Nr. 1 Satamedia/Finland

EHRM 21 juli 2015, 931/13

In the case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:
Guido Raimondi, President, Päivi Hirvelä, George Nicolaou, Nona Tsotsoria, Krzysztof Wojtyczek, Faris Vehabovi , Yonko Grozev, judges, and Fato Aracı, Deputy Section Registrar,
Having deliberated in private on 23 June 2015,
Delivers the following judgment, which was adopted on that date:

PROCEDURE

[...]

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

5. The applicant companies have their seat in Kokemäki.

6. The first applicant company Satakunnan Markkinapörssi Oy has been publishing Veropörssi magazine since 1994. The magazine publishes yearly information about natural persons' taxable income and assets. This information is public according to Finnish law. Several other publications and media companies also publish such information. The editor-in-chief of the magazine lodged an application with the Court in 2010 (see Anttila v. Finland (dec.), no. 16248/10, 19 November 2013).

7. In 2002 the magazine appeared 17 times and each issue concentrated on a certain geographical area of the country. Data on 1.2 million persons' taxable income and assets was published, which constituted at the time a third of all taxable persons in Finland. The magazine also published tax-related articles and announcements.

8. The first applicant company Satakunnan Markkinapörssi Oy has worked in cooperation with the second applicant company, Satamedia Oy. The companies are owned by the same persons. In 2003 the second applicant company, together with a telephone operator, started an SMS-service. By sending a person's name to a service number, taxation information concerning that person could be obtained if information was available in the database. The database was created using data already published in the magazine. Since 2006 the second applicant company has also been publishing Veropörssi magazine.

9. On an unspecified date the Data Protection Ombudsman (tietosuojavaltuutettu, dataombudsmannen) contacted the applicant companies and advised them to stop publishing taxation data in the manner and to the extent that had been the case in 2002. Collecting data which was not to be published was not forbidden. The companies declined because they felt that this request violated their freedom of expression.

10. By letter dated 10 April 2003 the Data Protection Ombudsman requested the Data Protection Board (tietosuojalautakunta, datasekretessnämnden) to order that the applicant companies be forbidden to process taxation data in the manner and to the extent that had been the case in 2002 and to pass such data to an SMS-service. He claimed that, under the Personal Data Act, the companies had no right to establish such personal data registers and that the derogation provided by the Act concerning journalism did not apply to the present case. The collecting of taxation information and the passing of such information to third parties was not journalism but processing of personal data which the applicant companies had had no right to do.

11. On 7 January 2004 the Data Protection Board dismissed the request of the Data Protection Ombudsman. It found that the derogation provided by the Personal Data Act concerning journalism applied to the present case. As concerned the SMS-service, the data used in the service had already been published in Veropörssi magazine and the Act did not therefore apply to it.

12. By letter dated 12 February 2004 the Data Protection Ombudsman appealed to the Helsinki Administrative Court (hallinto-oikeus, förvaltningsdomstolen), reiterating his request that the applicant companies be forbidden to process taxation information in the manner and to the extent that had been the case in 2002 and to pass such data to the SMS-service.

13. On 29 September 2005 the Administrative Court rejected the appeal. It found that the derogation provided by the Personal Data Act concerning journalism, which had its origins in Directive 95/46/EC, should not be interpreted too strictly as it would then favour protection of privacy over freedom of expression. The court considered that Veropörssi magazine had a journalistic purpose and that it was also in the public interest to publish such data. The court emphasised, in particular, that the published data was public. The derogation provided by the Personal Data Act concerning journalism thus applied to the present case. As concerned the SMS-service, the court agreed with the Data Protection Board that, as the information had already been published in the magazine, the Act did not apply to it.

14. By letter dated 26 October 2005 the Data Protection Ombudsman appealed further to the Supreme Administrative Court (korkein hallinto-oikeus, högsta förvaltningsdomstolen), reiterating the grounds of appeal already presented before the Administrative Court.

15. On 8 February 2007 the Supreme Administrative Court decided to request a preliminary ruling from the Court of Justice of the European Union on the interpretation of Directive 95/46/EC.

16. On 16 December 2008 the Court of Justice of the European Union, sitting in a Grand Chamber composition, gave its judgment (see Case C-3/07 Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy, judgment of 16 December 2008 (Grand Chamber)). It found first of all that the activities in question constituted "processing of personal data" to which the Directive applied. Moreover, activities involving the processing of personal data such as that relating to personal data files which contained solely, and in unaltered form, material that had already been published in the media, also fell within the scope of the Directive. In order to take account of the importance of the right to freedom of expression in every democratic society, it was necessary to interpret notions relating to that freedom, such as journalism, broadly. However, in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy required that the derogations and limitations in relation to the protection of data provided for in the Directive had to apply only in so far as was strictly necessary. In conclusion, activities such as those involved in the domestic proceedings, relating to data from documents which were in the public domain under national legislation, could be classified as "journalistic activities" if their object was to disclose to the public information, opinions or ideas, irrespective of the medium which was used to transmit them. They were not limited to media undertakings and could be undertaken for profit-making purposes.

