van zijn recht stelt het EHRM dat ook daarvan geen papieren spoor is. Er is geen papieren bevestiging dat het aanhoudingsbevel aan Simeonov is betekend. Daarmee staat vast dat die hele eerste periode van drie dagen sprake is geweest van inbreuk op het recht op verhoorbijstand.

8. Op dat punt gekomen gaat het EHRM nog even ambtshalve na of er, ondanks die bevinding, 'compelling reasons' bestonden die een dergelijke inbreuk konden rechtvaardigen. Daarmee is het EHRM snel klaar. Die zijn er niet. (r.o. 116-118 juncto 129-131). En daarmee komt het EHRM aan de vraag of ondanks de inbreuk op het recht op verhoorbijstand de strafprocedure tegen Simeonov als geheel toch voldeed aan de eisen van art. 6 EVRM. Of, zoals het nog duidelijker in het Engels staat: *whether the overall fairness of the proceedings was ensured* (r.o. 120 jo. 132-144). Let wel: daarbij was de bewijslast omgekeerd. Het was nu aan de staat om overtuigend aan te tonen dat "the overall fairness of the criminal proceedings against the applicant had not been irretrievably prejudiced by the absence of legal assistance for the first three days of his police custody". Het EHRM beoordeelt dat met toepassing van de beginselen toe die zijn neergelegd in het arrest *Ibrahim e.a./het Verenigd Koninkrijk*, waaronder de vereiste 'strict scrutiny'. En dan is het EHRM er snel uit: er werd in de periode zonder verhoorbijstand blijkbaar niets gedaan aan het onderzoek. Simeonov heeft in die tijd ook niet hoeven meewerken aan onderzoekshandelingen. Voor zover hij in die tijd al een verklaring zou hebben afgelegd — dat wordt door de staat ontkend — is daarvan niets op papier gekomen. Het zou overigens, gelet op de Bulgaarse wet, zelfs niet tegen hem gebruikt kunnen worden. Pas toen hij zijn eigen raadsman had gekregen heeft hij een bekennende verklaring afgelegd. Hij heeft daarna een actieve rol gespeeld in alle stadia van de procedure. Bovendien, zijn veroordeling was niet louter gebaseerd op zijn eigen verklaringen maar ook op een 'whole body of consistent evidence'.

9. De dissenters zijn van oordeel dat de meerderheid meer nadruk had moeten leggen op de omstandigheid dat Simeonov zich in die eerste dagen van zijn bewaring in een uiterst kwetsbare positie bevond. Het is wellicht niet zonder betekenis dat vier van de vijf dissenters afkomstig zijn uit een voormalig Oostblokland (Hongarije, Macedonië, Montenegro en Kroatië). De vijfde dissenter is de rechter die is gekozen met betrekking tot Cyprus.

10. Wat is de lering die voor Nederland kan worden getrokken? Allereerst dat naar het oordeel van het EHRM vanaf het moment van de 'charge' sprake is van een recht op verhoorbijstand. Maar ook, dat niet iedere inbreuk op het recht op verhoorbijstand naar het oordeel van het EHRM moet leiden tot de constatering dat dus art. 6 EVRM is geschonden. Daarbij moet gelijk worden aangetekend dat het EHRM aangeeft wat de minimumgrens is. Het staat een lidstaat volkomen vrij de eigen eerlijkheidslat hoger te leggen. Maar lager mag niet. In dat verband een klein plaagstootje tot besluit: In de memorie van toelichting op het 'Voorstel van wet tot vaststelling van Boek 1 inhoudende algemene bepalingen over de strafvordering in het algemeen in verband met de modernisering van het Wetboek van Strafvordering (Vaststellingswet Boek 1 van het nieuwe Wetboek van Strafvordering (strafvordering in het algemeen))' staat op p. 60 vermeld:

> "De aan de verdachte toegekende rechten stellen hem in staat om — desgewenst na het raadplegen van een raadsman —, een eigen proceshouding te bepalen. Deze omvat de consequenties van het gebruik maken van zijn rechten dan het wel bewust daarvan afzien. Naarmate hij vollediger is geïnformeerd over de inhoud van de rechten die hem toekomen, kan hij daarvan effectiever gebruik maken. De positie van de verdachte in de eerste fase van het opsporingsonderzoek wordt mede versterkt doordat de aanvang van het eerste inhoudelijke politieverhoor dient als duidelijke markering van het voor de verdachte kenbare begin van het opsporingsonderzoek. Een aantal rechten wordt hem vanaf dat tijdstip toegekend, zoals een recht op kennisneming van de processtukken en een recht op een afloopbericht over het al dan niet instellen van vervolging. Een nieuwe verplichting die in het wetboek aan de verdachte (en later ook veroordeelde) is opgelegd is de vaststelling van zijn identiteit, die inhoudt dat hij moet dulden dat van hem vingerafdrukken worden afgenomen, een foto wordt gemaakt, en dat hij een strafrechtketennummer krijgt in de strafrechtketendatabank."

Mooi gezegd. Maar Simeonov leert nog eens dat de eerlijkheid al wordt vereist vanaf de 'charge'. En ook dat dat niet samenvalt met de aanvang van het inhoudelijke politieverhoor.

B.E.P. Myjer

NJ 2018/67

EUROPEES HOF VOOR DE RECHTEN VAN DE MENS
27 juni 2017, nr. 931/13
(A. Sajó, I. Karakaş, A. Nußberger, G. Yudkivska, L. López Guerra, M. Lazarova Trajkovska, K. Pardalos, V.A. De Gaetano, P. Pinto de Albuquerque, H. Keller, A. Pejchal, J.F. Kjølbro, S. O'Leary, C. Ranzoni, A. Harutyunyan, P. Koskelo, M. Bošnjak)
m.nt. E.J. Dommering

Art. 6, 10 EVRM

H&I 2015/345
NJB 2017/2037
ECLI:CE:ECHR:2017:0627JUD000093113
ECLI:NL:XX:2015:350

Geen schending van art. 10 EVRM door verbod op massapublicatie van belastinggegevens van

1,2 miljoen Finse burgers. Het verbod is met name gerechtvaardigd nu de publicatie geen bijdrage levert aan een publiek debat en geen in het nationale recht of EU-recht beschermd journalistiek doel dient. Wel een schending van de redelijke termijn in art. 6 EVRM door de excessieve lengte van de totale procedure op nationaal niveau (zes jaar en zes maanden).

Klagers zijn twee Finse mediabedrijven die bij de Finse belastingdienst gegevens opvragen inzake het belastbaar inkomen en vermogen van natuurlijke personen om deze vervolgens openbaar te maken door middel van publicatie in een tijdschrift en door middel van een betaalde sms-service in samenwerking met een telecomaanbieder. In 2002 hebben klagers op deze wijze de belastinggegevens van 1,2 miljoen natuurlijke personen gepubliceerd. Deze natuurlijke personen hadden geen publieke functie en geen hoog inkomen. In 2003 heeft de Finse Privacy Ombudsman de Finse Autoriteit persoonsgegevens verzocht om klagers te verbieden om op zo grote schaal de belastinggegevens van natuurlijke personen te verzamelen, te publiceren in een tijdschrift en aan derden beschikbaar te stellen door middel van een betaalde sms-service. De Ombudsman heeft zich hierbij op het standpunt gesteld dat klagers op grond van de Finse Wet persoonsgegevens geen recht hadden om de belastinggegevens van natuurlijke personen te verzamelen en te publiceren en dat de uitzondering op de bescherming van persoonsgegevens voor journalisten in art. 9 Richtlijn 95/46/EG betreffende de bescherming van natuurlijke personen in verband met de verwerking van persoonsgegevensniet van toepassing is op klagers omdat het doel beoogd met de publicatie niet het bedrijven van journalistiek is maar commercieel van aard. De Finse Autoriteit Persoonsgegevens heeft echter het gevorderde verbod geweigerd. De Ombudsman heeft deze beslissing vervolgens aangevochten tot aan de hoogste Finse bestuursrechter, die het HvJ EU prejudiciële vragen heeft gesteld. Het HvJ EU oordeelde dat het aan de nationale rechter was om te beoordelen of met de publicatie daadwerkelijk journalistieke doeleinden werden nagestreefd, hiervan is sprake wanneer het enige doel van de publicatie is om het publiek te informeren. De hoogste Finse bestuursrechter heeft vervolgens de bestreden beslissing van de Autoriteit Persoonsgegevens vernietigd en deze opgedragen klagers het door de Ombudsman verzochte verbod op te leggen omdat geen maatschappelijk debat was gediend met de massapublicatie van de door klagers verzamelde privacy gevoelige gegevens van natuurlijke personen. Tegen de hierop volgende beslissing van de Autoriteit Persoonsgegevens hebben klagers administratief beroep ingesteld en geklaagd over de beperking van hun vrijheid van meningsuiting. Dit beroep is door de hoogste Finse bestuursrechter afgewezen.

