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**INFLUENCE OF RULINGS OF EUROPEAN COURT OF HUMAN RIGHTS  
AGAINST ESTONIA ON LAW OF EUROPEAN UNION**

Master's Thesis

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## INTRODUCTION

Though legally sovereign, Estonia along with some other states of Eastern Europe was part of an ideological, political, economic and military block, dominated by a neighbouring superpower.<sup>1</sup> After the collapse of this regime, it was necessary for Estonia to take efforts to return to the family of democratic states and to open itself up to a democratisation process.<sup>2</sup>

One of the steps of this undertaking was the ratification of the European Convention on Human Rights (the Convention) on 13 March 1996.<sup>3</sup> The ECHR<sup>4</sup> is an international treaty drawn up within the Council of Europe, which was established in Strasbourg in 1949 in the course of the first post-war attempt to unify Europe, institutionalise shared democratic values and provide a safeguard against the spread of communism from the Soviet Union to European states.<sup>5</sup>

The Convention is a living instrument that needs to be interpreted in the light of present-day conditions. An ongoing judicial dialogue between national courts and the European Court of Human Rights (the Strasbourg Court, the ECtHR or the Court) is essential for the development of human rights.<sup>6</sup> This dialogue largely depends on the degree to which the Court respects national sensitivities and traditions.<sup>7</sup>

Since 1996, there have been 52 judgments and 99 decisions on the admissibility in relation to the applications submitted against Estonia compared to more than 18 000 judgments when it comes to other countries during the same period of time. Moreover, there have been no pilot judgments in relation to Estonia that could have identified the structural problems underlying repetitive cases and imposed an obligation to address those problems.<sup>8</sup> Estonia is not one of

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<sup>1</sup> D. Thomas. The Helsinki Accords and Political Change in Eastern Europe. Published in T. Risse, S. Ropp, K. Sikkink (eds.). *The Power of Human Rights. International Norms and Domestic Change*. Cambridge: Cambridge University Press 1999, p 233.

<sup>2</sup> J. Laffranque. *European Human Rights Law and Estonia: One- or Two-way Street?* - *Juridica International*, Vol 23, Issue 4, 2015, p 4.

<sup>3</sup> K. Merusk, M. Susi. *Ten Years after Ratification. The European Convention on Human Rights and Its Impact on Estonia*. - *German Yearbook of International Law*, Vol 48, 2005, p 327.

<sup>4</sup> Convention for the Protection of Human Rights and Fundamental Freedoms. 03.09.1953. ETS no 5.

<sup>5</sup> A. Donald, J. Gordon, P. Leach. *Equality and Human Rights Commission Research Report 83. The UK and the European Court of Human Rights*. Available online: [https://www.equalityhumanrights.com/sites/default/files/83\\_european\\_court\\_of\\_human\\_rights.pdf](https://www.equalityhumanrights.com/sites/default/files/83_european_court_of_human_rights.pdf) (10.04.2018), p 6.

<sup>6</sup> J. Rinceanu. *Judicial dialogue between the European Court of Human Rights and national supreme courts*. Available online: <http://crime-in-crisis.com/en/?p=287> (10.04.2018), p 1038.

<sup>7</sup> J. Gerards, J.Fleuren (eds.). *Implementation of the European Convention on Human Rights and of the Judgments of the ECtHR in National Case Law. A comparative analysis*. Antwerp: Intersentia 2014, p 88.

<sup>8</sup> European Court of Human Rights. *Factsheet – Pilot judgments*. Available online: [https://www.echr.coe.int/Documents/FS\\_Pilot\\_judgments\\_ENG.pdf](https://www.echr.coe.int/Documents/FS_Pilot_judgments_ENG.pdf) (10.04.2018).

the top ten countries in terms of the number of filed complaints.<sup>9</sup> However, in the year of 2017, the average number of applications concerning Estonia allocated per 10 000 inhabitants was 1,19; that noticeably exceeds the average number of applications in relation to the Council of Europe Member States (0,76).<sup>10</sup>

The aim of this thesis is to investigate whether the Court's dialogue with Estonia through its judgments, dealing with the applications submitted against the state, has influenced the law of EU Member States and EU law in general. The hypothesis of this written work is that Estonia has influenced the ECtHR case law and through that EU law. In order to determine whether or not the hypothesis is right, the author should investigate whether case law of ECHR legally can and in fact did influence the law of the EU institutions and Member States in the first place. It is also necessary to evaluate the impact the rulings against Estonia have made on the case law of the ECtHR. No additional enquiries in relation to the factual use of those decisions in the domestic courts were made in pursuance of limiting the scope of the research and fulfilling the requirements for the allowable length of the thesis. In addition to this, there are some difficulties based on the fact that a national court may accept that a human right is in issue, but not refer specifically to the ECtHR and its decisions.<sup>11</sup> The same is true in relation to political decisions. In such cases, it is nearly impossible to evaluate the impact of the judgments, in which Estonia was the defendant state, on law of each of EU Member States, without "an in-depth understanding of the formal legal rules that exist within the respective systems and also of the socio-political context broadly understood in which those rules have evolved and developed."<sup>12</sup>

Each chapter of this thesis is based on relevant legal textbooks and academic articles. In addition to this, the author analyzed the case law of the ECtHR, related judgments of the Court of Justice of the European Union (the Luxembourg Court, the CJEU) and the Supreme Court of Estonia. The sources for this thesis include written works of the professors and lecturers of Utrecht and Ghent Universities, Vienna University of Economics and Business, Geneva University, the University of Manchester, the University of Cambridge.

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<sup>9</sup> J. Laffranque. Euroopa Inimõiguste Kohus ja Eesti õigus: kas monoloog või dialoog? - Juridica, Issue 8, 2016, p 540.

<sup>10</sup> European Court of Human Rights. Analysis of statistics 2017. Available online: [https://www.echr.coe.int/Documents/Stats\\_analysis\\_2017\\_ENG.pdf](https://www.echr.coe.int/Documents/Stats_analysis_2017_ENG.pdf) (10.04.2018), p 11.

<sup>11</sup> L. Woods. Freedom of Expression in the European Union. - European Public Law, Vol 12, Issue 3, 2006, p 391.

<sup>12</sup> B. Stirn, D. Fairgrieve, M. Guyomar. Droits et libertés en France et au Royaume-Uni. Paris: Odile Jacob 2006, p 7.

The author of this study used the evaluation of the importance of the judgments provided in HUDOC<sup>13</sup> - the official database that gives access to the case law of the Court. The decisions are marked by their level of importance. The most significant rulings are published or selected for publication in the Court's official Reports of Judgments and Decisions - Case Reports. Only two of the judgments, *Tammer v. Estonia*<sup>14</sup> and *Veeber v. Estonia (no. 2)*,<sup>15</sup> and four decisions on admissibility in the cases against Estonia have been published in Case Reports. In addition to this, one of the recent judgments - *Delfi AS v. Estonia*<sup>16</sup> - has also been selected to be published. This judgment has also inspired an active discussion in legal journals, seconded by *Tammer*.<sup>17</sup>

The author of this thesis limited the primary analysis to those three judgments mentioned above. An exception was made for two the decisions on admissibility - *Kolk and Kislyiy*<sup>18</sup> and *Penart*<sup>19</sup> due to the fact that these judgments were necessary to analyze the influence of *Veeber (no. 2)*.

In addition to this, a brief study revealed those judgments against Estonia that were quoted the most in the Court's case law in relation to a particular article of the Convention: *Tammer*, *Veeber (no. 2)* and *Delfi* (despite being adjudicated only three years ago). The percentages of quotations for the decisions on admissibility other than *Kolk and Kislyiy v. Estonia* were very small. This also allowed to limit the scope of the research.