17. On 23 September 2009 the Supreme Administrative Court quashed the previous decisions and referred the case back to the Data Protection Board. It requested the Board to forbid the processing of taxation data in the manner and to the extent carried out in 2002. The court noted first that the term "journalism" was not defined in Directive 95/46/EC but that, according to the Court of Justice of the European Union, it was necessary to interpret notions relating to freedom of expression, such as journalism, broadly. However, when balanced against the right to privacy, any derogations to the latter were to be kept only to what was strictly necessary. When balancing the right to freedom of expression against the right to privacy, the Court had found that the decisive factor was to assess whether a publication contributed to a public debate or was solely intended to satisfy the curiosity of readers. The Supreme Administrative Court found that the publication of the whole database collected for journalistic purposes could not be regarded as journalistic activity. The public interest did not require such publication of personal data to the extent seen in the present case, in particular as the derogation in the Personal Data Act was to be interpreted strictly. The same applied also to the SMS-service.

18. The SMS-service was shut down after the decision of the Supreme Administrative Court was served on the applicant companies. The magazine continued publishing taxation data in autumn 2009 when its content was only one fifth of the previous content. Since then the magazine has not appeared.

19. On 26 November 2009 the Data Protection Board forbade the first applicant company to process taxation data in the manner and to the extent that had been the case in 2002 and to forward this infor-

mation to an SMS-service. The second applicant company was forbidden to collect, save or forward to an SMS-service any information received from the first applicant company's registers and published in Veropörssi magazine.

20. By letter dated 15 December 2009, after the Data Protection Board had made its decision, the Data Protection Ombudsman asked the applicant companies to indicate what measure they were envisaging to take in view of the Board's decision. In their reply, the applicant companies asked the Data Protection Ombudsman's view on the conditions under which they could continue publishing public taxation data at least to a certain extent. In his reply the Data Protection Ombudsman stated that, according to the Supreme Administrative Court's decision, the applicant companies lacked the legal right to maintain their taxation database and to publish it, and reminded them of his duty to report any breach of the Personal Data Act to the police.

21. By letter dated 9 February 2010 the applicant companies appealed against the decision of the Data Protection Board to the Helsinki Administrative Court which transferred the case to the Turku Administrative Court. They complained that the decision violated the prohibition of censorship guaranteed by the Constitution as well as their freedom of expression. The Finnish Constitution provided better protection than the international human rights treaties as the latter did not prohibit censorship fully. According to the domestic law, it was not possible to prevent publication of information on the basis of the amount of information to be published or of the means used for its publication. Nor was it possible to use "public interest" as a criterion for preventing publication when preventive restriction of freedom of expression was concerned. Accepting that would mean that the authorities would be able to prevent publication, if they thought that the publication did not promote discussion of a topic of public interest.

22. On 28 October 2010 the Turku Administrative Court rejected the applicant companies' appeal. It found that, as far as the matter had been decided by the Supreme Administrative Court in its decision of 23 September 2009, it could not take a stand on the issue. In the latter decision the Supreme Administrative Court had stated that the case was not about the public nature of the taxation documents, nor about the right to publish such information. As the court was now examining only the decision rendered by the Data Protection Board which was issued as a result of the Supreme Administrative Court's decision of 23 September 2009, it could not examine the issues which the Supreme Administrative Court had excluded from the scope of its decision. As the Board's decision corresponded to the content of the Supreme Administrative Court's decision, there was no reason to change it.

23. By letter dated 29 November 2010 the applicant companies appealed further to the Supreme Administrative Court, reiterating the grounds of appeal already presented before the Administrative Court. They noted in particular that the decision issued by the Data Protection Board had prohibited the processing of taxation information for publishing purposes as well as requiring that the internal registers of the first applicant company be protected in a manner required by the Personal Data Act. In practice the companies were prevented from collecting information for publishing purposes, which meant that there was an interdiction to publish such information. The companies noted that the Finnish Constitution also prohibited indirect preventive censorship.

24. On 18 June 2012 the Supreme Administrative Court upheld the judgment of the Administrative Court. It found that the case was not about the right to publish taxation information as such, nor about preventive censorship. On these grounds and the grounds mentioned in the Administrative Court's reasoning, the court found that there was no reason to change the latter's decision.

[…]

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

35. The applicant companies complained under Article 10 of the Convention that their right to freedom of expression had been violated in a manner which was not "necessary in a democratic society". The collection of taxation information was not illegal as such and this information was public. The decisions of the Supreme Administrative Court meant in fact that the applicant companies were put under prior censorship while other newspapers had been able to continue publishing such information. Also, a wide audience had a right to receive information.