Bij zijn beoordeling stelt het EHRM voorop dat de verzameling van de belastinggegevens door klagers naar nationaal recht rechtmatig is geweest en dat de voorliggende vraag slechts is of door de nationale rechter bij het verbod op publicatie gemaakte afweging tussen de vrijheid van meningsuiting van klagers en het belang van de bescherming van de privacy van de natuurlijke personen wier persoonsgegevens zijn verzameld EVRM-conform is (r.o. 120-122). Vervolgens herhaalt het EHRM zijn vaste rechtspraak dat ook de publicatie van gegevens die al eerder openbaar zijn gemaakt een schending van art. 8 EVRM kan opleveren en dus dat de in casu rechtmatig verzamelde belastinggegevens onder de reikwijdte van art. 8 EVRM vallen (r.o. 134-138). Het bestreden verbod op publicatie van de Finse Autoriteit Persoonsgegevens levert een inmenging in de art. 10 EVRM-rechten van klagers zodat het dient te onderzoeken of deze inbreuk gerechtvaardigd is (r.o. 140-141). De inmenging heeft een wettelijke grondslag (r.o. 154) en dient een legitiem doel, namelijk de bescherming van de privacy-rechten van derden zoals beoogd in Richtlijn 95/46/EG (r.o. 159). De belangenafweging bij conflicterende rechten uit art. 10 en 8 EVRM valt binnen de ruime margin of appreciation van de verdragsstaten (r.o. 162). Wel is deze beleidsvrijheid beperkter wanneer een publicatie een bijdrage levert aan het publieke debat (r.o. 167). Met betrekking tot de gemaakte belangenafweging in dit concrete geval overweegt het EHRM dat het beleid van de Finse overheid om belastinggegevens vrijelijk beschikbaar te maken aan derden in het kader van volledige transparantie van fiscaal beleid nog niet betekent dat het massaal verzamelen en publiceren van de belastinggegevens van natuurlijke persoenen een bijdrage aan het publieke debat oplevert (r.o. 172-174). Het feit dat er een maatschappelijk belang bestaat bij het toestaan aan journalisten om persoonsgegevens te verzamelen en te verwerken voor een publicatie die een bijdrage levert aan een publiek debat betekent niet tevens dat het ongefilterd publiceren van deze verzamelde persoonsgegevens ook een maatschappelijk belang dient (r.o. 175). In het onderhavige geval had de Finse wetgever met de transparantie van het fiscale beleid en de mogelijkheid van het opvragen van belastinggegevens van derden slechts bedoeld de mogelijkheid te scheppen de overheid te controleren en niet tegemoet te komen aan de nieuwsgierigheid van het publiek naar de vermogenspositie van natuurlijke personen (r.o. 176-177). De publicatie van klagers had niet als enig doel een bijdrage te leveren aan het publieke debat en streefde dus niet een beschermd journalistiek doel na (r.o. 178). Het feit dat de data die klagers hadden gepubliceerd beschikbaar waren in het publiek domein maakte nog niet dat deze in casu niet beschermd werden door art. 8 EVRM. Belastinggegevens van natuurlijke personen waren in Finland in te zien bij de kantoren van de belastingdienst, de gegevens van 1,2 miljoen natuurlijke personen verzamelen en vervolgens publiceren op alfabetische volgorde is een verwerking van persoonsgegevens die de Finse wetgever niet heeft bedoeld met de transparantie van het fiscale beleid (r.o. 188-190). Relevant hierbij is dat Finland een van de weinige lidstaten is waar belastinggegevens van natuurlijke personen toegankelijk zijn voor derden (r.o. 192). Onder deze omstandigheden conformeert de door de hoogste Finse bestuursrechter gemaakte belangenafweging tussen de art. 10

EVRM-rechten van klagers en de art. 8 EVRM-rechten van de natuurlijke personen wier persoonsgegevens waren verzameld door klagers aan de criteria neergelegd in de rechtspraak van het EHRM is gemaakt (arresten Von Hannover II, NJ 2013/250, en Perinçek, NJ 2017/451) (r.o. 198).

Satakunnan Markkinapörssi Oy and Satamedia Oy
tegen
Finland

EHRM:

The law

I. The government's preliminary objections

Enz. (red.)

A. The Chamber Judgment

98. The Chamber considered that there had been an interference with the applicant companies' right to impart information, but that that interference had been 'prescribed by law' and had pursued the legitimate aim of protecting the reputation or rights of others. As to the necessity of said interference in a democratic society, the Chamber noted that the taxation data in question were already a matter of public record in Finland and, as such, was a matter of public interest. This information had been received directly from the tax authorities and there was no evidence, according to the Chamber, or indeed any allegation, of factual errors, misrepresentation or bad faith on the part of the applicant companies. The only problematic issue for the national authorities and courts had been the manner and the extent to which the information could be published.

99. The Chamber noted that, after having received the preliminary ruling from the CJEU, the Supreme Administrative Court had found that the publication of the whole database containing personal data collected for journalistic purposes could not be regarded as a journalistic activity. It had considered that the public interest did not require publication of personal data to the extent seen in the present case. The same applied also to the SMS service. The Chamber observed that, in its analysis, the Supreme Administrative Court had attached importance both to the applicant companies' right to freedom of expression and to the right to respect for the private life of those tax payers whose taxation information had been published. It had balanced these interests in its reasoning, interpreting the applicant companies' freedom of expression strictly, in line with the CJEU ruling on the need for a strict interpretation of the journalistic purposes derogation, in order to protect the right to privacy. The Chamber found this reasoning acceptable. According to the Chamber, the Court would, under such circumstances, require strong reasons to substitute its own view for that of the domestic courts.

100. As regards the sanctions imposed by the domestic authorities, the Chamber noted that the applicant companies had not been prohibited generally from publishing the information in question but only to a certain extent. Their decision to shut down the business was thus not a direct consequence of the actions taken by the domestic courts and authorities but an economic decision made by the applicant companies themselves.

B. The parties' submissions to the Grand Chamber

1. The applicant companies

101. The applicant companies maintained that the domestic decisions had prevented them from imparting information and had as a consequence impeded them 'entirely' from carrying out their publishing activities. The said interference had taken the form of a prior ban. On 1 November every year, when the tax records of the previous year became public, numerous newspapers and other media published personal tax data in paper and electronic formats. This was no different from what the applicant companies had engaged in, apart from the quantity of the published data. The majority of the persons whose data were accessible in this way were not known to the public and were of varying backgrounds and professions. No particular judicial attention had ever been paid to the identity of the persons whose names and amounts of taxable income had been published. Nor had the activities of other media ever been subject to the Data Protection Ombudsman's scrutiny.

102. The applicant companies argued that this interference with their right to freedom of expression had not been 'prescribed by law'. The publishing of taxation data had, in particular, been accepted by the Finnish legislator. The preparatory work relating to the Act on the Public Disclosure and Confidentiality of Tax Information noted that such publishing had taken place for years and also served certain societal purposes. A thorough discussion had taken place during the preparation of the said Act, assessing the pros and cons of publishing taxation data, and the legislator had finally decided to maintain public access to such data. The Personal Data Act was not intended to restrict publishing activities. The relevant preparatory work stated that the legal status of the data in question was to remain unchanged. The journalistic purposes derogation was to apply to databases that were designed to support publishing so as to prevent even indirect prior restrictions on freedom of expression. Possible violations of privacy were to be examined and dealt with *ex post facto*. On this basis the applicant companies argued that the interference had not been 'prescribed by law' within the meaning of Article 10 § 2 of the Convention.

103. The applicant companies also claimed that the interference had not been 'necessary in a democratic society'. There had never been any issue as regards the accuracy of the information, only its

quantity. The balancing criteria applied by the Court functioned best where the privacy of one or two persons was concerned. In such situations the data relating to a particular individual took prominence. When hundreds of thousands of names were published, all in the same manner, the information concerning a specific person 'blended in'. The publication of such data could hardly violate anyone's privacy. For such situations, a different type of balancing criteria ought to be applied in order to better take into account the nature of the mass data published, namely a criterion for protecting the privacy of a large population. Moreover, when other media had published taxation data on, for example, 150,000 individuals, it had never been requested that this information be viewed in the light of the Court's balancing criteria. It was only when the applicant companies had published 1.2 million names that such criteria became applicable.

104. The issue of public interest had been examined when the Act on the Public Disclosure and Confidentiality of Tax Information was enacted. According to the applicant companies, public access to tax data enabled the public to observe the results of tax policies and how differences in income and wealth developed, for example, between different regions, occupations and sexes. It also enabled supervision by the Finnish tax administration as people reported their suspicions of tax evasion directly to the tax administration. In 2015 alone, the tax administration had received 15,000 such reports. The applicant companies thus argued that a balance between the public and publishable tax records, on the one hand, and the protection of privacy, on the other hand, had already been struck by the Finnish legislator. Therefore, no margin of appreciation, or at least a very narrow one, was left to the domestic authorities. There was thus no need for any re-balancing. Contrary to *Fressoz and Roire v. France* [GC], no. 29183/95, ECHR 1999-I (*NJ* 1999/713, m.nt. E.J. Dommering; *red.*), the taxation information in the present case had been obtained lawfully by the applicant companies from public tax records, in the same manner as any other member of the public. The effect on a person's privacy could not in any significant way be different depending on whether the information had been received from the applicant companies, other media or through a phone-in service operated by the tax administration itself. Since the information had been so readily available, its publication could not violate anyone's privacy.

105. Referring to the definition of journalistic activities set out in the draft EU General Data Protection Regulation, the applicant companies argued that their publishing activities should be considered as journalism. The reasoning of the Supreme Administrative Court was in contradiction with this definition, which fact was bound to endanger the very idea of freedom of expression. Given the terms of the Supreme Administrative Court's judgment, one had to ask how much information needed to be published to transgress the limit between publishable and non-publishable information. The quantity and the manner in which taxation information could be lawfully published had, according to the applicant companies, never been defined. The national court had failed to take into account the balancing criteria in the Court's case-law, and had only had regard to the public interest criterion. There should in any event be no upper limit on the quantity of information publishable.

2. The Government

106. The Government agreed, in essence, with the Chamber's finding of no violation, but contended that there had been no interference with the applicant companies' right to impart information. The applicant companies could still collect and publish public taxation data in so far as they complied with the requirements of data protection legislation.

107. In the event that the Court were to find that an interference had occurred, the Government agreed with the Chamber's finding that the interference was prescribed by law and pursued the legitimate aim of protecting the reputation or rights of others. As to the further question whether any interference had been necessary in a democratic society, the Government shared the Chamber's view that the general subject-matter, namely taxation data relating to natural persons' taxable income, was a matter of public interest. Taxation data were publicly available in Finland but had to be accessed and used in conformity with the Personal Data Act and the Act on the Openness of Government Activities. Public access to such information did not imply that that information could always be published. Respect for personal data and privacy under Article 8 of the Convention required the disclosure of such information to be subject to certain controls.

108. The Government emphasised that the applicant companies had requested the data in question from the National Board of Taxation in 2000 and 2001. On the basis of an opinion received by the Board from the Data Protection Ombudsman, the Board had requested the applicant companies to provide further information regarding their request, and indicated that the data could not be disclosed if the publishing methods of *Veropörssi* continued unchanged. The applicant companies had then cancelled their request while explaining that they would provide information to the Data Protection Ombudsman and the National Board of Taxation the following year, which they never did. Instead, they employed people to collect taxation data manually at the local tax offices.

109. The Government pointed out that, according to the Guidelines for Journalists which were in force at the material time, the right to privacy also applied when publishing public

documents or other information originating from public sources. The Guidelines made clear that the public availability of information did not necessarily imply that it could be freely published.