General principles of the most relevant articles of the ECHR discussed in a chosen judgment were described and compared with the reasoning of the Court in a particular decision. It was then analyzed if a particular decision has influenced the subsequent case law of the Court, whether the Court of Justice of the European Union or the Supreme Court of Estonia, as the court of a Member State, used any of the principles of a decision in their judgments. It was also examined if there was any other indication of influence, for example, in legal literature.

This thesis is divided into four chapters. Chapter one addresses a theoretical possibility of the case law of the ECtHR to influence the law of EU and its Member States. Moreover, it briefly describes if this impact has indeed occurred. Chapter two discusses a possible influence of

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<sup>13</sup> HUDOC - Council of Europe. Accessible online: <https://hudoc.echr.coe.int> (10.04.2018).

<sup>14</sup> ECtHR 41205/98, 06.02.2001, *Tammer v. Estonia*.

<sup>15</sup> ECtHR 45771/99, 21.01.2003, *Veeber v. Estonia (no. 2)*.

<sup>16</sup> ECtHR 64569/09, 16.06.2015, *Delfi AS v. Estonia*.

<sup>17</sup> The author's personal conclusion based on a comparison of available materials.

<sup>18</sup> ECtHR 23052/04, 24018/04, 17.01.2006, *Kolk and Kislyiy v. Estonia (dec.)*.

<sup>19</sup> ECtHR 14685/04, 24.01.2006, *Penart v. Estonia (dec.)*.

*Veeber (no. 2)*. This case concerned the retrospective application of criminal law by Estonian courts.

An overview of the influence of the judgments concerning the freedom of speech in the cases against Estonia is found in chapters three and four of the current thesis. The problem of balancing the freedom of speech (Article 10 of the ECHR) against the right to respect for one's private and family life (Article 8 of the ECHR) is extremely important and is currently gaining even bigger significance. It is based on the intensification of both commercial and user-generated expressive activity on the Internet.<sup>20</sup> Issues relating to the Internet changing the reality and everyday life of the Europeans are so pressing that even cases dealing with the surveillance of Internet usage in the workplace have started to reach the ECtHR.<sup>21</sup> On the other hand, it can often be found concurring with the right to respect for one's private and family life, embodying central democratic and societal concerns. It also contains a commercial element, thus reflecting some of the tensions inherent within the EU system itself<sup>22</sup> and reveal the dialogue between the Strasbourg and Luxembourg Courts.

The scope of the research on a topic of the ECtHR case law relating to Estonia is usually limited by the influence of the case law on the democratic development of Estonia, not the other way around.<sup>23</sup> Only one of the recent academic articles<sup>24</sup> and one of the chapters of a new book on the relationship between the ECtHR and Estonian law<sup>25</sup> address the same issue as the thesis at hand. In both of these written works it was established that there was, indeed, a dialogue, not a monologue, between the ECtHR and Estonia. The judgments in which Estonia was the defendant state were found to influence the case law of the ECtHR and its later case law applied to other states.<sup>26</sup> In particular, the biggest impact was discovered in relation to the right to freedom of expression,<sup>27</sup> the conditions of detention, the extension of a pre-trial detention.<sup>28</sup>

The following keywords could be used to characterise this thesis: human rights, international courts of law and European Union law.

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<sup>20</sup> UN Human Rights Council Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, Report to the Human Rights Council A/HRC/17/27, 2011, para 74.

<sup>21</sup> ECtHR 61496/08, 05.09.2017, *Bărbulescu v. Romania*.

<sup>22</sup> L. Woods. Freedom of Expression in the European Union. - European Public Law, Vol 12, Issue 3, p 373.

<sup>23</sup> J. Laffranque (note 9), p 540.

<sup>24</sup> J. Laffranque (note 9).

<sup>25</sup> J. Laffranque. Euroopa Inimõiguste Kohus ja Eesti õigus. Tallinn: Juura 2017, p 99.

<sup>26</sup> J. Laffranque (note 9), p 551; J. Laffranque (note 23), p 99.

<sup>27</sup> J. Laffranque (note 9), p 551; J. Laffranque (note 23), p 109.

<sup>28</sup> J. Laffranque (note 9), p 551; J. Laffranque (note 23), p 110.

# 1. Legal Ability of Case Law of European Court of Human Rights to Influence Law of European Union and its Member States

## 1.1. Relationship between European Court of Human Rights and European Union

Within Europe, both the Council of Europe and the European Union ensure human rights at the same supranational level. On the one hand, there is the Council of Europe, which functions on the basis of the Convention and through its Court. On the other hand, there is the EU, which operates through the CJEU and ensures that all of its Member States act in conformity with the EU human rights standards.<sup>29</sup>

The CJEU has to regard the ECHR as one of the lawful criteria for examining the impact of EU Regulations and Directives in the specific field of human rights after the judgment of *Rutili* delivered in 1975.<sup>30</sup> In *Wachauf*<sup>31</sup> the CJEU ruled that Member States are obliged to respect fundamental rights when implementing Community law.<sup>32</sup> In addition to this, in *ERT* the CJEU pointed out that the Convention has special significance in that respect.<sup>33</sup> As a result, the case law of the ECtHR has often been cited by the Luxembourg judges in their decisions.<sup>34</sup> This tradition is so deeply rooted in the Luxembourg Court that the judges recognize their personal tendency to read and consider similar Strasbourg judgments before providing their opinions.<sup>35</sup>

The EU has legislative and executive jurisdiction by which it may act against Member States or private persons in a way that impacts upon their Convention obligations and rights. When exercising jurisdiction in this ways, it is possible that EU institutions may infringe the Convention rights.<sup>36</sup> In the case of *Matthews v. the United Kingdom*, the Court observed that

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<sup>29</sup> N. Van Belle. The Judicial Protection of Human Rights in Europe after the Accession of the European Union to the European Convention on Human Rights. - *Inter-American and European Human Rights Journal*, Vol 6, 2013, p 74.

<sup>30</sup> B. Fan. European Pluralism on the Protection of Fundamental Rights: The European Convention on Human Rights vis-a-vis the EU Legal Order. - *National Taiwan University Law Review*, Vol 11, Issue 2, 2016, p 333; C-36/75, 28.10.1975, *Roland Rutili v. Ministre de l'intérieur*.

<sup>31</sup> C-5/88, 13.07.1989, *Hubert Wachauf v. Bundesamt für Ernährung und Forstwirtschaft*, p 17.

<sup>32</sup> H. Gencaga. The Past, Present and Future of the EU Charter of Fundamental Rights: A Prediction. - *Anglo-German Law Journal*, Vol 1, 2015, p 164.

<sup>33</sup> C-260/89, 18 June 1991. - *Elliniki Radiophonia Tiléorassi AE and Panellinia Omospondia Syllogon Prossopikou v. Dimotiki Etairia Pliroforissis and Sotirios Kouvelas and Nicolaos Avdellas and others*, p 41.

<sup>34</sup> B. Fan, p 353.

<sup>35</sup> S. Morano-Foadi, S. Andreadakis. Reflections on the Architecture of the EU after the Treaty of Lisbon: The European Judicial Approach to Fundamental Rights. - *European Law Journal*, Vol 17, Issue 5, 2011, p 601.