[…]

2. The Court's assessment

(a) Whether there was an interference

51. The Court notes that the parties disagree on whether the ban imposed on the applicant companies constitutes an interference with their right to freedom of expression, as guaranteed by Article 10 § 1 of the Convention. According to the Government, banning the applicant companies from processing taxation data did not constitute an interference with the applicant companies' right to freedom of expression, while the applicant companies claimed that it did, referring in this respect even to censorship.

52. The Court notes that in November 2009 the Data Protection Board forbade the first applicant company to process taxation data in the manner and to the extent that had been the case in 2002 and to forward this information to an SMS-service. The second applicant company was forbidden to collect, save or forward to an SMS-service any information received from the first applicant company's registers and published in the magazine. As a result, Veropörssi magazine published taxation data once more in autumn 2009 when its content was only one fifth of the previous content. Since then, the magazine has not appeared. The SMS-service had already been shut down earlier.

53. The Court considers that the prohibition issued by the Data Protection Board did not prevent the applicant companies from publishing taxation data as such. However, it prohibited them from collecting, saving and processing such data to a large extent, with the result that an essential part of the information previously published in Veropörssi magazine could no longer be published. It must therefore be considered that there was an interference with the applicant companies' right to impart information, as guaranteed by Article 10 § 1 of the Convention.

(b) Whether the interference was prescribed by law and pursued a legitimate aim

54. The Court notes that the parties also disagree on whether the interference was prescribed by law and pursued a legitimate aim. According to the Government, the impugned measures had a basis in Finnish law, especially in various provisions of the Personal Data Act and these measures were taken for the protection of the reputation or rights of others, in particular for the protection of private life. On the contrary, the applicant companies maintained that the Personal Data Act did not prescribe any restrictions to freedom of expression and that this Act was not at all intended to be applied to such personal data which was to be published. The "journalistic exception" provided by the Act was to be applied to the personal data registers which were meant to support actual publishing.

55. The Court notes that the right to impart information is subject to the exceptions set out in Article 10 § 2 of the Convention. The Court accepts that the interference was based on the provisions of the Personal Data Act, as in force at the relevant time. In the present case the question before the domestic courts was whether the "journalistic exception" provided by the Personal Data Act was applicable to the applicant companies' case. In other words, the question was whether in their case the domestic law, as interpreted by the domestic courts, allowed exceptions to be made from the protection of private life in favour of the freedom of expression. The Court therefore considers that the interference was "prescribed by law" and it pursued the legitimate aim of protecting the reputation or rights of others, within the meaning of Article 10 § 2.

(c) Whether the interference was necessary in a democratic society

56. According to the Court's well-established case-law, freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and each individual's self-fulfilment. Subject to paragraph 2 of Article 10 of the Convention, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are

the demands of pluralism, tolerance and broadmindedness, without which there is no "democratic society". This freedom is subject to the exceptions set out in Article 10 § 2 which must, however, be strictly construed. The need for any restrictions must be established convincingly (see, for example, Nilsen and Johnsen v. Norway [GC], no. 23118/93, § 43, ECHR 1999-VIII; and Lingens v. Austria, 8 July 1986, § 41, Series A no. 103).

57. The adjective "necessary", within the meaning of Article 10 § 2, implies the existence of a "pressing social need". The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with a European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10 (see Janowski v. Poland [GC], no. 25716/94, § 30, ECHR 1999-I).

58. The Court's task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation (see, among many other authorities, Fressoz and Roire v. France [GC], no. 29183/95, § 45, ECHR 1999-I).

59. In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole. In particular, it must determine whether the interference in issue was "proportionate to the legitimate aims pursued" and whether the reasons adduced by the national authorities to justify it were "relevant and sufficient" (see Janowski v. Poland, cited above, § 30; News Verlags GmbH & Co.KG v. Austria, no. 31457/96, § 52, ECHR 2000-I; Barfod v. Denmark, 22 February 1989, § 28, Series A no. 149; Lingens v. Austria, cited above, § 40; and Sunday Times v. the United Kingdom (no. 1), 26 April 1979, § 62, Series A no. 30). In doing so, the Court has to satisfy itself that the national authorities applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they based themselves on an acceptable assessment of the relevant facts (see Jersild v. Denmark, 23 September 1994, § 31, Series A no. 298).

60. The Court further emphasises the essential function the press fulfils in a democratic society. Although the press must not overstep certain bounds, particularly as regards the reputation and rights of others and the need to prevent the disclosure of confidential information, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest (see Bladet Tromsø and Stensaas v. Norway [GC], no. 21980/93, § 58, ECHR 1999-III; De Haes and Gijsels v. Belgium, 24 February 1997, § 37, Reports of Judgments and Decisions 1997-I; and Jersild v. Denmark, cited above, § 31). Not only do the media have the task of imparting such information and ideas, the public also has a right to receive them (see, for example, Sunday Times v. the United Kingdom (no. 1), cited above, § 65).