110. The Government noted that, as the domestic courts had made clear, the manner and extent of the publication were of importance. The data published in *Veropörssi* had encompassed data relating to 1.2 million persons, almost one third of all taxpayers in Finland. Other Finnish media published taxation data concerning 50,000 to 100,000 individuals annually, which was considerably less than the applicant companies. The latter published, without any analysis, data on persons with low or medium income who were not public figures and held no important positions in society. Their publishing activities could not therefore be viewed as data journalism aimed at drawing conclusions from such data and drawing attention to issues of public interest for public debate. Such publishing did not contribute to public debate in a manner that outweighed the public interest in protecting the processing of personal data to the described extent; it mainly satisfied readers' curiosity. The applicant companies had not been prevented from publishing taxation data as such or participating in any public debate on an issue of general importance.

111. Should the public interest in ensuring the transparency of the taxation data require the possibility of their disclosure by, for instance, publishing the data by the media, the Government took the view that that aim could have been accomplished without processing personal data to the extent prohibited by the Personal Data Act and the Data Protection Directive. The present case differed from *Fressoz and Roire v. France*, cited above, in which the publishing of data concerned a single person having a key role in a public debate on a socially important issue. Contrary to the applicant companies' allegations, the present case was not abstract and hypothetical. Private persons had been affected by their activities: between 2000 and 2010 the Data Protection Ombudsman had received a number of complaints requesting his intervention. There was thus a pressing social need to protect private life under Article 8 of the Convention.

112. Concerning the interpretation of the Data Protection Directive, the CJEU had noted in its preliminary ruling in the present case that it was necessary to interpret the notion of journalism broadly and that derogations and limitations in relation to data protection had to apply only insofar as was strictly necessary. The applicant companies were never prevented from publishing taxation information in general. They could have, had they so wished, adjusted their activities so as to comply with the Personal Data Act.

113. Referring to the margin of appreciation, the Government emphasised, as did the Chamber, that the Court would need strong reasons to substitute its own view for that of the domestic courts. The domestic courts had been acting within the margin of appreciation afforded to them and had struck a fair balance between the competing interests at stake. The interference complained of was 'necessary in a democratic society' and there had been no violation of Article 10 of the Convention.

C. Third-party observations

1. The European Information Society Institute

114. The European Information Society Institute noted that data journalism involved the making of already existing information more useful to the public. Processing and analysing of available data on a particular topic was also an important journalistic activity in and of itself. To remove the protection of Article 10 when journalists published databases would jeopardise the protection that ought to be afforded to a wide range of activities in which journalists engaged to impart information to the public. If the use of new technologies could not find protection under Article 10, the right to impart information as well as the right to receive it would be seriously impaired.

115. The traditional criteria for defining the limits on the quantity of information that could be published and processed by private actors were not well suited to balancing the tensions created by data journalism. The balancing factors previously used by the Court were not useful in cases like the present one. When data journalists made available information that was in the public interest, their actions should be supported in a democratic society — not silenced. The European Information Society Institute therefore suggested that the Court might revisit its method of applying the existing case-law in cases where journalists processed information in order to impart information to the public. It should extend the Article 10 protection to innovative forms of journalism and recognise that the standard for determining how Article 10 protected journalists engaged in the processing of data could have important consequences.

2. NORDPLUS Law and Media Network

116. NORDPLUS Law and Media Network noted that it was important for the Court to develop principles related to freedom of expression in the light of present day conditions and to consider how the established principles applied in the digital media context. Many UN, EU and OECD guidelines referred to media neutrality and technological neutrality when addressing the digital media environment. The present case provided a key opportunity to review the existing definition of 'journalist'. The EU guidelines pointed out that there was a need to go beyond the notion of traditional journalists and widen its scope for the benefit of those whose freedom of expression should be protected. An extended scope could also have an impact on the balancing test and its possible reassessment. The Court should further elaborate

on whether the concept of 'chilling effect' should be viewed differently in the new media environment.

117. Access to information was one of the cornerstones of participation in democratic debate and a precondition for the media in the performance of their role of public watchdog. Many countries had different traditions when it came to making information public. In Finland, transparency was a highly important societal value. NORDPLUS Law and Media Network concluded that the Court's case-law needed further clarification in order to reduce the uncertainty that existed in the field of freedom of expression and the right to privacy in the digital media environment.

3. ARTICLE 19, the Access to Information Programme and Társaság a Szabadságjogokért

118. ARTICLE 19, the Access to Information Programme and Társaság a Szabadságjogokért noted that the CJEU had in 2008 adopted a wide definition of journalism in its case Satakunnan Markkinapörssi. The Committee of Ministers of the Council of Europe had also defined a journalist broadly as 'any natural or legal person who [was] regularly or professionally engaged in the collection and dissemination of information to the public via any means of mass communication'. In Ireland, the High Court had extended the journalistic privilege to bloggers, and the UN Special Rapporteur on Freedom of Expression had noted in his 2015 report that persons other than professional journalists carried out a 'vital public watchdog role'. The Court should therefore not set the standard of protection under Article 10 any lower than mentioned above.

119. Disclosure of public personal data could contribute to the good of society by creating transparency and accountability around the actions of those who wielded power within society or, conversely, were engaged in unlawful conduct. Publication of such information did not merely satisfy the curiosity of readers but contributed substantially to the pursuit of public interest journalism. These arguments became even stronger if the personal data had previously been published by the State or had otherwise been deemed public under national legislation. The fact that such information was made public implied that there was a public interest regarding access to such information. The public interest in publishing such information outweighed privacy considerations and, once publication had taken place, the information could no longer be regarded as inherently private.

D. The Court's assessment

1. Preliminary remarks on the scope and context of the Court's assessment

120. The Court notes at the outset that the present case is unusual to the extent that the taxation data at issue were publicly accessible in Finland. Furthermore, as emphasised by the applicant companies, they were not alone amongst media outlets in Finland in collecting, processing and publishing taxation data such as the data which appeared in *Veropörssi*. Their publication differed from that of those other media outlets by virtue of the manner and the extent of the data published.

121. In addition, as also indicated in paragraph 81 above, only a very small number of Council of Europe member States provide for public access to taxation data, a fact which raises issues regarding the margin of appreciation which Finland enjoys when providing and regulating public access to such data and reconciling that access with the requirements of data protection rules and the right to freedom of expression of the press.

122. Given this context and the fact that at the heart of the present case lies the question whether the correct balance was struck between that right and the right to privacy as embodied in domestic data protection and access to information legislation, it is necessary, at the outset, to outline some of the general principles deriving from the Court's case-law on Article 10 and press freedom, on the one hand, and the right to privacy under Article 8 of the Convention in the particular context of data protection on the other.

123. Bearing in mind the need to protect the values underlying the Convention and considering that the rights under Articles 10 and 8 of the Convention deserve equal respect, it is important to remember that the balance to be struck by national authorities between those two rights must seek to retain the essence of both (see also *Delfi AS v. Estonia* [GC], no. 64569/09, § 110, ECHR 2015).

(a) Article 10 and press freedom

124. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Von Hannover v. Germany* (no. 2) [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012 (*NJ* 2013/250, m.nt. E.J. Dommering; *red.*); *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 88, ECHR 2015 (extracts); and *Bédat v. Switzerland* [GC], no. 56925/08, § 48, ECHR 2016).

125. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its task is nevertheless to impart — in a manner consistent

with its obligations and responsibilities — information and ideas on all matters of public interest. The task of imparting information necessarily includes, however, 'duties and responsibilities', as well as limits which the press must impose on itself spontaneously (see *Couderc and Hachette Filipacchi Associés*, cited above, § 89; and *Von Hannover (no. 2)*, cited above, § 102).

126. The vital role of the media in facilitating and fostering the public's right to receive and impart information and ideas has been repeatedly recognised by the Court. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role as 'public watchdog' (see, recently, *Magyar Helsinki Bizottság v. Hungary* [GC], no. 18030/11, § 165, 8 November 2016, ECHR 2016 (*NJ* 2017/431, m.nt. E.J. Dommering; *red.*); and further authorities).

127. Furthermore, the Court has consistently held that it is not for it, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298; and *Stoll v. Switzerland* [GC], no. 69698/01, § 146, ECHR 2007-V (*NJ* 2008/236, m.nt. E.J. Dommering; *red.*)).

128. Finally, it is well-established that the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom (see, most recently, *Magyar Helsinki Bizottság*, cited above, § 130, with further references).

(b) Article 8, the right to privacy and data protection

129. As regards whether, in the circumstances of the present case, the right to privacy under Article 8 of the Convention is engaged given the publicly accessible nature of the taxation data processed and published by the applicant companies, the Court has constantly reiterated that the concept of 'private life' is a broad term not susceptible to exhaustive definition (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008 (*NJ* 2009/410, m.nt. E.A. Alkema; *red.*); and *Vukota-Bojić v. Switzerland*, no. 61838/10, § 52, 18 October 2016).

130. Leaving aside the numerous cases in which the Court has held that the right to privacy in Article 8 covers the physical and psychological integrity of a person, private life has also been held to include activities of a professional or business nature (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251 B) or the right to live privately, away from unwanted attention (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 95, ECHR 2003 IX (extracts) (*NJ* 2006/550, m.nt. T.M. Schalken; *red.*)).

131. Indeed, the Court has also held that there is a zone of interaction of a person with others, even in a public context, which may fall within the scope of 'private life' for the purposes of Article 8 of the Convention (see *Couderc and Hachette Filipacchi Associés*, cited above, § 83; and *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX (*NJ* 2003/670, m.nt. E.J. Dommering; *red.*).

132. The vast majority of cases in which the Court has had to examine the balancing by domestic authorities of press freedom under Article 10 and the right to privacy under Article 8 of the Convention have related to alleged infringements of the right to privacy of a named individual or individuals as a result of the publication of particular material (see, for example, *Flinkkilä and Others v. Finland*, no. 25576/04, 6 April 2010; and *Ristamäki and Korvola v. Finland*, no. 66456/09, 29 October 2013).

