. 23, 2015. https://www.globalwitness.org/en/campaigns/oil-gas-and-mining/myanmarjade/
[18] See further *Von Hannover v Germany* (no. 59320/00, ECHR 2004-VI) and *Axel Springer AG v. Germany* ([GC], no. 39954/08, particularly 91.
[19] Access Info Europe & Organized Crime and Corruption Reporting Project, It's none of your business!, April 2016.
[20] Directive 2009/101/EC of the European Parliament and of the Council of 16 September 2009 on coordination of safeguards which, for the protection of the interests of members and third parties, are required by Member States of companies within the meaning of the second paragraph of Article 48 of the Treaty, with a view to making such safeguards equivalent.
[21] See Article 2 (d) of the Directive.
[22] Cf. Article 3 of the Directive.
[23] Office of the Ombudsman, Hidden History? – The Law, the Archives, and the General Register Office, July 2012.

recognition of this principle. Re-use includes dissemination of information as can be seen in Recitals 4, 8 and 9 of the PSI Directive. Moreover, its amendment by Directive 2013/37/EU pushed for online publication of large amounts of data in machine readable and open formats. The amendments had to be reflected in all 28 national legislative systems by July 2015. According to the PSI Directive provisions (as amended in 2013) the grounds for exemptions from re-use should follow the ones applied by access to information regimes.[24]

28. Whilst certain categories of documents are excluded from the ambit of the PSI Directive, for example documents held by public service broadcasters or educational establishments, documents are not automatically excluded merely because they may incorporate personal data (see Article 1(2)). It follows that EU law implicitly recognises that there may be circumstances in which the re-use of public sector information comprising personal data ought to be permitted, albeit that the recital 21 to the PSI Directive also makes clear that it should be implemented and applied in compliance with the DP Directive, which of course recognises an exemption for journalism.

29. The fact that such personal data is published by the State, such that it is made readily available to members of the public, has the following important implications: first, it presupposes that there is a public interest in members of the public being able to access such information; second, it presupposes that the Parliament has found that public interest in publication outweighs the privacy rights of affected citizens; third, once publication has occurred, that in turn affects the extent to which the information in question can properly be regarded as inherently private. All of these factors substantially militate against any republication of the data being unduly invasive of the privacy rights of the affected data subjects.

4. BALANCING DATA PRIVACY RIGHTS AND ARTICLE 10 FREEDOMS

30. As noted above, EU law requires that data protection is balanced with freedom of expression and information by the incorporation of specific exemptions in Article 9 which allow for processing of personal information "for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression." A joint declaration of principles by all of the EU Data Protection Authorities in 2014 stated "Data protection rights must be balanced with other fundamental rights, including non-discrimination and freedom of expression, which are of equal value in a democratic society."[25] A revision of the EU Directive was approved by the Committee of Ministers, European Parliament and European Commission which requires significant recognition of freedom of expression and access to information. According to a recent FAQ "The proposed provisions on the 'right to be forgotten' are very clear: freedom of expression, as well as historical and scientific research are safeguarded."[26]

[24] See Article 1, para.2, (c).
[25] Joint statement of the European Data Protection Authorities Assembled in the Article 29 working party, 25 November 2014.
[26] Questions and Answers - Data protection reform, 21 December 2015

31. Similarly, the COE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS 108), which has now been ratified by all 47 COE member states, requires that data protection interests must be reconciled against other rights. The preamble states:

> Reaffirming at the same time their commitment to freedom of information regardless of frontiers;
>
> Recognising that it is necessary to reconcile the fundamental values of the respect for privacy and the free flow of information between peoples

32. Convention 108 is currently being revised and the new text provides for stronger protections. The recitals now state that "Recalling that the right to protection of personal data is to be considered in respect of its role in society and that it has to be reconciled with other human rights and fundamental freedoms, including freedom of expression". Article 11(b) allows for exemptions that are necessary and proportionate to allow for "… the rights and fundamental freedoms of others, notably freedom of expression."[27]

33. This recognition has been widely incorporated into the laws of all EU member states[28] as well as the overall member states of the COE. As described by the EU's Article 29 Working Group "In most cases, independently of any express derogation that may exist, data protection legislation does not apply fully to the media because of the special constitutional status of the rules on freedom of expression and freedom of the press. These rules place a de facto limit on the application of substantive data protection provisions or at least their effective enforcement."[29]

34. Globally, there are approximately 110 jurisdictions which have adopted data protection laws.[30] In all but a handful of countries, the legislation includes specific balancing provisions for freedom of expression.

35. It is also found in major international agreements on data protection including the 2014 African Union Convention on Cyber Security and Personal Data Protection (Article 14(3)); Economic Commission of Western Africa, Supplementary Act A.SA.1/01/10 on Personal Data Protection within ECOWAS, 2010 (Article 32); Southern African Development Community (SADC) Model Law on Data

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[27] COE Council of Ministers Ad hoc Committee on Data Protection (CAHDATA). Draft Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (CETS No. 108). GR-J(2016)2-rev2, March 2016. Available at http://www.coe.int/t/dghl/standardsetting/dataprotection/CAHDATA/Draft%20amending%20protocole%20with%20reservations_En.pdf

[28] For a comprehensive review of journalistic exemptions in EU member states, see Erdos, Fundamentally Off Balance: European Union Data Protection Law and Media Expression, Cambridge Legal Studies Research Paper 42/2014, July 2014.

[29] Working Party on the Protection of Individuals with regard to the Processing of Personal Data, Recommendation 1/97, Data protection law and the media. Adopted by the Working Party on 25 February 1997.

[30] Greenleaf, Graham, Global Data Privacy Laws 2015: 109 Countries, with European Laws Now a Minority (January 30, 2015). (2015) 133 Privacy Laws & Business International Report, February 2015; UNSW Law Research Paper No. 2015-21. Available at SSRN: http://ssrn.com/abstract=2603529

Protection (Article10(2)); and the Commonwealth Draft Model Law on the Protection of Personal Information (2004).

36. The 1990 UN General Assembly Guidelines for the regulation of computerized personal data files state that the principles can be limited if they are necessary to "protect the rights and freedoms of others" as set out in the International Bill of Human Rights. The UN Special Rapporteur for Freedom of Opinion and Expression in his 2013 annual report to the UN Human Rights Council on the privacy stated "as it happens for all permissible limitations to the right to freedom of expression,…the principle of proportionality must be strictly observed, since there is otherwise danger that freedom of expression would be undermined" (emphasis ours).[31]

CONCLUSIONS

37. International law broadly defines journalism to apply to a wide number of actors and their activities. Thus, any assessment of who is a journalist must be rigorous and meet the criteria as laid out by the court in limited freedom of expression.

38. Access and use of information released by public bodies is an essential aspect of modern journalism in the Internet era.

39. There is universal recognition in both international law and in national practices that there must be a careful assessment of the interests of both freedom of expression and data protection.

40. The Court must strictly review the necessity of interference made by any decisions limiting the right of the media to publish information that is already public without deference to the national court.

Submitted for the Interveners

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[31] Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue, A/HRC/23/40, 17 April 2013.