61. The Court has recently set out the relevant principles to be applied when examining the necessity of an instance of interference with the right to freedom of expression in the interests of the "protection of the reputation or rights of others". It noted that in such cases the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see Axel Springer AG v. Germany [GC], no. 39954/08, § 84, 7 February 2012; and MGN Limited v. the United Kingdom, no. 39401/04, § 142, 18 January 2011).

62. In Von Hannover v. Germany (no. 2) [GC] (nos. 40660/08 and 60641/08, §§ 104-107, ECHR 2012) and Axel Springer AG v. Germany [GC] (cited above, §§ 85-88), the Court defined the Contracting States' margin of appreciation and its own role in balancing these two conflicting interests. The Court went on to identify a number of criteria as being relevant where the right of freedom of expression is being balanced against the right to respect for private life (see Von Hannover v. Germany (no. 2) [GC], cited above, §§ 109-113; and Axel Springer AG v. Germany [GC], cited above, §§ 89-95), namely:

(i) contribution to a debate of general interest;

(ii) how well-known is the person concerned and what is the subject of the report;

(iii) prior conduct of the person concerned;

(iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken;

(v) content, form and consequences of the publication; and

(vi) severity of the sanction imposed.

63. Turning to the facts of the present case, the Court notes that the applicant companies were not as such forbidden to publish taxation data in Veropörssi magazine. However, they were forbidden to collect, save or process taxation data in the manner and to the extent that had been the case in 2002 and to forward this information to an SMS-service. As a result, the applicant companies published one more issue of Veropörssi magazine in autumn 2009 with one fifth of the previous content. Since then, the magazine has not appeared. The SMS-service had already been shut down earlier.

64. In order to assess whether the "necessity" of the restriction of the exercise of the freedom of expression has been established convincingly, the Court must examine whether the balancing exercise between the freedom of expression and the right to respect for private life has been undertaken by the national authorities, in conformity with the criteria laid down in the Court's case-law.

65. The Court considers first of all that the general subject-matter which was at the heart of the publication in question, namely the taxation data about natural persons' taxable income and assets, was already a matter of public record in Finland, and as such was considered to be a matter of public interest. From the point of view of the general public's right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for imparting such information to the public.

66. The Court notes that in 2002 Veropörssi magazine published taxation data on 1.2 million persons' taxable income and assets. These persons must have included both well-known personalities and ordinary citizens. According to the specific Act on the Public Disclosure and Confidentiality of Tax Information, this taxation information is public in Finland. There is thus no suggestion that the published information was obtained by subterfuge or other illicit means (compare Von Hannover v. Germany, no. 59320/00, § 68, ECHR 2004-VI). On the contrary, the published information was received directly from the tax authorities.

67. Moreover, the Court observes that the accuracy of the published information was not in dispute even before the domestic courts. There is no evidence, or indeed any allegation, of factual errors, misrepresentation or bad faith on the part of the applicant companies (see, in this connection, Flinkkilä and Others v. Finland, no. 25576/04, § 81, 6 April 2010).

68. The Court notes that the only problematic issue for the national authorities and courts was the extent of the published information. According to them, the publishing of taxation information to such an extent as in 2002 could not be considered as journalism but as processing of personal data, which the applicant companies had no right to do. The central question thus turned on the concept of journalism. As the derogation provided by the Personal Data Act concerning journalism had its origins in Directive 95/46/EC, the Supreme Administrative Court decided to request a preliminary ruling from the Court of Justice of the European Union on the interpretation of Directive 95/46/EC in that respect.

69. The Court notes that the Court of Justice of the European Union found in its preliminary ruling that, in order to take account of the importance of the right to freedom of expression in every democratic society, it was necessary to interpret notions relating to that freedom, such as journalism, broadly. However, in order to achieve a balance between the two fundamental rights, the protection of the fundamental right to privacy required that the derogations and limitations in relation to the protection of data provided for in the Directive had to apply only in so far as was strictly necessary. In conclusion, the court found that activities such as those involved in the case at hand, relating to data from documents which were in the public domain under national legislation, could be classified as "journalistic activities" if their object was to disclose to the public information, opinions or ideas, irrespective of the medium which was used to transmit them.

70. The Court notes that, after having received the preliminary

ruling from the Court of Justice of the European Union, the Supreme Administrative Court found that the publication of the whole database collected for journalistic purposes could not be regarded as journalistic activity. It considered that the public interest did not require such publication of personal data to the extent that had been seen in the present case, in particular as the derogation in the Personal Data Act was to be interpreted strictly. The same applied also to the SMS-service.

71. The Court observes that, in its analysis, the Supreme Administrative Court attached importance both to the applicant companies' right to freedom of expression as well as to the right to respect for private life of those tax-payers whose taxation information had been published. The court examined the case on the basis of principles embodied in Article 10 and the criteria laid down in the Court's case-law. The Supreme Administrative Court thus balanced in its reasoning the applicant companies' right to freedom of expression against the right to privacy. According to the Supreme Administrative Court, it was thus necessary to interpret the applicant companies' freedom of expression strictly in order to protect the right to privacy.