133. In the particular context of data protection, the Court has, on a number of occasions, referred to the Data Protection Convention (see paragraph 80 above), which itself underpins the Data Protection Directive applied by the domestic courts in the present case. That Convention defines personal data in Article 2 as 'any information relating to an identified or identifiable individual'. In *Amann*, cited above, § 65, the Court provided an interpretation of the notion of 'private life' in the context of storage of personal data when discussing the applicability of Article 8:

> 'The Court reiterates that the storing of data relating to the 'private life' of an individual falls within the application of Article 8 § 1 (see the *Leander v. Sweden* judgment of 26 March 1987, Series A no. 116, p. 22, § 48).
>
> It points out in this connection that the term 'private life' must not be interpreted restrictively. In particular, respect for private life comprises the right to establish and develop relationships with other human beings; furthermore, there is no reason of principle to justify excluding activities of a professional or business nature from the notion of 'private life' (see the *Niemietz v. Germany* judgment of 16 December 1992, Series A no. 251-B, pp. 33–34, § 29; and the *Halford* judgment cited above, pp. 1015–16, § 42).
>
> That broad interpretation corresponds with that of the Council of Europe's Convention of 28 January 1981 for the Protection of Individuals with regard to Automatic Processing of Personal Data, which came into force on 1 October 1985 and whose purpose is 'to secure in the territory of each Party for every individual … respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him' (Article 1), such personal data being defined as 'any information relating to an identified or identifiable individual' (Article 2).'

134. The fact that information is already in the public domain will not necessarily remove the protection of Article 8 of the Convention. Thus, in *Von Hannover v. Germany* (no. 59320/00, §§ 74–75 and 77, ECHR 2004 VI (*NJ* 2005/22, m.nt. E.J. Dommering; *red.*)), concerning the publication of

photographs which had been taken in public places of a known person who did not have any official function, the Court found that the interest in publication of that information had to be weighed against privacy considerations, even though the person's public appearance could be assimilated to 'public information'.

135. Similarly, in *Magyar Helsinki Bizottság*, cited above, §§ 176–178, central to the Court's dismissal of privacy concerns was not the public nature of the information to which the applicant sought access, which is a factor to be considered in any balancing exercise, but rather the fact that the domestic authorities made no assessment whatsoever of the potential public-interest character of the information sought by the applicant in that case. Those authorities were rather concerned with the status of public defenders in relation to which the information was sought from the perspective of the Hungarian Data Act, which itself allowed for only very limited exceptions to the general rule of non-disclosure of personal data. Moreover, the respondent government in that case failed to demonstrate that the disclosure of the requested information could have affected the right to privacy of those concerned (*ibid*., § 194).

136. It follows from well-established case-law that where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private life considerations arise (see *Uzun v. Germany*, no. 35623/05, §§ 44–46, ECHR 2010 (extracts); see also *Rotaru v. Romania*, cited above, §§ 43–44; *P.G. and J.H. v. the United Kingdom*, cited above, § 57; *Amann*, cited above, §§ 65–67; and *M.N. and Others v. San Marino*, no. 28005/12, §§ 52–53, 7 July 2015).

137. The protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life, as guaranteed by Article 8 of the Convention. The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of this Article (see *S. and Marper*, cited above, § 103). Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged.

138. In the light of the foregoing considerations and the Court's existing case-law on Article 8 of the Convention, it appears that the data collected, processed and published by the applicant companies in *Veropörssi*, providing details of the taxable earned and unearned income as well as taxable net assets, clearly concerned the private life of those individuals, notwithstanding the fact that, pursuant to Finnish law, that data could be accessed, in accordance with certain rules, by the public.

2. Existence of an interference

139. The Court notes that, by virtue of the decisions of the domestic data protection authorities and courts, the first applicant company was prohibited from processing taxation data in the manner and to the extent that had been the case in 2002 and from forwarding that information to an SMS service. Those courts found that the collection of personal data and their processing in the background file of the first applicant company could not as such be regarded as contrary to the data protection rules, provided, inter alia, that the data had been protected properly. However, considering the manner and the extent to which the personal data in the background file had subsequently been published in *Veropörssi*, the first applicant company, which was found not to be able to rely on the journalistic purposes derogation, had processed personal data concerning natural persons in violation of the Personal Data Act. The second applicant company was prohibited from collecting, storing or forwarding to an SMS service any data received from the first applicant company's database and published in *Veropörssi* (see paragraph 23 above).

140. The Court finds that the Data Protection Board's decision, as upheld by the national courts, entailed an interference with the applicant companies' right to impart information as guaranteed by Article 10 of the Convention.

141. In the light of paragraph 2 of Article 10, such an interference with the applicant companies' right to freedom of expression must be 'prescribed by law', have one or more legitimate aims and be 'necessary in a democratic society'.

3. Lawfulness

142. The expression 'prescribed by law' in the second paragraph of Article 10 not only requires that the impugned measure should have a legal basis in domestic law, but also refers to the quality of the law in question, which should be accessible to the person concerned and foreseeable as to its effects (see, amongst many authorities, Delfi AS, cited above, § 120, with further references).

143. As regards the requirement of foreseeability, the Court has repeatedly held that a norm cannot be regarded as a 'law' within the meaning of Article 10 § 2 unless it is formulated with sufficient precision to enable a person to regulate his or her conduct. That person must be able — if need be with appropriate advice — to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail. Those consequences need not be foreseeable with absolute certainty. Whilst certainty is desirable, it may bring in its train excessive rigidity, and the law must be able to keep pace with changing circumstances. Accordingly, many laws are inevitably couched in terms which, to a greater or lesser extent, are vague, and whose interpretation and application are questions of practice (see

further *Delfi AS*, cited above, § 121; and *Centro Europa 7 S.r.l. and Di Stefano v. Italy* [GC], no. 38433/09, § 141, ECHR 2012).

144. The role of adjudication vested in the national courts is precisely to dissipate such interpretational doubts as may remain. The Court's power to review compliance with domestic law is thus limited, as it is primarily for the national authorities, notably the courts, to interpret and apply domestic law (see, amongst other authorities, *Kudrevičius and Others v. Lithuania* [GC], no. 37553/05, § 110, ECHR 2015, with further references). Moreover, the level of precision required of domestic legislation — which cannot provide for every eventuality — depends to a considerable degree on the content of the law in question, the field it is designed to cover and the number and status of those to whom it is addressed (see *Delfi AS*, cited above, § 122; and *Kudrevičius*, cited above, § 110).

145. The Court has found that persons carrying on a professional activity, who are used to having to proceed with a high degree of caution when pursuing their occupation, can on this account be expected to take special care in assessing the risks that such activity entails (see *Delfi AS*, cited above, § 122, with further references; and, in the context of banking data, *G.S.B. v. Switzerland*, no. 28601/11, § 69, 22 December 2015 (*NJ* 2016/338, m.nt. J.W. Zwemmer; *red.*)).

146. In the present case, the applicant companies and the Government (see paragraphs 102 and 107 above respectively) differed as to whether the interference with the applicant company's freedom of expression was 'prescribed by law'.

147. As regards the existence of a clear legal basis for the impugned interference, the Court finds no reason to call into question the view taken by the Supreme Administrative Court in the instant case that the impugned interference had a legal basis in sections 2(5), 32 and 44(1) of the Personal Data Act (see paragraph 22 above).

148. As regards the foreseeability of the domestic legislation and its interpretation and application by the domestic courts, in the absence of a provision in the domestic legislation explicitly regulating the quantity of data which could be published and in view of the fact that several media outlets in Finland were also engaged in publication of similar taxation data to some extent, the question arises whether the applicant companies could be considered to have foreseen that their specific publishing activities would fall foul of the existing legislation, bearing in mind in this connection the existence of the journalistic purposes derogation.

149. For the Court, the terms of the relevant data protection legislation and the nature and scope of the journalistic derogation on which the applicant companies sought to rely were sufficiently foreseeable and those provisions were applied in a sufficiently foreseeable manner following the interpretative guidance provided to the Finnish court by the CJEU. The Personal Data Act transposed the Data Protection Directive into Finnish law. According to the Act, the processing of personal data meant the collection, recording, organisation, use, transfer, disclosure, storage, manipulation, combination, protection, deletion and erasure of personal data, as well as other measures directed at personal data (see paragraph 34 above). It seems reasonably clear from this wording and from the relevant preparatory work (see paragraph 36 above) that there was a possibility that the national competent authorities would one day arrive at the conclusion, as they did in this case, that a database established for journalistic purposes could not be disseminated as such. The quantity and form of the data published could not exceed the scope of the derogation and the derogation, by its nature, had to be restrictively interpreted, as the CJEU clearly indicated.

150. Even if the applicant companies' case was the first of its kind under the Personal Data Act, that would not render the domestic courts' interpretation and application of the journalistic derogation arbitrary or unpredictable (see *Kudrevičius*, cited above, § 115; and, *mutatis mutandis*, in relation to Article 7 of the Convention, *Huhtamäki v. Finland*, no. 54468/09, § 51, 6 March 2012, with further references), nor would the fact that the Supreme Administrative Court sought guidance from the CJEU on the interpretation of the derogation in Article 9 of the Data Protection Directive. Indeed, as regards the latter, the Court has regularly emphasised the importance, for the protection of fundamental rights in the EU, of the judicial dialogue conducted between the domestic courts of EU Member States and the CJEU in the form of references from the former for preliminary rulings by the latter (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland* [GC], no. 45036/98, § 164, ECHR 2005-VI; and *Avotiņš v. Latvia* [GC], no. 17502/07, §§ 105 and 109, ECHR 2016).

151. Moreover, the applicant companies were media professionals and, as such, they should have been aware of the possibility that the mass collection of data and its wholesale dissemination — pertaining to about one third of Finnish taxpayers or 1.2 million people, a number 10 to 20 times greater than that covered by any other media organisation at the time — might not be considered as processing 'solely' for journalistic purposes under the relevant provisions of Finnish and EU law.

152. In the instant case, following their requests for data from the National Board of Taxation in 2000 and 2001, the applicant companies were requested by the Data Protection Ombudsman to provide further information regarding those requests and were told that the data could not be disclosed if *Veropörssi* continued to be published in its usual form. Instead of complying with the request for

more information of the Ombudsman, the applicant companies circumvented the usual route for journalists to access the taxation data sought and organised for the latter to be collected manually at the local tax offices (see paragraph 12 above). It is not for the Court to speculate on the reasons why they acted in this way but the fact that they did suggests some anticipation, on their part, of difficulties in relying on the journalistic purposes derogation and the relevant national legislation on access to taxation data.