<sup>36</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley. Harris, O'Boyle, and Warbrick: *Law of the European Convention on Human Rights*. 2nd edition. Oxford: Oxford University Press 2009, p 38.

acts of the EU as such cannot be challenged before the Court because the EU is not a Contracting Party.<sup>37</sup> They can, however, be successfully disputed before the CJEU<sup>38</sup> if there is a breach of fundamental rights, as guaranteed by the ECHR. Those rights constitute general principles of the Union's law under Article 6(3) of the Treaty of Lisbon amending the TEU and the TEEC.<sup>39</sup> It follows that the application and the interpretation of the Convention remain for the CJEU, not the Convention's own court.<sup>40</sup> As long as the ECtHR lacks the jurisdiction over the EU, Member States may be also required to bear the burden for violations that are a product of the EU's action.<sup>41</sup> There is a presumption, however, that a State has not departed from the requirements of the Convention when it implements legal obligations flowing from its membership of the organisation if an equivalent protection of fundamental rights is considered to be provided by the organisation. This presumption can be rebutted if, in the circumstances of a particular case, the protection of Convention rights was considered manifestly deficient.<sup>42</sup> In such cases, the interest of international cooperation would be outweighed by the Convention.<sup>43</sup> The immunity allowed by the *Bosphorus* case does not apply where the state has some discretion in its application of EU law. The state is expected to exercise its discretion consistently with the Convention.<sup>44</sup> Moreover, it is only applicable in the cases where the deployment of the full potential of the supervisory mechanism provided for by EU law took place.<sup>45</sup> This second condition should be applied without excessive formalism and taking into account the specific features of the supervisory mechanism in question. For example, it would serve no useful purpose to make the implementation of the *Bosphorus* presumption subject to a requirement for the domestic court to request a ruling from the CJEU in all cases without exception, including those cases where no genuine and serious issue arises with regard to the protection of fundamental rights by EU law or those in which the CJEU has already stated precisely how the applicable provisions of EU law should be interpreted in a manner compatible with fundamental rights.<sup>46</sup>

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<sup>37</sup> ECtHR 24833/94, 18.02.1999, *Matthews v. the United Kingdom*, para 32.

<sup>38</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 39.

<sup>39</sup> Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community. OJ C306/01, 2007.

<sup>40</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 39.

<sup>41</sup> L. Eaton, Protecting Fundamental Rights Or Autonomy: Will the European Union's Accession to the European Convention of Human Rights Affect Its Legal Autonomy. - Penn Undergraduate Law Journal, Vol 1, Issue 2, 2014, p 109.

<sup>42</sup> ECtHR 45036/98, 30.06.2005, *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland*, para 156.

<sup>43</sup> ECtHR 15318/89, 18.12.1996, *Loizidou v. Turkey*, para 56.

<sup>44</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 30; ECtHR 12323/11, 06.12.2012, *Michaud v. France*, para 103.

<sup>45</sup> ECtHR 12323/11, 06.12.2012, *Michaud v. France*, para 113.

<sup>46</sup> ECtHR 17502/07, 23.05.2016, *Avotiņš v. Latvia*, para 109.

Article 6(2) of the treaty of Lisbon states that the EU shall accede to the ECHR. However, the CJEU Opinion 2/13<sup>47</sup> has temporarily blocked this long-expected development. The opinion reiterates that the fundamental principle that the supreme role of the Luxembourg Court is exclusively prohibited to be undermined by any international agreement under the EU legal order.<sup>48</sup> The Luxembourg Court might lose its autonomous and authoritative status if it recognizes the binding effects of Strasbourg decision.<sup>49</sup>

The two European Courts, however, are expected to engage in a common European program on the fundamental rights protection. Both of them need to get legitimacy and inspiration from their counterpart's decisions, while they preserve their autonomy in the multilevel protection of human rights.<sup>50</sup>

As for this inspiration, the Strasbourg Court remains the last “conscience” in human rights questions, a last legal instance or decision-making body,<sup>51</sup> an instrument of increased moral and political legitimacy for the EU.<sup>52</sup> Research shows that naming and shaming strategies improve human rights conditions when they are directed against states that have formally joined a particular treaty regime.<sup>53</sup>

The Court's judgments serve not only to decide those cases brought before it but, more generally, to elucidate, safeguard and develop the rules instituted by the Convention.<sup>54</sup> The contribution of the ECtHR thus helps to clarify and strengthen the human rights system in the EU and ideally to decrease the need for judicial remedies.<sup>55</sup> The Court considers the Convention to be a living instrument and aims to render its rights practical and effective.<sup>56</sup> It could be said that the Court succeeded in its mission - the Convention is still regarded as the

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<sup>47</sup> Opinion 2/13 on the EU Accession to the ECHR, 2014 E.C.R. 2454.

<sup>48</sup> B. Fan, p 336.

<sup>49</sup> B. Fan, p 350.

<sup>50</sup> B. Fan, p 372.

<sup>51</sup> C. Grabenwarter. The European Convention on Human Rights: Inherent Constitutional Tendencies and the Role of the European Court of Human Rights. - ELTE Law Journal, Vol 2014, Issue 1, 2014, p 115.

<sup>52</sup> G. de Burca, J. Aschenbrenner. The Development of European Constitutionalism and the Role of the EU Charter of Fundamental Rights. - Columbia Journal of European Law, Vol 9, Issue 3, 2003, p 380.

<sup>53</sup> R. Goodman, D. Jinks. Social Mechanisms to Promote International Human Rights: Complementary or Contradictory. Published in T. Risse, S. Ropp, K. Sikkink (eds.). The Persistent Power of Human Rights. From Commitment to Compliance. Cambridge: Cambridge University Press 2014, p 118.

<sup>54</sup> ECtHR 5310/71, 18.01.1978, *Ireland v. United Kingdom*, para 154; ECtHR 7367/76, 06.11.1980, *Guzzardi v. Italy*, para 86.

<sup>55</sup> G. De Baere, A.-L. Chane, J. Wouters. International Courts as Keepers of the Rule of Law: Achievements, Challenges, and Opportunities. - New York University Journal of International Law and Politics, Vol 48, Issue 3, 2016, p 782.

<sup>56</sup> G. De Baere, J. Wouters (eds.). The Contribution of International and Supranational Courts to the Rule of Law. Cheltenham: Edward Elgar Publishing 2015, p 227.

main source<sup>57</sup> and an effective method<sup>58</sup> of protection of human rights in Europe. Overall, the case law of the Court has a strong influence on EU law.<sup>59</sup>

## 1.2. Factual Influence of Case Law of European Court of Human Rights on Member States

There are some possible limitations on the implementation of the principles of the case law of the ECtHR. They could potentially diminish the practical value of the decisions against Estonia on a national level in Member States. These probable limitations include a lack of familiarity with Strasbourg judgments; a lack of awareness about the possibility for domestic courts to rely on international legal norms;<sup>60</sup> a doubt in the reliability of decisions that were adopted decades ago and thus do not reflect changed circumstances within a society.<sup>61</sup>

However, there is another important aspect to address. The final judgment of the Court is binding only in relation to the parties of particular proceedings.<sup>62</sup> It follows that the legal status of the Strasbourg case law is diverse among the Contracting States. It depends on domestic constitutional rules or Constitutional (Supreme) Court jurisprudence.<sup>63</sup> The judgments have indicative<sup>64</sup> and declamatory effect: they hold whether or not a state has breached its obligation under the Convention. The Court cannot annul the domestic act concerned nor can it decide in lieu of the domestic authority.<sup>65</sup> However, recent developments show that the Court can and will advise in its judgments as to how its decisions should be implemented.<sup>66</sup> Moreover, in cases of continuing human rights violations, states are expected to put an end to it.<sup>67</sup>

The Belgian *Cour Constitutionnelle* uses the technique of consistent interpretation, taking into account the case law of the ECtHR and showing its readiness even to revise its previous case

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<sup>57</sup> H. Gencaga, p 177.

<sup>58</sup> B. Virjan. Principle of Non-Retroactivity of Criminal Law according to Article 7 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. - Law Annals from Titu Maiorescu University, Vol 2012, 2012, p 95.