72. The Court finds this reasoning acceptable. The restrictions on the exercise of the applicant companies' freedom of expression were established convincingly by the Supreme Administrative Court, taking into account the Court's case-law. The Court reiterates its recent case-law according to which the Court would require, in such circumstances, strong reasons to substitute its own view for that of the domestic courts (see Von Hannover v. Germany (no. 2) [GC], cited above, § 107; and Axel Springer AG v. Germany [GC], cited above, § 88).

73. Lastly, as concerns the sanctions, the Court notes that the applicant companies were not prohibited generally from publishing the information in question but only to a certain extent. Nothing prevented them from continuing to publish taxation information to a lesser extent than they had done in 2002. The fact that, in practice, the limitations imposed on the quantity of the information to be published may have rendered the applicant companies' business activities unviable is not, however, a direct consequence of the actions taken by the domestic courts and authorities but an economic decision made by the applicant companies themselves. It must also be taken into account that the prohibition laid down by the domestic authorities cannot be considered as a criminal sanction but as an administrative one, and thereby a less severe sanction than a criminal one (contrast and compare Lehideux and Isorni v. France, 23 September 1998, § 57, Reports of Judgments and Decisions 1998-VII).

74. In conclusion, the reasons relied on by the domestic courts and authorities were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society". Having regard to all the foregoing factors, and taking into account the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake.

75. There has therefore been no violation of Article 10 of the Convention.

II. ALLEGED VIOLATION OF ARTICLE 6 OF THE CONVENTION

[…]

87. The Court reiterates that the reasonableness of the length of proceedings must be assessed in the light of the circumstances of the case and with reference to the following criteria: the complexity of the case, the conduct of the applicants and the relevant authorities and what was at stake for the applicants in the dispute (see, among many other authorities, Frydlender v. France [GC], no. 30979/96, § 43, ECHR 2000-VII).

88. The Court agrees with the Government that there has not been any particularly long period of inactivity on the part of the authorities and domestic courts. The proceedings were pending before the domestic authorities and courts for approximately one and a half years for each stage, which cannot be considered excessive. The excessive total length seems to have been caused by the fact that the case was examined twice by each level of jurisdiction.

89. The Court considers that even though the case was of some complexity, it cannot be said that this in itself justified the entire length of the proceedings. Some of this complexity may have been caused by the fact that the case was referred back to the Data Protection Board for a new examination.

90. The Court has frequently found a violation of Article 6 § 1 of the Convention in cases raising issues similar to the one in the present case (see Frydlender v. France, cited above).

91. Having examined all the material submitted to it, the Court considers that, even taking into account the complexity of the case, the Government have not put forward any fact or argument capable of persuading it to reach a different conclusion in the present case. Having regard to its case-law on the subject, the Court considers that in the instant case the length of the proceedings was excessive and failed to meet the "reasonable time" requirement.

92. There has accordingly been a breach of Article 6 § 1 of the Convention.

[…]

FOR THESE REASONS, THE COURT

1. Declares by a majority the complaints concerning the freedom of expression and the length of the proceedings admissible and the remainder of the application inadmissible;

2. Holds by six votes to one that there has been no violation of Article 10 of the Convention;

3. Holds unanimously that there has been a violation of Article 6 of the Convention;

4. Holds unanimously

(a) that the respondent State is to pay the applicant companies, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amount:

EUR 9,500 (nine thousand five hundred euros), plus any tax that may be chargeable to the applicants, in respect of costs and expenses;

(b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amount at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. Dismisses by six votes to one the remainder of the applicant companies' claim for just satisfaction.

[…]

Noot

Wouter Hins
Mr. dr. A.W. Hins is hoogleraar mediarecht aan de Universiteit Leiden, universitair hoofddocent staats- en bestuursrecht bij de UvA en onderzoeker bij het Instituut voor Informatierecht.

EHRM geeft voorrang aan bescherming van persoonsgegevens

Voorgeschiedenis

De naam 'Satamedia' is in Europa bekend sedert het arrest van 16 december 2008 van het Hof van Justitie.[1] Het Hof in Luxemburg gaf een uitleg aan de EU Richtlijn bescherming persoonsgegevens na prejudiciële vragen uit Finland. Het betrof een procedure die de Ombudsman voor gegevensbescherming (Tietosuojavaltuutettu) had aangespannen tegen de Finse evenknie van het Nederlandse College bescherming persoonsgegevens (Tietosuojalautakunta). Was dit college verplicht op te treden tegen publicaties van twee verwante

1 HvJ EG 16 december 2008, C-73/07, *Mediaforum* 2009-2, nr. 5 m.nt. Q.R. Kroes. De benaming HvJ EU dateert van 1 december 2009.