153. Furthermore, the 1992 version of the Guidelines for Journalists — reproduced in 2005, 2011 and 2014 — indicated clearly that the principles concerning the protection of an individual also applied to the use of information contained in public documents or other public sources and that the mere fact that information was accessible to the public did not always mean that it was freely publishable. These guidelines, which were intended to ensure self-regulation by Finnish journalists and publishers, must have been familiar to the applicant companies.

154. In light of the above considerations, the Court concludes that the impugned interference with the applicant companies' right to freedom of expression was 'prescribed by law'.

4. Legitimate aim

155. The parties did not in substance dispute that the interference with the applicant companies' freedom of expression could be regarded as pursuing the legitimate aim of protecting 'the reputation and rights of others'.

156. However, the applicant companies argued that while the need to protect against violations of privacy might be a relevant consideration, it was one which the Finnish legislator had already taken into account, assessed and accepted when adopting the Personal Data Act. In their view, the alleged need to protect privacy in the instant case was abstract and hypothetical. Any threat to privacy had been practically non-existent and, in any event, the case was not at all about the privacy of isolated individuals.

157. The Court notes that, contrary to the suggestions of the applicant companies, it emerges clearly from the case file that the Data Protection Ombudsman acted on the basis of concrete complaints from individuals claiming that the publication of taxation data in *Veropörssi* infringed their right to privacy. As is clear from the figures indicated in paragraph 9 above, a very large group of natural persons who were taxpayers in Finland had been directly targeted by the applicant companies' publishing practice. It is arguable that all Finnish taxpayers were affected, directly or indirectly, by the applicant companies' publication since their taxable income could be estimated by readers by virtue of their inclusion in or exclusion from the lists published in *Veropörssi*.

158. Leaving aside the question whether it would have been necessary to identify individual complainants at national level, the applicant companies' argument fails to appreciate the nature and scope of the duties of the domestic data protection authorities pursuant to, *inter alia*, section 44 of the Personal Data Act and the corresponding provisions of the Data Protection Directive. As regards the latter, it is noteworthy that the CJEU has held that the guarantee of the independence of national supervisory authorities was established in order to strengthen the protection of individuals and bodies affected by the decisions of those authorities. In order to guarantee that protection, the national supervisory authorities must, in particular, ensure a fair balance between, on the one hand, observance of the fundamental right to privacy and, on the other hand, the interests requiring free movement of personal data (see the CJEU judgment in the *Schrems* case, cited in paragraph 76 above). The protection of privacy was thus at the heart of the data protection legislation for which these authorities were mandated to ensure respect.

159. In the light of the above considerations and taking into account the aims of the Data Protection Convention, reflected in Directive 95/46 and, more recently, in Regulation 2016/79 (see paragraphs 59 and 67 above), it is clear that the interference with the applicant companies' right to freedom of expression pursued the legitimate aim of protecting 'the reputation or rights of others', within the meaning of Article 10 § 2 of the Convention.

5. Necessary in a democratic society

160. The core question in the instant case, as indicated previously, is whether the interference with the applicant companies' right to freedom of expression was 'necessary in a democratic society' and whether, in answering this question, the domestic courts struck a fair balance between that right and the right to respect for private life.

161. Having outlined above — see paragraphs 120–138 - some general principles relating to the rights to freedom of expression and respect for private life, as well as why Article 8 of the Convention is clearly engaged in circumstances such as these, the Court considers it useful to reiterate the criteria for balancing these two rights in the circumstances of a case such as the present one.

(a) General principles concerning the margin of appreciation and balancing of rights

162. The choice of the means calculated to secure compliance with Article 8 of the Convention is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative (see Couderc and Hachette Filipacchi Associés, cited above, § 90; and Von Hannover (no. 2), cited above, § 104, with further references). Likewise, under

Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression protected by this provision is necessary (ibid.).

163. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court reiterates that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, as indicated previously, these rights deserve equal respect (see paragraph 123 above). Accordingly, the margin of appreciation should in principle be the same in both situations.

164. According to the Court's established case-law, the test of necessity in a democratic society requires the Court to determine whether the interference complained of corresponded to a pressing social need, whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient (see The Sunday Times *v. the United Kingdom (no. 1)*, 26 April 1979, § 62, Series A no. 30). The margin of appreciation left to the national authorities in assessing whether such a need exists and what measures should be adopted to deal with it is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. As indicated above, when exercising its supervisory function, the Court's task is not to take the place of the national courts but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see, in particular, the summary of the relevant principles in *Perinçek v. Switzerland* [GC], no. 27510/08, § 198, ECHR 2015 (extracts) (*NJ* 2017/451, m.nt. E.J. Dommering; *red.*); and, in particular, *Von Hannover (no. 2)*, cited above, § 105). Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts (see *Couderc and Hachette Filipacchi Associés*, cited above, § 92; and *Von Hannover (no. 2)*, cited above, § 107).

165. The Court has already had occasion to lay down the relevant principles which must guide its assessment — and, more importantly, that of domestic courts — of necessity. It has thus identified a number of criteria in the context of balancing the competing rights. The relevant criteria have thus far been defined as: contribution to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and, where it arises, the circumstances in which photographs were taken. Where it examines an application lodged under Article 10, the Court will also examine the way in which the information was obtained and its veracity, and the gravity of the penalty imposed on the journalists or publishers (see *Couderc and Hachette Filipacchi Associés*, cited above, § 93; *Von Hannover (no. 2)*, cited above, §§ 109-13; and *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 90–95, 7 February 2012 (*NJ* 2013/251, m.nt. E.J. Dommering; *red.*)).

166. The Court considers that the criteria thus defined may be transposed to the present case, albeit certain criteria may have more or less relevance given the particular circumstances of the present case which, as explained previously (see paragraphs 8–9 above), concerned the mass collection, processing and publication of data which were publicly accessible in accordance with certain rules and which related to a large number of natural persons in the respondent State.

(b) Application of the relevant general principles to the present case

(i) Contribution of the impugned publication to a debate of public interest

167. There is, as the Court has consistently held, little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on matters of public interest (see *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV; and *Wingrove v. the United Kingdom*, 25 November 1996, § 58, *Reports of Judgments and Decisions* 1996-V). The margin of appreciation of States is thus reduced where a debate on a matter of public interest is concerned (see *Couderc and Hachette Filipacchi Associés*, cited above, § 96, with further references).

168. In ascertaining whether a publication disclosing elements of private life also concerned a question of public interest, the Court has taken into account the importance of the question for the public and the nature of the information disclosed (see *Couderc and Hachette Filipacchi Associés*, cited above, § 98; and *Von Hannover no. 2*, cited above, § 109).

169. The public has a right to be informed, and this is an essential right in a democratic society which, in certain special circumstances, can even extend to aspects of the private life of public figures. However, articles aimed solely at satisfying the curiosity of a particular readership regarding the details of a person's private life, however well-known that person might be, cannot be deemed to contribute to a debate of public interest (see *Von Hannover*, cited above, § 65; *MGN Limited v. the United Kingdom*, no. 39401/04, § 143, 18 January 2011; and *Alkaya v. Turkey*, no. 42811/06, § 35, 9 October 2012).

170. In order to ascertain whether a publication concerning an individual's private life is not intended purely to satisfy the curiosity of a certain

readership, but also relates to a subject of general importance, it is necessary to assess the publication as a whole and have regard to the context in which it appears (see *Couderc and Hachette Filipacchi Associés*, cited above, § 102; *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 87, 1 March 2007; *Björk Eiðsdóttir v. Iceland*, no. 46443/09, § 67, 10 July 2012; and *Erla Hlynsdóttir v. Iceland*, no. 43380/10, § 64, 10 July 2012).

171. Public interest ordinarily relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism (see *Couderc and Hachette Filipacchi Associés*, cited above, §§ 101 and 103, and the further references cited therein).

172. It is unquestionable that permitting public access to official documents, including taxation data, is designed to secure the availability of information for the purpose of enabling a debate on matters of public interest. Such access, albeit subject to clear statutory rules and restrictions, has a constitutional basis in Finnish law and has been widely guaranteed for many decades (see paragraphs 37–39 above).

173. Underpinning the Finnish legislative policy of rendering taxation data publicly accessible was the need to ensure that the public could monitor the activities of government authorities. While the applicant companies referred to the fact that access to taxation data also enabled supervision by citizens of one another and the reporting of tax evasion, the Court has not, on the basis of the relevant preparatory works and the material available to it, been able to confirm that this was the objective of the Finnish access regime (see paragraph 43 above) or that, over time, this supervisory purpose developed.

174. Nevertheless, public access to taxation data, subject to clear rules and procedures, and the general transparency of the Finnish taxation system does not mean that the impugned publication itself contributed to a debate of public interest. Taking the publication as a whole and in context and analysing it in the light of the above-mentioned case-law (see paragraphs 162–166 above), the Court, like the Supreme Administrative Court, is not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies contributed to such a debate or indeed that its principal purpose was to do so.

175. The journalistic purposes derogation in section 2(5) of the Personal Data Act is intended to allow journalists to access, collect and process data in order to ensure that they are able to perform their journalistic activities, themselves recognised as essential in a democratic society. This point was clearly made by the Supreme Administrative Court in its decision of 2009 (see paragraph 22 above), where it stated that restricting the processing of taxation data by journalists at the pre-publication or disclosure stage would have been impermissible as in practice it could have meant that a decision was being taken on what material could be published. However, the existence of a public interest in providing access to, and allowing the collection of, large amounts of taxation data did not necessarily or automatically mean that there was also a public interest in disseminating *en masse* such raw data in unaltered form without any analytical input. It had been made clear in the preparatory work on the domestic legislation (see paragraph 36 above) that databases established for journalistic purposes were not intended to be made available to persons not engaged in journalistic activities, thus underlining that the journalistic privilege in question related to the processing of data for internal purposes. This distinction between the processing of data for journalistic purposes and the dissemination of the raw data to which the journalists were given privileged access is clearly made by the Supreme Administrative Court in its first decision of 2009.

176. Furthermore, reliance on the derogation depended on the processing of the data being carried out 'solely' for journalistic purposes. Yet, as the Supreme Administrative Court found, the publication of the taxation data in *Veropörssi* almost verbatim, as catalogues, albeit split into different parts and sorted by municipality, amounted to the disclosure of the entire background file kept for journalistic purposes and there could be no question, in such circumstances, of an attempt solely to express information, opinions or ideas. While the applicant companies argued that the public disclosure of tax records enabled the public to observe results of tax policy — how differences between income and wealth develop, for example, between regions, professions and on the basis of gender — they did not explain how their readers would be able to engage in this type of analysis on the basis of the raw data, published *en masse*, in *Veropörssi*.