<sup>59</sup> A. Lazowski. R. Wessel. When Caveats Turn into Locks: Opinion 2/13 on Accession of the European Union to the ECHR. - German Law Journal, Vol 16, Issue 1, 2015, p 211.

<sup>60</sup> K. Merusk, M. Susi, p 365.

<sup>61</sup> R. Masterman. Section 2(1) of the Human Rights Act 1998: Binding Domestic Courts to Strasbourg? - Public Law, Vol 12, 2004, p 725.

<sup>62</sup> Article 46 ECHR.

<sup>63</sup> B. Fan, p 350.

<sup>64</sup> C. Grabenwarter, p 107.

<sup>65</sup> M. Villiger. Binding Effect and Declaratory Nature of the Judgments of the ECtHR. Published in A. Seibert-Fohr, M. Villiger (eds.). Judgments of the European Court of Human Rights – Effects and Implementation. Baden-Baden: Nomos Verlagsgesellschaft 2015, p 33.

<sup>66</sup> A. Seibert-Fohr, M. Villiger (note 65), p 35; L. Sicilianos. The Role of the ECtHR in the Execution of its own Judgments: Reflections on Article 46 ECHR. Published in A. Seibert-Fohr, M. Villiger (note 65), p 315.

<sup>67</sup> ECtHR 71503/01, 08.04.2004, *Assanidze v. Georgia*, para 198.

law if needed.<sup>68</sup> The Supreme Court of Denmark regularly consults the case law of the ECtHR.<sup>69</sup>

In Italy, as an aftermath of two decisions of the Italian Constitutional Court in 2007,<sup>70</sup> the decisions of the ECtHR do have an impact on Italian law. They give a noticeable contribution to the interpretation of the Conventional provisions integrated within the Italian sources of law. The Constitutional provision states that national legislation shall be compliant with international conventions to which Italy adheres.<sup>71</sup>

In Lithuania, Latvia and Estonia the Supreme Courts expressly agreed to be bound by the ECtHR's case law even when they interpret their national Constitution.<sup>72</sup> Many acts have been adopted or changed in order to comply with the standards of the Convention as they have been developed in the case law of the ECtHR in Lithuania.<sup>73</sup> The Supreme Court of Lithuania frequently refers to the jurisprudence of the ECtHR as well.<sup>74</sup> Deep influence of the judgments of the ECtHR was also noted in Latvia. This huge impact could be explained by the need to facilitate a smooth transition from the Socialist law to that of modern Continental Europe and lack of corresponding human rights traditions.<sup>75</sup>

Both France and the Netherlands are also incredibly open to the Convention. The ECHR is directly applicable before French courts and is expected to complement and remedy the shortcomings of domestic law.<sup>76</sup> French courts often refer to ECtHR decisions as binding precedents.<sup>77</sup> Adjusting legislation is a frequently occurring consequence of rulings by the ECtHR in the Netherlands. Sometimes it can take the form of the implementation of a

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<sup>68</sup> G. Martinico. Is the European Convention Going to Be 'Supreme'? A Comparative-Constitutional Overview of ECHR and EU Law before National Courts. - *European Journal of International Law*, Vol 23, Issue 2, 2012, p 412.

<sup>69</sup> G. Martinico, p 412.

<sup>70</sup> Constitutional Court of Italy, 22.10.2007, Nos 348 and 349.

<sup>71</sup> L. Busatta. End of Life Issues in Italy: Between Case Law and (Still Missing) Legislation. - *Digest: National Italian American Bar Association Law Journal*, Vol 25, 2017, p 62.

<sup>72</sup> A. Kjeldgaard-Pedersen (ed.). *Nordic Approaches to International Law*. Leiden: Brill - Nijhoff 2017, p 3.

<sup>73</sup> D. Jočienė. Lithuania: The ECHR in the Lithuanian Legal System: the Lessons Learned and Perspectives for the Future. Published in I. Motoc, I. Ziemele (eds.). *The Impact of the ECHR on Democratic Change in Central and Eastern Europe*. Cambridge: Cambridge University Press 2016, p 240.

<sup>74</sup> I. Motoc, I. Ziemele (note 73), p 259.

<sup>75</sup> M. Mits. Latvia: Consolidating Democratic Changes in Latvia: the Various Roles of the ECHR. Published in I. Motoc, I. Ziemele (note 73), p 201.

<sup>76</sup> E. Bjorge, p 21.

<sup>77</sup> L. Cohen-Tanugi. Case Law in a Legal System Without Binding Precedent: The French Example. Available online: <https://cgc.law.stanford.edu/commentaries/17-laurent-cohen-tanugi/> (10.04.2018).

completely new act or an adjustment of the policy of the executive branch. None of the Dutch state powers will escape being influenced by the ECHR through the case law of the Court.<sup>78</sup>

However, Austrian Constitutional Court stressed the possibility of departing from the ECtHR case law if the opposite would entail a violation of the Constitution.<sup>79</sup>

Moreover, the courts of United Kingdom must “take into account” the case law of the Strasbourg court and decide accordance with Convention rights, “so far as it is possible to do so.”<sup>80</sup> According to Lord Philips in the *R v. Horncastle & Others*, the requirement to “take into account” the Strasbourg jurisprudence will normally result in applying principles that are clearly established by the Strasbourg Court. There will, however, be rare occasions of concern as to whether a decision of the Strasbourg Court sufficiently appreciates or accommodates particular aspects of the domestic process. In such circumstances it is open to the Supreme Court of the United Kingdom to decline to follow the Strasbourg decision, giving reasons for adopting this course and hoping the Strasbourg Court would reconsider the particular aspect of its decision.<sup>81</sup> To sum up, the United Kingdom explicitly denies the Strasbourg’s automatic binding status in the domestic legal order,<sup>82</sup> yet is still open to apply principles that are clearly established by the Strasbourg Court.

The binding effect of the ECtHR judgments in Germany derives from Article 46 ECHR in conjunction with the domestic legislation and case law.<sup>83</sup> The authorities can, however, deviate from the ECtHR judgments, but only exceptionally and if the execution of the decision would imply a violation of the constitution.<sup>84</sup> The ECHR and the case law of the Court are to help in the interpretation of the extensive rights catalogue of the German constitution and the robust municipal rights.<sup>85</sup> However, if an adverse ruling contests an aspect of the legal culture in Germany or an evolved interpretation of the domestic law, national authorities may be reluctant to implement it.<sup>86</sup>

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<sup>78</sup> N. Efthymiou, J. de Wit. The Role of Dutch Courts in the Protection of Fundamental Rights. - Utrecht Law Review, Vol 9, Issue 2, 2013, p 83.

<sup>79</sup> G. Martinico, p 422.

<sup>80</sup> E. Bjorge. National Supreme Courts and the Development of ECHR Rights. - International Journal of Constitutional Law, Vol 9, Issue 1, 2011, p 14.

<sup>81</sup> Supreme Court of the United Kingdom, 09.12.2009, *R v. Horncastle and Others*, UKSC 14 (2009), para 11.

<sup>82</sup> B. Fan, p 350.

<sup>83</sup> S. Müller, C. Gusy. The Interrelationship between Domestic Judicial Mechanisms and the Strasbourg Court Rulings in Germany. Published in D. Anagnostou (ed.). The European Court of Human Rights: Implementing Strasbourg’s Judgments on Domestic Policy. Edinburgh: Edinburgh University Press 2014, p 31.

<sup>84</sup> S. Müller, C. Gusy, p 32.

<sup>85</sup> E. Bjorge, p 26.

<sup>86</sup> S. Müller, C. Gusy, p 43.