bedrijven, die samen als Satamedia worden aangeduid? Enerzijds wilde de nationale rechter weten of de richtlijn van toepassing is op het doorgeven van reeds in de media gepubliceerde persoonsgegevens. Anderzijds was de vraag welke betekenis de journalistieke exceptie van artikel 9 van de Richtlijn heeft. Op de eerste vraag antwoordde het Hof van Justitie bevestigend. Wat betreft de tweede vraag zette het Hof uiteen dat het begrip 'journalistiek' ruim moet worden uitgelegd. Wel wees het Hof erop dat de nationale rechter moet beoordelen of een bepaalde verwerking 'uitsluitend' voor journalistieke doeleinden plaats vindt. Bovendien moet de uitzondering, neergelegd in artikel 9, binnen de grenzen van het 'strikt noodzakelijke' blijven.

Veel commentatoren trokken uit het arrest van 2008 de conclusie dat dit in het voordeel was van Satamedia. Het Hof overwoog in de eerste plaats dat de journalistieke exceptie niet alleen geldt voor traditionele media, maar voor alle in de journalistiek werkzame personen. In de tweede plaats sloot het Hof zich aan bij de stelling dat het hebben van een winstoogmerk niet uitsluit dat een bedrijf zuiver journalistiek bezig is. Een zeker commercieel succes kan zelfs de *conditio sine qua non* zijn voor het voortbestaan van professionele journalistiek, aldus het Hof. Tenslotte overwoog het Hof dat rekening moet worden gehouden met de voortschrijdende techniek van communicatie en informatieverspreiding. Voor de vraag of sprake is van een activiteit voor uitsluitend journalistieke doeleinden is niet bepalend of de verwerkte gegevens worden overgedragen via papier, via de omroep dan wel via elektronische middelen, zoals het internet. Daarmee heeft het Hof duidelijk gemaakt welke criteria niet van belang zijn. Over de vraag welk criterium wel relevant is, zei het Hof alleen dat het moet gaan om de bekendmaking aan het publiek van informatie, meningen of ideeën.

De nationale rechter oordeelde vervolgens dat de Tietosuojalautakunta moest optreden tegen Satamedia. Zowel het publiceren van alfabetische lijsten van belastingplichtigen, opgesplitst naar regio, als het exploiteren van de sms-dienst, vielen buiten de journalistieke exceptie. Volgens de hoogste bestuursrechter in Finland hadden de activiteiten van Satamedia niet uitsluitend een journalistiek doel: '*Because the processing of registered data to this extent can be compared with the publishing of a so-called background register gathered by the whole company for editorial use, the question is not only about expressing information, opinions and ideas*'. Daarnaast maakte de rechter onderscheid tussen het bevredigen van individuele nieuwsgierigheid en het leveren van een bijdrage aan een publiek debat. Laatstgenoemd belang eist niet dat de financiële gegevens van natuurlijke personen in zo grote hoeveelheden worden verspreid. De noodzaak om een uitzondering te maken was dus onvoldoende aangetoond.[2]

Journalistieke exceptie

In Mediaforum heb ik al eens vraagtekens gezet bij deze uitspraak van de Finse rechter.[3] Bijvoorbeeld bij de overweging dat het publiceren van ruwe achtergrondinformatie geen journalistieke werkzaamheid is. In de woorden van mevrouw Tsotsoria, die de dissenting opinion schreef bij het arrest van het EHRM, omvat journalistiek de onmisbare elementen '*data collection, interpretation and storytelling*'. Een bedrijf dat niets anders doet dan ruw materiaal zonder analyse of commentaar door te geven, is niet journalistiek bezig. Datajournalistiek is echter wel degelijk een vorm van journalistiek. Denk aan iemand die één of meer publicaties wil schrijven over de belastingheffing in Finland. Het verzamelen van een grote hoeveelheid persoonsgegevens is daartoe een essentiële voorbereiding. Het is niet logisch om het eindproduct – de publicatie – wel te laten vallen onder de journalistieke exceptie, maar de noodzakelijke voorbereiding niet. Daarmee zou de vrijheid van nieuwsgaring worden losgekoppeld van de vrijheid van meningsuiting, ten nadele van beide. Dat Satamedia inderdaad redactionele artikelen publiceerde over belastingen, blijkt uit r.o. 7 van bovenstaand arrest.