177. Finally, while the information might have enabled curious members of the public to categorise named individuals, who are not public figures, according to their economic status, this could be regarded as a manifestation of the public's thirst for information about the private life of others and, as such, a form of sensationalism, even voyeurism (see *Couderc and Hachette Filipacchi Associés*, cited above, § 101).

178. In the light of these considerations, the Court cannot but agree with the Supreme Administrative Court that the sole object of the impugned publication was not, as required by

domestic and EU law, the disclosure to the public of information, opinions and ideas, a conclusion borne out by the layout of the publication, its form, content and the extent of the data disclosed. Furthermore, it does not find that the impugned publication could be regarded as contributing to a debate of public interest or assimilated to the kind of speech, namely political speech, which traditionally enjoys a privileged position in its case-law, thus calling for strict Convention scrutiny and allowing little scope under Article 10 § 2 of the Convention for restrictions (see, in this regard, *Sürek v. Turkey (no. 1)*, cited above, § 61; and *Wingrove*, cited above, § 58).

(ii) Subject of the impugned publication and how well-known were the persons concerned

179. The data published in *Veropörssi* comprised the surnames and names of natural persons whose annual taxable income exceeded certain thresholds (see paragraph 9 above). The data also comprised the amount, to the nearest € 100, of their earned and unearned income as well as details relating to their taxable net assets. When published in the newspaper, the data were set out in the form of an alphabetical list and were organised according to municipality and income bracket.

180. In the present case, 1.2 million natural persons were the subject of the *Veropörssi* publication. They were all taxpayers but only some, indeed very few, were individuals with a high net income, public figures or well-known personalities within the meaning of the Court's case-law. The majority of the persons whose data were listed in the newspaper belonged to low income groups. It was estimated that the data covered one third of the Finnish population and the majority of all full-time workers. Unlike other Finnish publications, the information published by the applicant companies did not pertain specifically to any particular category of persons such as politicians, public officials, public figures or others who belonged to the public sphere by dint of their activities or high earnings (see, in that regard, *Krone Verlag GmbH & Co. KG v. Austria*, no. 34315/96, § 37, 26 February 2002; and *News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 54, ECHR 2000-I (*NJ* 2001/74, m.nt. E.J. Dommering; *red.*)) or their position (see *Verlagsgruppe News GmbH v. Austria (no. 2)*, no. 10520/02, § 36, 14 December 2006). As the Court has previously stated, such persons inevitably and knowingly lay themselves open to close scrutiny by both journalists and the public at large (see, *inter alia, Lingens v. Austria*, 8 July 1986, § 42, Series A no. 103 and *Couderc and Hachette Filipacchi Associés*, cited above, §§ 120–121).

181. The applicant companies rely on the relative anonymity of the natural persons whose names and data featured in the newspaper and were accessible via the SMS service, as well as the sheer amount of data published, to downplay any interference with their privacy rights, suggesting that the more they published the less they interfered with privacy given what they described as a 'blending in' factor (see paragraph 103 above). However, even assuming that such a factor could operate to attenuate or diminish the degree of interference resulting from the impugned publication, it fails to take into account the personal nature of the data and the fact that it was provided to the competent tax authorities for one purpose but accessed by the applicant companies for another. It also ignores the fact that the manner and extent of the publication meant that, in one way or another, the resulting publication extended to the entire adult population, uncovered as beneficiaries of a certain income if included in the list but also of not being in receipt of such an income if excluded because of the threshold salaries involved (see also paragraph 157 above). It is the mass collection, processing and dissemination of data which data protection legislation such as that at issue before the domestic courts is intended to address.

(iii) Manner of obtaining the information and its veracity

182. The accuracy of the information published was never in dispute in the present case. The published information was collected in the local tax offices and was accurate.

183. As to the manner in which the information was obtained, it is important to remember that, in the area of press freedom the Court has held that, by reason of the duties and responsibilities inherent in the exercise of the freedom of expression, the safeguard afforded by Article 10 to journalists in relation to reporting on issues of public interest is subject to the proviso that they are acting in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism (see *Magyar Helsinki Bizottság*, cited above, § 159, with further references).

184. The Court reiterates that, in the present case, the applicant companies cancelled their request for data from the National Board of Taxation and instead hired people to collect taxation data manually at the local tax offices (see paragraph 12 above). They thereby circumvented both the legal limitations (the obligation to substantiate that the data would be collected for a journalistic purpose and not be published as a list) and the practical limitations (by employing people to collect the information manually in order to gain unlimited access to the personal taxation data with a view to its subsequent dissemination) imposed by the relevant domestic legislation. The data were then published in raw form, as catalogues or lists.

185. While the Court cannot but agree with the Chamber judgment that the data were not obtained by illicit means, it is clear that the applicant companies had a policy of circumventing the normal channels open to journalists to access taxation data and, accordingly, the checks and

balances established by the domestic authorities to regulate access and dissemination.

(iv) Content, form and consequences of the publication and related considerations

186. The Court has held, as indicated previously (see paragraph 127 above), that the approach to covering a given subject is a matter of journalistic freedom. It is for neither the Court nor the domestic courts, to substitute their own views for those of the press in this area (see *Jersild*, cited above, § 31; and *Couderc and Hachette Filipacchi Associés*, cited above, § 139). Article 10 of the Convention also leaves it to journalists to decide what details ought to be published in order to ensure an article's credibility (see *Fressoz and Roire*, cited above, § 54; and ibid.). In addition, journalists enjoy the freedom to choose, from the news items that come to their attention, which they will deal with and how. This freedom, however, is not devoid of responsibilities (*ibid.*). The choices that they make in this regard must be based on their profession's ethical rules and codes of conduct (see *Couderc and Hachette Filipacchi Associés*, cited above, § 138).

187. Where the impugned information was already publicly available, the Court has had regard to this factor in its assessment of whether the impugned restriction on freedom of speech was 'necessary' for the purposes of Article 10 § 2. In some cases it has been a decisive consideration leading the Court to find a violation of the Article 10 guarantee (see *Weber v. Switzerland*, 22 May 1990, §§ 48–52, Series A no. 177; Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, §§ 66–71, Series A no. 216; The Sunday Times *v. the United Kingdom (no. 2)*, 26 November 1991, §§ 52–56, Series A no. 217; and *Vereniging Weekblad* Bluf! *v. the Netherlands*, 9 February 1995, §§ 41–46, Series A no. 306-A) while in others, notably regarding the freedom of the press to report on public court proceedings, the fact that the information was in the public domain was found to be outweighed by the need to protect the right to respect for private life under Article 8 of the Convention (see *Egeland and Hanseid v. Norway*, no. 34438/04, §§ 62–63, 16 April 2009; and *Shabanov and Tren v. Russia*, no. 5433/02, §§ 44–50, 14 December 2006).

188. It is noteworthy that the CJEU has made clear — not least in *Satakunnan Markkinapörssi Oy*, cited above, § 48; and *Google Spain*, cited above, § 30 — that the public character of data processed does not exclude such data from the scope of the Data Protection Directive and the guarantees the latter lays down for the protection of privacy (see paragraphs 20 and 75 above).

189. Whilst the taxation data in question were publicly accessible in Finland, they could only be consulted at the local tax offices and consultation was subject to clear conditions. The copying of that information on memory sticks was prohibited. Journalists could receive taxation data in digital format, but retrieval conditions also existed and only a certain amount of data could be retrieved. Journalists had to specify that the information was requested for journalistic purposes and that it would not be published in the form of a list (see paragraphs 49–51 above). Therefore, while the information relating to individuals was publicly accessible, specific rules and safeguards governed its accessibility.

190. The fact that the data in question were accessible to the public under the domestic law did not necessarily mean that they could be published to an unlimited extent (see paragraphs 48 and 54 above). Publishing the data in a newspaper, and further disseminating that data via an SMS service, rendered it accessible in a manner and to an extent not intended by the legislator.

191. As indicated previously, the gathering of information is an essential preparatory step in journalism and an inherent, protected part of press freedom (see paragraph 128 above). It is noteworthy that, in the instant case, the Supreme Administrative Court did not seek to interfere with the collection by the applicant companies of raw data, an activity which goes to the heart of press freedom, but rather with the dissemination of data in the manner and to the extent outlined above.

192. It is also necessary, at this point, to reiterate that Finland is one of very few Council of Europe Member States which provides for this degree of public access to taxation data. When assessing the margin of appreciation in a case such as this, as well as the proportionality of the impugned interference and the Finnish regime pursuant to which it was adopted, the Court must also assess the legislative choices which lay behind it and, in that context, the quality of the parliamentary and judicial review of the necessity of that legislation and the measures adopted on that basis which interfere with freedom of expression (see, in this regard, *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, §§ 108 and 110, ECHR 2013 (extracts) (*NJ* 2016/321, m.nt. E.J. Dommering; *red.*)).

193. As both parties have demonstrated, parliamentary review of Finnish legislation relating to access to information and taxation data in particular, as well as that relating to data protection, has been both exacting and pertinent. That scrutiny and debate at domestic level was furthermore reflected in the data protection context at EU level, when it came to the adoption of the Data Protection Directive and, subsequently, of Regulation 2016/79.

194. The Court observes that the Finnish legislator had decided, in adopting the Act on the Public Disclosure and Confidentiality of Tax Information, to maintain the public accessibility of the taxation data in question. Although a balancing exercise between the private and public interests involved had thus been conducted when this issue was decided by the Finnish Parliament, it does not follow that the treatment of such taxation data would no longer be subject to any data protection considerations as the applicant companies contend.

Section 2 (5) of the Personal Data Act was adopted to reconcile the rights to privacy and freedom of expression and to accommodate the role of the press but reliance on this journalistic derogation was, as the Supreme Administrative Court indicated, dependent on the fulfilment of certain conditions. The Public Disclosure and Confidentiality of Tax Information also clearly stated that such information 'is public to the extent provided in this Act' (see paragraph 39 above).