Overall, the role of the case law of the ECtHR for the development of national legal systems cannot be appreciated enough.<sup>87</sup> Sometimes the Court uncovers serious structural problems that can only be solved through adaptation and amendment of the legal system and gives guidelines to these changes. Besides that, it increasingly supplements national human rights guarantees.<sup>88</sup> The Court carefully repeats the principles developed in its case law and thus sets an example for domestic courts.<sup>89</sup> However, it is in no way the Court's task to take the place of the competent national courts but rather to review the decisions they delivered in the exercise of their power of appreciation.<sup>90</sup>

Brief analysis at hand shows that despite potential limitations mentioned above and differences in the legal status of the Strasbourg case law among the Contracting States, there has been a consistent and noticeable influence of the case law of the ECtHR on the law of EU Member States. This impact is most likely to grow as the Court continues to advise on the implementation of its judgments and criticize repetitive failures of the national authorities to comply. For example, the overcrowded and unsanitary conditions of the detention in Hungary that amounted to inhuman and degrading treatment in breach of Article 3 of the Convention in multiple recent cases.<sup>91</sup> That impact, present and future, in turn, creates a possibility for the decisions in the cases submitted against Estonia to influence the law of EU Member States. Considering that fundamental rights, as guaranteed by the ECHR, constitute general principles of the Union's law, the influence of the decisions of the ECtHR in the legal disputes submitted against Estonia is possible not only on a domestic level but also on the Union level. This, however, presupposes that some new principles of high practical value were developed in the cases where Estonia was the defendant state. The next chapters are aimed to investigate this aspect in more detail.

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<sup>87</sup> C. Grabenwarter, p 115.

<sup>88</sup> C. Grabenwarter, p 115.

<sup>89</sup> J. Laffranque (note 9), p 539.

<sup>90</sup> ECtHR 5493/72, 07.12.1976, *Handyside v. the United Kingdom*, para 50.

<sup>91</sup> ECtHR 30221/06, 07.06.2011, *Szél v. Hungary*, para 18; ECtHR 69095/10, 02/07/2013, *Fehér v. Hungary*, para 22.

## 2. *Veeber v. Estonia (no. 2)*

### 2.1. Principle of Legality

Rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention.<sup>92</sup> Essential to the rule of law is the principle of legality. It is embodied in Article 7 of the Convention:<sup>93</sup> no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. It should be noted that finding an offence to be “criminal” for the purposes of the Convention is not limited to criteria laid down in national law. “Criminal” thus, has an autonomous meaning under the Convention, and offenses that are considered to be administrative offenses or are in other ways classified as non-criminal under national law may be viewed by the court as criminal in the context of Article 7.<sup>94</sup>

The guarantee of legality occupies a prominent place in the Convention system of protection. It is also underlined by the fact that no derogation from it is permissible under Article 15 in time of war or another public emergency. It should be construed and applied, as follows from its object and purpose, in such a way as to provide effective safeguards against arbitrary prosecution, conviction and punishment.<sup>95</sup> In a larger sense, this principle underpins the rule of law.<sup>96</sup>

Two forms of retroactivity of the law can be derived from the wording of Article 7. Both of those forms are prohibited for legislatures and the courts<sup>97</sup> and must be taken into account by the ECtHR. On one hand, the retroactivity of the law in a broad sense, namely of a legal norm, which is also called direct retroactivity, and, on the other hand, the retroactivity of the interpretation of the legal norm by the court, which is also called indirect retroactivity.<sup>98</sup> The

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<sup>92</sup> ECtHR 31107/96, 25.03.1999, *Iatridis v. Greece*, para 58.

<sup>93</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley. Harris, O'Boyle, and Warbrick: Law of the European Convention on Human Rights. 2nd edition. Oxford: Oxford University Press 2009, p 331.

<sup>94</sup> F. Jacobs, R. White. The European Convention on Human Rights. 2nd edition. Oxford: Oxford University Press 1996, p 164-166.

<sup>95</sup> ECtHR 34044/96, 35532/97 and 44801/98, 22.03.2001, *Streletz, Kessler and Krenz v. Germany*, para 50.

<sup>96</sup> M. Shahabuddeen. Does the Principle of Legality Stand in the Way of Progressive Development of Law. - Journal of International Criminal Justice, Vol 2, No 4, 2004, p 1008.

<sup>97</sup> P. Whelan. Legal Certainty and Cartel Criminalisation within the EU Member States. - The Cambridge Law Journal, Vol 71, No 3, 2012, p 700.

<sup>98</sup> S. Van Drooghenbroeck. Interprétation jurisprudentielle et non-rétroactivité de la loi pénale. - Revue trimestrielle des droits de l'homme, Issue 27, 1996, p 470.

principle of non-retroactivity of criminal law is not violated by retroactive application of a more lenient criminal regulation according to the ECtHR.<sup>99</sup>

The principle of legality is multifaceted and incorporates the principle of legal certainty.<sup>100</sup> According to the case law of the Court, it follows from Article 7 that an offence must be clearly defined in law. The term “law” has an autonomous meaning under the Convention, and includes judge-made law as well as legislation, and delegated legislation as well as primary legislation.<sup>101</sup> The Court considers the “law” to be the provision in force as the competent courts have interpreted it.<sup>102</sup> Hence it follows that the offences, as well as the relevant penalties, must be defined as detailed as possible.<sup>103</sup> However, whilst certainty is highly desirable, it may cause excessive rigidity and the law must be able to keep pace with changing circumstances.<sup>104</sup>

For example, in *Steel v. the United Kingdom*, the Court accepted that, although provisions such as “breach of the peace” or “being of good behaviour” were imprecise, vague and general, their meaning had either been sufficiently clarified by the national courts - in the case of “breach of the peace” - or was sufficiently comprehensible by the applicants - the requirement “to be of good behaviour” as a condition of being bound over to keep the peace as a criminal penalty.<sup>105</sup>

The requirement of legal certainty is satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts’ interpretation of it, what acts and omissions will make him or her criminally liable.<sup>106</sup> In addition to this, Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and

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<sup>99</sup> D. Wallace. Redress of Human Rights. Abuses in Criminal Justice in International Human Rights. - International Criminal Justice Review, Vol 24, Issue 4, 2014, p 458; ECtHR 50550/06, 10.06.2008, *Scoppola v. Italy*, para 103.

<sup>100</sup> J. Merrills. The Development of International Law by the European Court of Human Rights. Manchester: Manchester University Press 1989, pp 129-132.

<sup>101</sup> ECtHR 21906/04, 12.02.2008, *Kafkaris v. Cyprus*, para 139, as interpreted in M. Faure, M. Goodwin, F. Weber. The Regulator's Dilemma: Caught between the Need for Flexibility & the Demands for Foreseeability - Reassessing the Lex Certa Principle. - Albany Law Journal of Science and Technology, Vol 24, No 2, 2014, p 309.

<sup>102</sup> ECtHR 21906/04, 12.02.2008, *Kafkaris v. Cyprus*, para 139.

<sup>103</sup> A. Cassese. International Criminal Law. 2nd edition. New York: Oxford University Press 2008, p 41.

<sup>104</sup> ECtHR 21906/04, 12.02.2008, *Kafkaris v. Cyprus*, para 141.

<sup>105</sup> ECtHR 24838/94, 23.09.1998, *Steel and Others v. the United Kingdom*, para 75.