Natuurlijk zullen de artikelen van Satamedia minder informatie hebben bevat dan de verzamelde belastinggegevens van 1,2 miljoen Finnen. Individuele data zijn omgezet in anonieme tabellen of grafieken. Om een artikel leesbaar te houden kun je geen honderden namen van individuele belastingplichtigen opsommen. Hooguit zal dat gebeuren bij enkele personen, die in de schijnwerpers staan. Het is echter goed mogelijk dat een medium er belang bij heeft de geloofwaardigheid van zijn publicatie te vergroten door inzage te geven in het ruwe materiaal. Men kan hier denken aan een overweging uit het EHRM arrest *Fressoz en Roire tegen Frankrijk*, dat ook betrekking had op het publiceren van belastinggegevens. De nationale rechter had Fressoz en Roire veroordeeld wegens het afdrukken van een gelekt belastingformulier van de president-directeur van Peugeot. Zij hadden dat gedaan om de geloofwaardigheid van hun artikel te vergroten. Dat was legitiem, aldus het EHRM, dat unaniem oordeelde dat artikel 10 EVRM was geschonden. '*In essence, that Article leaves it for journalists to decide whether or not it is necessary to reproduce such documents to ensure credibility*'.

Een tweede vraagteken betreft de overweging van de Finse rechter, dat de journalistieke exceptie uitsluitend betrekking heeft op bijdragen aan een maatschappelijk debat en dat van een dergelijke bijdrage geen sprake was. De gedachtegang van de nationale rechter is weergegeven in r.o. 17 van het EHRM-arrest: de beslissende factor is of een publicatie bijdraagt aan een publiek debat dan wel alleen beoogt de nieuwsgierigheid van de lezers te bevredigen. Nu is er wel iets voor te zeggen om de journalistieke exceptie in artikel 9 van de EU-richtlijn te beperken tot nuttige journalistiek. Die beperking gaat echter wringen bij de artistieke en literaire doeleinden, die in één adem met de journalistieke doeleinden worden genoemd. In het arrest van het Hof van Justitie van 16 december 2008 is bovendien niets te vinden dat wijst op een beperking van het begrip 'journalistiek'. Kennelijk heeft het Hof niet het advies willen volgen van Advocaat-Generaal Kokott, die voorstelde de journalistieke exceptie te beperken tot de overbrenging van informatie en ideeën over vraagstukken van openbaar belang.[4]

Ook A-G Kokott waarschuwde overigens dat men voorzichtig moet zijn met het restrictief interpreteren van het begrip 'journalistiek'. Zij schreef de volgende verstandige toevoeging:

> "78. Hieraan zij echter toegevoegd dat overheidsinstanties, met inbegrip van de gerechten, de aanwezigheid van journalistieke doeleinden niet streng kunnen toetsen. Welke informatie betrekking heeft op vraagstukken van openbaar belang is vooraf nauwelijks vast te stellen, en het is uiteindelijk althans gedeeltelijk aan de media om door verstrekking van informatie om te beginnen überhaupt publieke interesse te wekken. Lukt dit niet, dan kan men hun – achteraf – moeilijk iets verwijten. Echter ook ex ante is het in beginsel niet de taak van de overheid om te voorspellen dat er in de toekomst geen openbaar belang zal zijn. Een dergelijke voorspelling zou een eerste stap zijn op weg naar censuur. Dat de verspreiding van informatie en ideeën geen vraagstukken van openbaar belang betreft, kan derhalve alleen worden vastgesteld wanneer het zonneklaar is."

De stelling dat het verspreiden van belastinggegevens geen betrekking heeft op een vraagstuk van openbaar belang, komt tenslotte niet geloofwaardig over nu de wetgever zelf heeft besloten dat de stukken ter inzage moeten liggen op de belastingkantoren. Ongetwijfeld vanwege hun openbaar belang.

Doorgeven van reeds openbare informatie

Het Europese Hof voor de Rechten van de Mens heeft niet tot taak een uitleg te geven aan het EU-recht. Zijn taak is het om vast te stellen of Finland het EVRM heeft geschonden. In dat verband zijn twee dingen van belang. Artikel 10 EVRM beschermt niet alleen journalisten. Belangrijk is ook dat de belastinggegevens van Finse ingezetenen een openbaar karakter hebben. Wat Satamedia deed was niet het onthullen van vertrouwelijke informatie, maar het toegankelijk maken van reeds openbare informatie. Toen de wetgever besloot dat alle belastinggegevens openbaar zijn, deed hij dat vanuit de overtuiging dat deze een onderwerp van maatschappelijk belang betreffen. Is het dan niet een beetje hypocriet om Satamedia te verwijten dat zij alleen de nieuwsgierigheid van het publiek bevredigt?

Rechter Tsotsoria, die als enige tot het oordeel komt dat artikel 10 EVRM is geschonden, beroept zich onder meer op het arrest van het

2 Korkein Hallinto-orkeus d.d. 23 september 2009, KHO, Case 2009/82 [2009]. Integraal in het Fins te raadplegen op www.kho.fi/paatokset/47977.htm. Een samenvatting in het Engels staat op www.aca-europe.eu/WWJURIFAST_WEB/DOCS/FI01/FI01000075.pdf.