195. The Court emphasises that the safeguards in national law were built in precisely because of the public accessibility of personal taxation data, the nature and purpose of data protection legislation and the accompanying journalistic derogation. Under these circumstances, and in line with the approach set out in *Animal Defenders International* (cited above, § 108), the authorities of the respondent State enjoyed a wide margin of appreciation in deciding how to strike a fair balance between the respective rights under Articles 8 and 10 of the Convention in this case. Furthermore, while the margin of appreciation of any State must be limited and its exercise is subject to external supervision by the Court, the latter may also take into consideration, when assessing the overall balance struck, the fact that that State, somewhat exceptionally, as a matter of constitutional choice and, in the interests of transparency, has chosen to make taxation data accessible to the public.

196. In the instant case, the domestic courts, when weighing these rights, sought to strike a balance between freedom of expression and the right to privacy embodied in data protection legislation. Applying the derogation in section 2(5) of the Personal Data Act and the public interest test to the impugned interference, they and, in particular, the Supreme Administrative Court, analysed the relevant Convention and CJEU case-law and carefully applied the case-law of the Court to the facts of the instant case.

(v) Gravity of the sanction imposed on the journalists or publishers

197. As indicated in the Chamber judgment, the applicant companies were not prohibited from publishing taxation data or from continuing to publish *Veropörssi*, albeit they had to do so in a manner consistent with Finnish and EU rules on data protection and access to information. The fact that, in practice, the limitations imposed on the quantity of the information to be published may have rendered some of their business activities less profitable is not, as such, a sanction within the meaning of the case-law of the Court.

(vi) Conclusion

198. In the light of the aforementioned considerations, the Court considers that, in assessing the circumstances submitted for their appreciation, the competent domestic authorities and, in particular, the Supreme Administrative Court gave due consideration to the principles and criteria as laid down by the Court's case-law for balancing the right to respect for private life and the right to freedom of expression. In so doing, the Supreme Administrative Court attached particular weight to its finding that the publication of the taxation data in the manner and to the extent described did not contribute to a debate of public interest and that the applicants could not in substance claim that it had been done solely for a journalistic purpose within the meaning of domestic and EU law. The Court discerns no strong reasons which would require it to substitute its view for that of the domestic courts and to set aside the balancing done by them (see Von Hannover (no. 2), cited above, § 107; and Perinçek, cited above, § 198). It is satisfied that the reasons relied upon were both relevant and sufficient to show that the interference complained of was 'necessary in a democratic society' and that the authorities of the respondent State acted within their margin of appreciation in striking a fair balance between the competing interests at stake.

199. The Court therefore concludes that there has been no violation of Article 10 of the Convention.

III. Alleged violation of Article 6 § 1 of the Convention

Enz. (*red.*)

IV. Application of Article 41 of the Convention

Enz. (red.)

For these reasons, the Court

1. *Dismisses*, unanimously, the Government's preliminary objections;
2. *Holds*, by fifteen votes to two, that there has been no violation of Article 10 of the Convention;
3. *Holds*, by fifteen votes to two, that there has been a violation of Article 6 § 1 of the Convention;
4. *Holds*, by fourteen votes to three,

(a) that the respondent State is to pay the applicant companies, within three months, € 9,500 (nine thousand five hundred euros), inclusive of any tax that may be chargeable, 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 fifteen votes to two, the remainder of the applicant companies' claim for just satisfaction.

Noot

1. Deze uitspraak is een interessant voorbeeld van de verwevenheid van de rechtspraak van het HvJ EU en het EHRM en zij bevat belangrijke beslissingen over hoe om te gaan met een conflict tussen art. 8 en art. 10 EVRM in het kader van de deels Eu-

ropese en deels nationale dataprotectieregels. Zij laat ook zien hoe het Hof de regels die zij heeft ontwikkeld voor het conflict tussen privacy en vrijheid van meningsuiting voor publieke media ook toepast op het publieke gebruik van persoonsgegevens. Het draait om de in Finland bestaande openbaarheidsregels over de belastingaangiften. Kortgezegd is in Finland je fiscale inkomen openbaar. De inhoud van deze regels is in de overwegingen 39-41 van het Hof te vinden: openbaar zijn naam, geboortedatum, woonplaats en alle fiscaal vastgestelde inkomens- en kapitaalsbelastingen. Zij kent ook een journalistieke uitzondering van de dataprotectieregels, die gebaseerd is op art. 9 Privacyrichtlijn 95/46/EG: de lidstaten zullen voorzien in uitzonderingen van de hoofdstukken IV en VI van de richtlijn (de belangrijkste materiële regels) wanneer persoonsgegevens worden verwerkt ten behoeve van journalistieke doeleinden of ten behoeve van de artistieke en literaire expressievrijheid, en alleen wanneer die verwerking nodig is om het recht van privacy en het recht van vrije meningsuiting met elkaar te verzoenen (in Nederland geïmplementeerd in art. 3 Wbp). Deze regel is in verruimde vorm te vinden in art. 85 van de GDPR-verordening 2016/679, *PbEU* L 119, d.d. 4.5.2016 die in mei van dit jaar van toepassing wordt. Lid 3 van dit artikel legt de lidstaten de verplichting op aan de Commissie te melden hoe zij deze uitzondering hebben geïmplementeerd. De Finse fiscale wet en de algemene openbaarheidswetgeving voorzien in procedures voor journalisten om die gegevens op te vragen. Blijkens de wetsgeschiedenis die het Hof in r.o. 48 citeert, geeft het feit dat een document in het publieke domein is niet automatisch het recht de daarin vervatte informatie met betrekking tot een persoon te publiceren. De fiscus heeft daarom instructies uitgevaardigd (zie r.o. 49-52) die de gegevens fiscaal voor het publiek toegankelijk maken mits de vrager zich onderwerpt aan gebruiksrestricties. Journalisten moeten precies aangeven voor welk journalistiek doel zij de gegevens willen gebruiken.

2. De bedrijven, klagers in deze procedure, gebruikten deze fiscale gegevens als grondstof voor hun publicaties (r.o. 8 e.v.). Satakunnan publiceerde een nieuwsblad *Veröporssi* waarin zij de fiscale inkomensgegevens van 1,2 miljoen burgers in de inkomenscategorie 60.000-80.000 Finse marken (rond 2000: € 10-13.500), alfabetisch, naar inkomenscategorie en naar gemeente had gerangschikt. De gegevens die de basis voor deze publicatie vormden leverde zij op CD-ROM aan haar zusteronderneming Satamedia die met behulp daarvan een SMS-dienst opzette waardoor iemand uit het publiek via zijn mobiele telefoon de fiscale inkomens kon opvragen op naam van degene die in deze databank was opgenomen. De Finse zaak ontstaat op het moment dat de Finse Data Ombudsman in 2003 de Data-Autoriteit verzoekt beide bedrijven op te dragen te stoppen met het op deze manier verspreiden van op zich zelf openbare gegevens. Deze Data-Autoriteit wijst het verzoek af omdat zij meent dat de journalistieke exceptie van toepassing is. Als de rechters die over die zaak oordelen moeten beslissen wat die journalistieke exceptie eigenlijk betekent, begint het EU-traject op het moment dat de hoogste rechter daarover prejudiciële vragen stelt aan het HvJ EU. Dat besliste daarover op 16 december 2008 in C-73/07, *NJ* 2009/193, m.nt. M.R. Mok. Het Hof besliste dat het gaat om een verwerking van persoonsgegevens waarop de regels van de richtlijn van toepassing zijn. Over de betekenis van de journalistieke exceptie besliste het als volgt:

> "Om rekening te houden met het belang dat de vrijheid van meningsuiting in elke democratische samenleving toekomt, is het in de eerste plaats noodzakelijk, de daarmee samenhangende begrippen, waaronder het begrip journalistiek, ruim te interpreteren. In de tweede plaats, om tot een evenwichtige afweging tussen de beide fundamentele rechten te komen, eist het fundamentele recht op bescherming van het privéleven dat de uitzonderingen op en beperkingen van de gegevensbescherming in vorengenoemde hoofdstukken van de richtlijn, binnen de grenzen van het strikt noodzakelijke blijven. In dit verband dienen de volgende factoren in aanmerking te worden genomen. In de eerste plaats, (…) gelden de in artikel 9 van de richtlijn neergelegde ontheffingen en uitzonderingen niet alleen voor mediaondernemingen maar voor alle in de journalistiek werkzame personen. In de tweede plaats sluit het feit dat een publicatie van openbare gegevens is verbonden met een winstgevend doel niet a priori uit, dat deze is te beschouwen als een activiteit 'uitsluitend voor journalistieke doeleinden'. Zoals Markkinapörssi en Satamedia in hun opmerkingen en de advocaat-generaal in punt 82 van haar conclusie opmerken, is elke onderneming met haar activiteiten uit op winst. Een zeker commercieel succes kan zelfs de conditio sine qua non zijn voor het voortbestaan van professionele journalistiek. In de derde plaats moet rekening worden gehouden met de ontwikkeling en de verveelvoudiging van middelen voor communicatie en informatieverspreiding. Zoals is opgemerkt, met name door de Zweedse regering, is de drager waarmee de verwerkte gegevens worden overgedragen, of dit nu klassieke dragers zijn zoals papier of elektromagnetische golven, dan wel elektronische zoals internet, niet bepalend voor de beoordeling of het gaat om een activiteit 'uitsluitend voor journalistieke doeleinden'. Uit de voorgaande overwegingen volgt dat activiteiten als die in het hoofdgeding, die betrekking hebben op gegevens afkomstig uit documenten die volgens de nationale wetgeving openbaar zijn, kunnen worden aangemerkt als 'journalistieke activiteiten', indien zij de bekendmaking aan het publiek van informatie, meningen of ideeën tot doel hebben, ongeacht het overdrachtsmedium. Deze activiteiten zijn niet voorbehouden aan mediaondernemingen en kunnen een winst-

oogmerk hebben. Op de tweede vraag moet dus worden geantwoord dat artikel 9 van de richtlijn aldus moet worden uitgelegd dat de bedoelde activiteiten, die betrekking hebben op gegevens afkomstig uit documenten die volgens de nationale wetgeving openbaar zijn, moeten worden beschouwd als verwerking van persoonsgegevens 'uitsluitend voor journalistieke doeleinden' in de zin van die bepaling, indien die verwerking als enig doel heeft de bekendmaking aan het publiek van informatie, meningen of ideeën. Het staat aan de nationale rechter om te beoordelen of dit het geval is."