<sup>106</sup> ECtHR 17862/91, 15.11.1996, *Cantoni v. France*, para 29.

could reasonably be foreseen.<sup>107</sup> In other words, the core point in this connection is whether the accused can foresee the criminal consequences of an intended act.<sup>108</sup> In that regard, the Court's interpretation provides a minimum upon which the Member States and other European courts build.<sup>109</sup> The ECtHR's role is confined to ascertaining whether the effects of such an interpretation are compatible with the Convention<sup>110</sup> regarding both the definition of an offence and the penalty the offence in question carries.<sup>111</sup>

For a criminal law to deter a given conduct, that individual must understand that this conduct is the subject of a criminal law and if carried out will result in criminal punishment.<sup>112</sup> This enables each community to regulate itself according to the norms prevailing in the society.<sup>113</sup> It does not only ensure respect for the rule of law but also helps to reduce potential costs of litigation. A firm understanding of the prohibited conduct is also important for the achievement of retribution, particularly if such retribution aims to communicate the wrongfulness of the behaviour in question to the accused.<sup>114</sup>

The Court has developed two different standards in regard to the requirement of "foreseeability". One of them is "common sense" - the individuals must be able to foresee the consequences under the criminal law of pursuing illegal activities.<sup>115</sup> However, the court also expects more than simple common sense from an individual employed in a professional capacity. Professionals are expected to consult the law relevant to their position<sup>116</sup> or to take an appropriate legal advice to assess, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>117</sup>

When it comes to the judgments in which Estonia was the defendant state, the best example of the application of the principles described in this subchapter is the judgment of the ECtHR in the case *Veeber v. Estonia (no. 2)*.

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<sup>107</sup> ECtHR 20166/92, 22.11.1995, *S.W. v. the United Kingdom*, para 36; ECtHR 34044/96, 35532/97 and 44801/98, 22.03.2001, *Streletz, Kessler and Krenz v. Germany*, para 50.

<sup>108</sup> T. Baumbach. The Notion of Criminal Penalty and the Lex Mitior Principle in the *Scoppola v. Italy* Case. - Nordic Journal of International Law, Vol 80, No 2, 2011, p 131.

<sup>109</sup> M. Faure, M. Goodwin, F. Weber, p 315.

<sup>110</sup> ECtHR 9174/02, 19.09.2008, *Korbely v. Hungary*, para 72.

<sup>111</sup> ECtHR 67335/01, 10.11.2004, *Achour v. France*, para 41.

<sup>112</sup> P. Whelan, p 681.

<sup>113</sup> M. Faure, M. Goodwin, F. Weber, p 309.

<sup>114</sup> P. Whelan, p 683.

<sup>115</sup> ECtHR 74357/01, 26764/02 and 27434/02, 19.02.2008, *Kuolelis, Bartoševičius and Burokevičius v. Lithuania*, para 112.

<sup>116</sup> M. Faure, M. Goodwin, F. Weber, p 312.

<sup>117</sup> ECtHR 17862/91, 15.11.1996, *Cantoni v. France*, para 35.

## 2.2. Judgment of European Court of Human Rights in *Veeber v. Estonia* (no. 2)

The applicant, Tiit Veeber, was convicted for the offences committed from 1993 to 1996<sup>118</sup> under criminal legislation that had come into force in 1995. The applicant submitted that his acts prior to 13 January 1995 did not qualify as criminal under the law in force at that time. He pointed out that, as worded prior to that date, the relevant provision made the existence of a previous administrative penalty for a similar offence a precondition for a criminal conviction for the acts defined therein. However, no such penalty had been imposed on him.<sup>119</sup> Therefore, the applicant believed his conviction amounted to the retrospective application of criminal law in breach of Article 7(1) of the Convention.<sup>120</sup>

The Government submitted that the applicant had been given a clear indication in the bill of indictment of the acts of which he was accused, their legal qualification and the reasons for qualifying those acts as a continuing offence. The case law of the Supreme Court of Estonia also demonstrated that the relevant provision was applicable to acts of intentional and continuing tax evasion even before the amendment if the criminal activity had continued after it came into force. The domestic courts had given sufficiently detailed reasons for their decision to qualify the acts committed by the applicant as a continuing offence and to rely on all of them as the basis for convicting him.<sup>121</sup>

The Court observed that the application of the criminal law of 13 January 1995 to subsequent acts was not at issue in the instant case.<sup>122</sup> The applicant's criminal responsibility was primarily a matter for the assessment of the domestic courts. However, it was the Court's task to consider, from the standpoint of Article 7(1) of the Convention, whether the applicant's acts, at the time when they were committed, constituted offences defined with sufficient accessibility and foreseeability by the national law.<sup>123</sup>

The Court found that tax evasion was also an offence prior to the new legislation coming into force, in particular in 1993 and 1994, when the applicant committed some of the acts of which he was accused. However, a prerequisite for a criminal conviction under the law in force at

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<sup>118</sup> *Veeber v. Estonia* (no. 2), para 20.

<sup>119</sup> *Veeber v. Estonia* (no. 2), para 28.

<sup>120</sup> *Veeber v. Estonia* (no. 2), para 3.

<sup>121</sup> *Veeber v. Estonia* (no. 2), para 29.

<sup>122</sup> *Veeber v. Estonia* (no. 2), para 32.

<sup>123</sup> *Veeber v. Estonia* (no. 2), para 32.

that time was that the person concerned had previously been found liable for a similar offence and subjected to an administrative penalty.<sup>124</sup> The applicant was not a subject of such a penalty. The newer legislation maintained the requirement for a previous administrative penalty but added a condition concerning intent. The two conditions were alternative, not cumulative, thus making a person criminally liable if one of the conditions was satisfied. Thus, in finding the applicant guilty under that Article, the domestic courts held that the fact that no administrative penalty had previously been imposed on him was not a bar to his conviction.<sup>125</sup> The sentence imposed on the applicant – a suspended term of three years and six months' imprisonment – took into account acts committed both before and after the newer legislation came into force.<sup>126</sup>

The Court observed that, by definition, a “continuing offence” is a type of crime committed over a period of time.<sup>127</sup> According to the text of the relevant provision that was applicable to the acts committed before their amendment in 1995, a person could be held criminally liable for tax evasion only if an administrative penalty had been imposed on him or her for a similar offence. The condition was thus an element of the offence of tax evasion without which a criminal conviction could not follow.<sup>128</sup> The decisions of the Supreme Court referred to by the Government were handed down in April 1997 and January 1998, whereas the applicant’s complaint concerned the conviction based on acts committed during the period from 1993 to 1994. In these circumstances, the jurisprudence of the Supreme Court did not make the risk of criminal punishment foreseeable to the applicant.<sup>129</sup> The Court found that the domestic courts applied the 1995 amendment to the law retrospectively to behaviour which did not previously constitute a criminal offence<sup>130</sup> in violation of Article 7(1) of the Convention.

### 2.3. Influence of *Veeber v. Estonia (no. 2)* on Case Law of European Court of Human Rights

There have not been many decisions in the case law of the ECtHR based on Article 7(1) since the judicial purge after the Second World War, and even fewer cases in which the act has been

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<sup>124</sup> *Veeber v. Estonia (no. 2)*, para 34.

<sup>125</sup> *Veeber v. Estonia (no. 2)*, para 34.

<sup>126</sup> *Veeber v. Estonia (no. 2)*, para 36.

<sup>127</sup> *Veeber v. Estonia (no. 2)*, para 36.

<sup>128</sup> *Veeber v. Estonia (no. 2)*, para 36.

<sup>129</sup> *Veeber v. Estonia (no. 2)*, para 37.

<sup>130</sup> *Veeber v. Estonia (no. 2)*, para 38.

criminalised between the time of commission and the time of adjudication.<sup>131</sup> *Veeber v. Estonia (no. 2)* is the 17th in a line of 92 cases decided on the grounds of Article 7(1), the first dating back to 1961. It is also the 6th of the 18 cases published in Case Reports of the Court in that regard. This alone allows to presume this case to be at the very source of the Court's jurisprudence concerning the interpretation of Article 7(1).