3 A.W. Hins, 'De journalistieke exceptie en de bescherming van persoonsgegevens', Mediaforum 2013-4, p. 98-104.

4 Conclusie van J. Kokott d.d. 8 mei 2008, zaak C-73/07.

EHRM in de zaak *Observer en Guardian*.[5] Toen het Verenigd Koninkrijk sancties oplegde voor het verspreiden van staatsgeheimen die in feite al waren uitgelekt, handelde het in strijd met artikel 10 EVRM. Het doel van de sanctie – het beschermen van de vertrouwelijkheid van informatie – kon namelijk niet meer verwezenlijkt worden. Daardoor was de sanctie niet noodzakelijk in een democratische samenleving. Overtuigend is de vergelijking met *Observer en Guardian* echter niet. In de zaak *Satamedia* was het beoogde doel niet het beschermen van de vertrouwelijkheid van informatie, maar het beschermen van het recht op privacy. Iedere verwerking van persoonsgegevens moet op haar eigen merites worden beoordeeld. Hier ligt een vergelijking met het arrest *Google Spain* van het Hof van Justitie voor de hand.[6] De persoonsgegevens van de betrokkene, Mario Costeja Gonzales, mochten blijven staan op de website van de krant La Vanguardia. Het was Google evenwel niet toegestaan na een zoekopdracht met de naam 'Mario Costeja Gonzales' naar deze website te verwijzen. Deze tweede verwerking was volgens het Hof veel schadelijker dan de eerste en daarom in strijd met de EU-richtlijn bescherming persoonsgegevens.

Men zou in de zaak *Satamedia* kunnen redeneren: de eerste verwerking van persoonsgegevens is het ter inzage leggen van de fiscale documenten door de overheid zelf, de tweede verwerking is het publiceren van de gegevens door Satamedia via haar tijdschriften en een sms-dienst. De eerste verwerking veroorzaakt niet zo veel schade voor de privacy, want slechts weinig mensen zullen de moeite nemen de gegevens op te vragen bij het belastingkantoor. Mede daarom kan de overheid een beroep doen op de rechtvaardigingsgrond omschreven in artikel 7 onder c van de EU-richtlijn (vgl. artikel 8 onder c van de Nederlandse Wbp). De tweede verwerking is ingrijpender, omdat de informatie nu een veel groter publiek krijgt. Door de ingrijpende gevolgen voor de privacy kan Satamedia anders dan de overheid geen beroep doen op een rechtvaardigingsgrond. Dat geldt niet alleen voor de journalistieke exceptie van artikel 9 van de richtlijn, maar ook voor de rechtvaardigingsgrond van artikel 7 sub f van de richtlijn (vgl. artikel 8 sub f van de Nederlandse Wbp). Is de gegevensverwerking noodzakelijk voor de behartiging van het gerechtvaardigde belang van Satamedia of van de personen aan wie de gegevens worden verstrekt? Gezien de ingrijpende gevolgen zou het antwoord nee zijn.

Ik heb echter een paar bezwaren tegen deze redenering. In de eerste plaats is het onbevredigend dat de Staat zijn handen in onschuld wast door te stellen dat de eerste openbaarmaking weinig schade toebrengt. Openbaarheid impliceert dat de informatie mag worden doorgegeven aan anderen. In de tweede plaats is er een verschil met de casus van *Google Spain*. In dat arrest benadrukte het Hof van Justitie dat de verwerking van persoonsgegevens door een zoekmachine een bijzonder karakter heeft. Internetgebruikers krijgen een min of meer gedetailleerd profiel van de betrokkene doordat de zoekmachine een gestructureerd overzicht biedt van allerlei informatie over deze persoon. Deze kan betrekking hebben op tal van aspecten van zijn privéleven. Een zoekmachine voegt dus informatie toe. Dat gaat veel verder dan het doorgeven van één bericht over iemand.

Een laatste bezwaar tegen het arrest is dat de verwijzingen naar het belang van de privacy erg abstract blijven. Niet aangetoond is welke concrete schade dreigde te ontstaan door de activiteiten van Satamedia. Voor de meerderheid van het EHRM is doorslaggevend dat de publicatie van fiscale gegevens niet volledig is verboden. Het probleem zat hem in de hoeveelheid data (r.o. 68). Waarom die hoeveelheid een probleem was en welke hoeveelheid acceptabel zou zijn geweest, blijft gissen.

Tenslotte

Satamedia heeft wel een troostprijs behaald. Haar klacht dat de procedure in Finland veel te lang heeft geduurd had succes. Unaniem is het Hof van oordeel dat artikel 6 EVRM is geschonden. Het probleem had voorkomen kunnen worden wanneer de hoogste administratieve rechter in 2009 het geschil zelf had beslist en de zaak niet had terugverwezen naar het College bescherming persoonsgegevens. Dat had drie jaar procederen gescheeld.

5 EHRM 26 november 1991, Series A, no. 216, *The Observer and Guardian Newspapers Ltd. v. the United Kingdom.*

6 HvJ EU 13 mei 2014, C-131/12, *Google Spain v. AEPD*.