3. Met de laatste zin lag de bal dus weer bij de Finse rechter en daar begint dan de onderhavige zaak. De nationale rechter oordeelde dat de klagers tevergeefs een beroep op de journalistieke exceptie deden. Hij vond dat de wijze van verwerking van de openbare gegevens niet uitsluitend tot doel heeft aan het publiek informatie, meningen of ideeën bekend te maken. De Data-Autoriteit besliste conform, beroep tegen die beslissing werd verworpen, en zo moest het EHRM dus beoordelen of de nationale rechter bij de toepassing van het door het HvJ EU uitgelegde art. 9 van de Richtlijn een juiste balans heeft aangebracht tussen art. 8 en 10 EVRM.

4. Het EHRM bepaalt allereerst zijn positie ten opzichte van het EU-recht. Het citeert uit de considerans bij de GPDR-verordening, de overwegingen 4, 6, 9 en 153. De laatste luidt, verkort weergegeven:

> "Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes (…) should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. (…) In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly."

Vervolgens analyseert het in r.o. 70-78 de jurisprudentie van het HvJ EU. Het pakt uit de bekende *Google/Spain*-zaak (HvJ EU 13 mei 2014, C-131/12, *NJ* 2014/385, m.nt M.R. Mok) de algemene overweging 68 die verwijst naar twee ook door het EHRM in dit verband geciteerde arresten:

> "Het Hof heeft reeds geoordeeld dat richtlijn 95/46, doordat zij een regeling treft in verband met de verwerking van persoonsgegevens die afbreuk kan doen aan de fundamentele vrijheden, en inzonderheid aan het recht op privéleven, noodzakelijkerwijs moet worden uitgelegd op basis van de grondrechten, die volgens vaste rechtspraak integrerend deel uitmaken van de algemene rechtsbeginselen waarvan het Hof de eerbiediging verzekert, en die thans in het Handvest zijn opgenomen (zie met name arresten *Connolly/Commissie*, C-274/99 P, EU:C:2001:127, punt 37 (*NJ* 2001/473; red.), en *Österreichischer Rundfunk e.a.*, EU:C:2003:294, punt 68)."

In overweging 73 grijpt het expliciet terug op de uitspraak inzake *Lindqvist* (HvJ EG 6 november 2003, C-101/01, *NJ* 2004/248) waarin al het beginsel werd neergelegd (herhaald in *Satamedia*) dat de nationale rechter de fundamentele rechten tegen elkaar moet afwegen. Vervolgens recapituleert het Hof zijn uitspraken over privacy, openbaarheid en perspublicaties die bij een dergelijke afweging aan bod moeten komen (r.o. 124-138). Het gaat onder meer om de prinses Caroline-uitspraken (*Von Hannover/Duitsland I en II*, resp. EHRM 24 juni 2004, *NJ* 2005/22 en EHRM 7 februari 2012, *NJ 2013/251*, beide m.nt. E.J. Dommering). Het komt in deze zaak aan op de noodzakelijkheidstest (r.o. 162-166). De toepassing daarvan op deze zaak volgt dan in de r.o. 167 e.v. Het criterium is volgens r.o. 170-171:

> "In order to ascertain whether a publication concerning an individual's private life is not intended purely to satisfy the curiosity of a certain readership, but also relates to a subject of general importance, it is necessary to assess the publication as a whole and have regard to the context in which it appears. (…)The public interest cannot be reduced to the public's thirst for information about the private life of others, or to an audience's wish for sensationalism or even voyeurism."

In r.o. 173-174 stelt het vast dat de publieke toegankelijkheid van belastinginformatie in Finland vooral het doel dient om de autoriteiten te controleren:

> "Nevertheless, public access to taxation data, subject to clear rules and procedures, and the general transparency of the Finnish taxation system does not mean that the impugned publication itself contributed to a debate of public interest. Taking the publication as a whole and in context and analysing it in the light of the above-mentioned case-law (see paragraphs 162-166 above), the Court, like the Supreme Administrative Court, is not persuaded that publication of taxation data in the manner and to the extent done by the applicant companies contributed to such a debate or indeed that its principal purpose was to do so."

Het feit dat de informatie zoals deze in Finland in het publieke domein is, is dus niet doorslaggevend. Het gaat om het journalistieke doel waarvoor je die informatie wil gebruiken. Het geeft je wel grote vrijheid om die informatie te verzamelen (r.o. 191), maar bij de publicatie moet je journalistieke doelen dienen. Je mag het verzamelde materiaal dus niet *en masse* publiceren (r.o. 175: 'in disseminating *en masse* such raw data in unaltered form without any analytical input'). Het ging bovendien niet om informatie met betrekking tot publieke figuren (r.o. 180). Finland is een van de weinige landen binnen de Raad van Europa waar fiscale informatie openbaar

is, en heeft daarom ook een grote beleidsvrijheid de verdere publicatie daarvan aan beperkingen te onderwerpen. Al met al vindt het EHRM met de Finse rechters dat de mate en wijze van verspreiding de grens van het publieke doel van de openbaarheid overschrijdt.

5. In deze zaak gaat het om verspreiding door mediabedrijven van op zich zelf openbare maar privacygevoelige gegevens. Het Hof toetst of de verspreiders zich wel voldoende aan de beperkingen die het publieke debat oplegt hebben gehouden (is het wel voldoende publiek belang, is het niet te commercieel, is het niet te veel bevrediging van louter nieuwsgierigheid van het publiek?). De vraag blijft open hoe het EHRM denkt over de verspreiding door een zoekmachine. In de zaak *Google/Spain*, hiervoor in 4 geciteerd, zegt het HvJ EU in overweging 85 dat de journalistieke exceptie in deze zaak niet van toepassing is op de zoekmachine. Het is een terloopse opmerking in het kader van de beantwoording van een andere vraag. Het Hof Den Haag meent in een beslissing van 2017 dat het HvJ EU het niet algemeen bedoeld heeft of heeft kunnen bedoelen (zie overweging 5.9 van dat arrest: uitspraken.rechtspraak.nl/inziendocument?id=ecli:nl:ghdha:2017:1360). De zaak bij het Haagse Hof raakte in het bijzonder de vraag of de verwerking door een zoekmachine van gegevens met betrekking tot een strafrechtelijke veroordeling 'bijzondere gegevens' betreft die alleen onder de journalistieke exceptie mogen worden verwerkt. Hierover heeft de Franse *Conseil d'Etat* in februari 2017 prejudiciële vragen gesteld aan het HvJ EU, zie english.conseil-etat.fr/Activities/Press-releases/Right-to-be-delisted, geraadpleegd in januari 2018). De vraag van de toepasselijkheid van de journalistieke exceptie op de zoekmachine is een intrigerende vraag. Je kunt weliswaar de criteria die het EHRM in de onderhavige zaak formuleert, niet zonder meer toepassen op de zoekmachine daar deze 'neutraal' is: zij vindt op de gestelde vraag de openbare informatie en ontsluit die voor de vrager, die alle motieven kan hebben om van die informatie kennis te willen nemen: kennis, nieuws, handel of nieuwsgierigheid. Bovendien is de positie van de zoekmachine hybride omdat deze de vindbaarheid van openbare gegevens vergroot en zich ergens tussen 'verzamelen' en 'verspreiden' in bevindt. Hoewel het EHRM zich nog niet over de zoekmachine heeft uitgelaten als het gaat om een conflict tussen (de wijze van) verspreiding van informatie die openbaar is en het recht van privacy, heeft het in een ontvankelijkheidsbeslissing die ging over het verspreiden van beledigingen door een zoekmachine de rol daarvan in het openbare informatievoorzieningsproces wel erkend (de zaak *Tamiz/het Verenigd Koninkrijk*, 3877/14, beslissing van 19 september 2017). In die beslissing overwoog het onder meer in r.o. 90: 'having particular regard to the important role that ISSPs [information society service providers] such as Google Inc. perform in facilitating access to information and debate on a wide range of political, social and cultural topics (…)'. In alle zaken waar geen uitleg van EU-recht rijst (en dat is het geval, zoals in deze zaak, wanneer het gaat om de feitelijke afweging die de nationale rechter heeft gemaakt bij conflicterende grondrechten) zal het EHRM zich daarover kunnen uitlaten. Daarbij moet er op worden gewezen dat naast de General Protection Data Regulation (GPDR), ook de Algemene verordening gegevensbescherming (AVG), in werking per 25 mei 2018, enig verschil kan maken. Art. 85 AVG verordening, gelezen in het licht van de consideransoverweging 153, is ruimer geformuleerd dan art. 9 van de richtlijn. Laatstgenoemd artikel heeft het alleen over journalistieke, artistieke en literaire doeleinden, terwijl art. 85 in overeenstemming met de bewoordingen van de considerans opent met een algemene regel: "Member States shall by law reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression, with the right to the protection of personal data pursuant to this Regulation". Bovendien is er nu een apart art. 17 dat het 'right to be forgotten' (in de Nederlandse vertaling fraai aangeduid als 'recht op vergetelheid') regelt en dat in lid 3 expliciet stelt dat dit niet geldt als de verwerking nodig is voor de uitoefening van het recht van vrije meningsuiting.

6. Het arrest bevat ook nog beslissingen over andere procedurele punten en een dissenting opinion van de Hongaarse en Turkse rechters die vinden dat de journalistieke exceptie wel van toepassing was.

E.J. Dommering

NJ 2018/68

HOF VAN JUSTITIE VAN DE EUROPESE UNIE
14 juni 2017, nr. C-678/15
(T. von Danwitz, E. Juhász, C. Vajda, K. Jürimäe, C. Lycourgos; A-G M. Campos Sánchez-Bordona)
m.nt. V.P.G. de Serière*

Art. 4 lid 1 punt 2, Bijlage I, deel A, punt 1 van Richtlijn 2004/39/EG

RvdW 2017/854
ECLI:EU:C:2017:100
ECLI:EU:C:2017:451

Verzoek om een prejudiciële beslissing, ingediend door het Bundesgerichtshof (hoogste federale rechter in burgerlijke en strafzaken, Duitsland) bij beslissing van 10 november 2015.

Markten voor financiële instrumenten. Begrip 'beleggingsdiensten'. Ontvangen en doorgeven van orders met betrekking tot één of meer fi-

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