For example, the ECtHR used the basic characteristics of the principle of legality and its aspect in form of legal certainty quoting *Veeber* in another prominent decision in the case *Liivik v. Estonia*.<sup>132</sup> In the HUDOC database this case is marked by importance level one, which means that despite not being included in the Case Reports, it nevertheless made a significant contribution to the development, clarification or modification of the Court's case law.

The applicant, Mr Jaak Liivik, was appointed acting Director General of the Estonian Privatisation Agency and found guilty of misuse of his official position in connection with the privatisation proceedings.<sup>133</sup> The courts noted that the applicant had caused danger to the preservation of the State's assets<sup>134</sup> and had caused substantial moral damage to the authority of the State within society and to the reputation of the Republic of Estonia as a contractual partner internationally.<sup>135</sup>

The Court noted that relevant penal law provision and its interpretation were inherited from the former Soviet legal system. Thus, the domestic authorities were confronted with a difficult task of applying these legal norms and notions in the completely new context of a market economy.<sup>136</sup> The Court observed that the applicant was convicted of creating a situation in which the preservation of the State's assets might have been jeopardised and that this was considered significant damage despite the fact that the risks had not materialised.<sup>137</sup> The Court found that the interpretation and application of a legal provision in the present case involved the use of such broad notions and such vague criteria in relevant national case law that the

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<sup>131</sup> T. Baumbach. The Notion of Criminal Penalty and the *Lex Mitior* Principle in the *Scoppola v. Italy* Case. - Nordic Journal of International Law, Vol 80, No 2, 2011, p 126.

<sup>132</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*.

<sup>133</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 39.

<sup>134</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 59.

<sup>135</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 42.

<sup>136</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 97.

<sup>137</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 98.

criminal provision in question was not of the quality required under the Convention in terms of its clarity and the foreseeability of its effects.<sup>138</sup>

In addition, the Court observed that the Public Prosecutor's Office on several occasions expressed its opinion that the privatisation in question had been lawful and refused to initiate criminal proceedings against the applicant. The Public Prosecutor's Office radically changed its position within the space of a few days without any substantial change in the circumstances. Even though the Public Prosecutor's Office was not bound by its initial position, the radical change in the interpretation of the applicable law also demonstrates, in the circumstances, its insufficient clarity and foreseeability.<sup>139</sup>

*Liivik* decision itself was later quoted as an authority in relation to the connection between Article 7 and principles of legality, foreseeability and accessibility in cases *Khodorkovskiy and Lebedev v. Russia*<sup>140</sup> and *Alimucaj v. Albania*.<sup>141</sup>

There is also a case which factual basis is very similar to that of *Veeber v. Estonia (no. 2) - Puhk v. Estonia*.<sup>142</sup> The applicant was convicted for having failed adequately to organise bookkeeping in his company during the period of its activity. However, criminal liability for an infringement of the relevant rules was established only during the last year of the activity of his company and did not cover the whole period of its operation.<sup>143</sup> In applying the criminal law to the applicant's behaviour before the date the applicable provision came into force, the domestic courts found that it was part of a continuing offence which lasted beyond that date.<sup>144</sup> The Court noted that the length of the period to which the law was applied retrospectively is not decisive in considering whether or not the guarantees of Article 7 of the Convention have been respected.<sup>145</sup> The Court also pointed out that the jurisprudence referred to by the Government related not to the period of the activity of his company, but to the years that followed after the relevant period had passed. It follows that in the absence of a law on criminal liability for inadequate organisation of accounting, the applicant could not foresee the risk of criminal punishment for his conduct during that period.<sup>146</sup> In these circumstances,

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<sup>138</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 101.

<sup>139</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 201.

<sup>140</sup> ECtHR 11082/06 and 13772/05, 25.07.2013, *Khodorkovskiy and Lebedev v. Russia*, para 779.

<sup>141</sup> ECtHR 20134/05, 07.02.2012, *Alimucaj v. Albania*, para 150.

<sup>142</sup> ECtHR 55103/00, 10/02/2004, *Puhk v. Estonia*, para 26.

<sup>143</sup> ECtHR 55103/00, 10/02/2004, *Puhk v. Estonia*, para 38.

<sup>144</sup> ECtHR 55103/00, 10/02/2004, *Puhk v. Estonia*, para 38.

<sup>145</sup> ECtHR 55103/00, 10/02/2004, *Puhk v. Estonia*, para 39.

<sup>146</sup> ECtHR 55103/00, 10/02/2004, *Puhk v. Estonia*, para 40.

the Court found that the domestic courts applied retrospectively the 1993 law to behaviour which previously did not constitute a criminal offence,<sup>147</sup> thus reaching an analogical decision to the one in *Veeber (no. 2)*.

The principles described in *Veeber (no. 2)* were also used in the case of *Rohlena v. the Czech Republic*,<sup>148</sup> published in the Court's Case Reports and decided by the Grand Chamber. The applicant was formally indicted by the Brno municipal prosecutor for having, at least between 2000 and 2006, repeatedly physically and mentally abused his wife while he was drunk. According to the prosecutor, the applicant had thus committed the "continuing" criminal offence of abusing a person living under the same roof within the meaning of relevant criminal provisions of the Czech Republic, given that his conduct prior to the introduction of that offence on 1 June 2004 had amounted to the offence of violence against an individual or group of individuals and assault occasioning bodily harm.<sup>149</sup>

Despite taking into account other relevant case law of the ECtHR, the Court mostly based its substantial analysis on *Veeber (no. 2)*. The Court examined whether, at the time they were committed, the applicant's acts, including those carried out before the entry into force of a new legislation of 2004, constituted an offence defined with sufficient foreseeability<sup>150</sup> by domestic law.<sup>151</sup> The Court used the same principles to establish the occurrence of continuing or continuous criminal offence as in *Veeber (no. 2)* and found<sup>152</sup> that such an offence was a type of crime committed over a period of time.<sup>153</sup>

In analogy with *Veeber (no. 2)*,<sup>154</sup> the Court observed that it was implicit from the Supreme Court's reasoning that the concept of a continuation of a criminal offence developed by the case law was introduced into the domestic criminal code prior to the first assault on his wife of which the applicant was convicted.<sup>155</sup> The Court concluded that all the constituent elements of the offence were punishable under the old and the new law.<sup>156</sup> The Court found nothing to indicate that the above-mentioned approach by the domestic courts had the adverse effect of

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<sup>147</sup> ECtHR 55103/00, 10/02/2004, *Puhk v. Estonia*, para 41.

<sup>148</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*.

<sup>149</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*, para 10.

<sup>150</sup> *Veeber v. Estonia (no. 2)*, para 33; ECtHR 9174/02, 19.09.2008, *Korbely v. Hungary*, paras 72-73.

<sup>151</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*, para 56.

<sup>152</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*, para 57.

<sup>153</sup> *Veeber v. Estonia (no. 2)*, para 35.

<sup>154</sup> *Veeber v. Estonia (no. 2)*, para 37.

<sup>155</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*, para 60.

<sup>156</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*, para 66.

increasing the severity of the applicant's punishment as analyzed in *Veeber (no. 2)*.<sup>157</sup> On the contrary, had the acts perpetrated by him prior to the coming into force of a new legislation in 2004 have been assessed separately from those he committed after that date. In the event of an opposite nature, the applicant would have received at least the same sentence as the one actually imposed, or even a harsher one.<sup>158</sup>

*Veeber (no. 2)* was also used in the dissenting opinion of judge Popović in the case of *Achour v. France*,<sup>159</sup> also published in the ECtHR Case Reports. The applicant was initially convicted of drug trafficking in 1984 and that he finished serving his sentence in 1986. He was subsequently convicted (under new statutory rules that came into force in 1994) of further drug offences committed in the course of 1995<sup>160</sup> - the applicant was, in legal terms, a recidivist.<sup>161</sup> The Court noted that new statutory rules provide that the maximum sentence and fine that may be imposed are to be doubled in the event of recidivism and that the applicable period is no longer five years, as prescribed by the former legislation, but ten years from the expiry of the previous sentence or of the time allowed for its enforcement.<sup>162</sup>

The Court decided that the applicant's initial conviction of 1984 had not been expunged and remained in his criminal record. The domestic courts were therefore entitled to take it into account as the first component of recidivism. In this connection, the Court did not accept the applicant's argument that the expiry of the relevant period for the purposes of recidivism, as provided at the time of his first offence, had afforded him the right to have his first offence disregarded, there being no provision for any such right in the applicable legislation.<sup>163</sup> The Court further observed that there was long-established case law of the Court of Cassation on the question whether a new law extending the time that may elapse between the two components of recidivism can apply to a second offence committed after its entry into force. Such case law was manifestly capable of enabling the applicant to regulate his conduct.<sup>164</sup> The fact that the applicant's previous criminal status was subsequently taken into account by the trial and appeal courts, a possibility resulting from the fact that his first conviction remained in his criminal record, was not found to be in breach of the provisions of Article 7.

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<sup>157</sup> *Veeber v. Estonia (no. 2)*, para 36.

<sup>158</sup> ECtHR 59552/08, 18.04.2013, *Rohlena v. the Czech Republic*, para 67.

<sup>159</sup> ECtHR 67335/01, 10.11.2004, *Achour v. France*.

<sup>160</sup> *Achour v. France*, para 48.

<sup>161</sup> *Achour v. France*, para 49.

<sup>162</sup> *Achour v. France*, para 49.

<sup>163</sup> *Achour v. France*, para 51.

<sup>164</sup> *Achour v. France*, para 52.

The Court noted that the practice of taking past events into consideration should be distinguished from the notion of retrospective application of the law.<sup>165</sup>

In his dissenting opinion judge Popović considered that Article 7(1) of the Convention was infringed. The Court has on a number of occasions<sup>166</sup> found violations of Article 7(1) of the Convention in that the national courts had not applied the more lenient or favourable law as, for example, in *Veeber (no. 2)*.<sup>167</sup> In his opinion, the Court endorsed the imposition of a harsher penalty than would have been imposed if the role of precedents which he considered binding had not been ignored. This role entailed applying the general rule on settling conflicts between successive criminal statutes.<sup>168</sup>

The Court also upheld legal principles given in *Veeber (no. 2)* in the case of *Aras v. Turkey (no. 2)*. The applicant, as the Director General of Yurtbank, had influenced the bank's branch offices to collect deposits to be transferred to offshore accounts. It was pointed out that these deposits had been used to provide loans to companies which were owned by the bank's main shareholder. The applicant was found guilty of aggravated fraud as charged under now repealed Criminal Code and sentenced to two years and eleven months' imprisonment and a fine in respect of this offence. As the appeal proceedings were pending, the Court of Cassation decided that the sentence should be reassessed in the light of the new Criminal Code. Following a retrial, the domestic court sentenced the applicant to two years and one month's imprisonment and a fine under new Criminal Code, indicating that this was the most favourable provision applicable to the case.<sup>169</sup>

The Court reiterated that it follows from the principles found in Article 7 of the Convention that an offence must be clearly defined in the law. As in *Veeber (no. 2)*<sup>170</sup> the Court found this requirement to be satisfied where the individual can know from the wording of the relevant provision and, if need be, with the assistance of the courts' interpretation of it, what acts and omissions will make him criminally liable.<sup>171</sup> The applicant, who was an executive board member and Director General of Yurtbank, and who undoubtedly had the benefit of appropriate legal advice in the course of his duties, should have foreseen at the material time

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<sup>165</sup> *Achour v. France*, para 59.

<sup>166</sup> ECtHR 68066/01, 22.07.2003, *Gabbari Moreno v. Spain*, para 33.

<sup>167</sup> *Gabbari Moreno v. Spain*, dissenting opinion of judge Popović, para 5.

<sup>168</sup> *Gabbari Moreno v. Spain*, dissenting opinion of judge Popović, para 6.

<sup>169</sup> ECtHR 1895/05, 17.02.2009, *Aras v. Turkey*, para 55.

<sup>170</sup> *Veeber v. Estonia (no. 2)*, para 31.

<sup>171</sup> ECtHR 1895/05, 17.02.2009, *Aras v. Turkey*, para 52.

that he ran a risk of prosecution for fraudulent granting of loans to companies belonging to the main shareholder of the bank. As a result, it could not be concluded that he was found guilty of an offence on account of an act which did not constitute a criminal offence under the national law.<sup>172</sup> In the light of the foregoing, the Court decided that this part of the application was manifestly ill-founded.<sup>173</sup>

There are two interesting and highly relevant decisions on admissibility involving Estonia. The cases concerned Article 7 of the Convention. It was examined whether the conviction of crimes against humanity was based on the retrospective application of criminal law.

In *Kolk and Kislõi (Kislyiy) v. Estonia* both applicants participated in the deportation of the civilian population from the occupied Republic of Estonia to remote areas of the Soviet Union.<sup>174</sup> The Court noted that this deed was expressly recognised as a crime against humanity in the Charter of the Nuremberg Tribunal of 1945.<sup>175</sup> The universal validity of the principles concerning crimes against humanity was subsequently confirmed by, *inter alia*, resolution 95 of the United Nations General Assembly (11 December 1946) and later by the International Law Commission. The Court emphasised that it is expressly stated in Article I(b) of the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity<sup>176</sup> that no statutory limitations shall apply to crimes against humanity, irrespective of the date of their commission and whether committed in time of war or in time of peace. After accession to the above Convention, the Republic of Estonia became bound to implement the said principles. The Court noted that even if the acts committed by the applicants could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. It was noteworthy in this context that the Soviet Union was a party to the relevant international agreements dating back to 1945 that affirmed the principles of international law recognised by the Charter. Consequently, it could not be claimed that these principles were unknown to the Soviet authorities. The Court thus considered groundless the applicants' allegations that their acts had not constituted crimes

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<sup>172</sup> ECtHR 1895/05, 17.02.2009, *Aras v. Turkey*, para 58.

<sup>173</sup> ECtHR 1895/05, 17.02.2009, *Aras v. Turkey*, para 59.

<sup>174</sup> *Kolk and Kislyiy v. Estonia* (dec.), part A.

<sup>175</sup> United Nations. Charter of the International Military Tribunal - Annex to the Agreement for the prosecution and punishment of the major war criminals of the European Axis. 08.08.1945.

<sup>176</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity. Adopted and opened for signature, ratification and accession by General Assembly resolution 2391(XXIII). 26.11.1968.

against humanity at the time of their commission and that they could not reasonably have been expected to be aware of that. The complaints were found to be manifestly ill-founded and were rejected.<sup>177</sup>

The case *Penart v. Estonia*<sup>178</sup> has a somewhat similar factual matrix. On the 9th of April 2003 the applicant was convicted of crimes against humanity under the relevant national provision. According to the charges the applicant had in 1953-1954 served as the head of Elva Department of the Ministry of the Interior of the Estonian Soviet Socialist Republic. In the summer of 1953 he had planned and directed the killing of a person hiding in the woods from the repressions of the occupation authorities.<sup>179</sup> The Court conducted an analysis analogical to the one in *Kolk and Kislõi (Kislyiy) v. Estonia* and noted that even if the acts committed by the applicant could have been regarded as lawful under the Soviet law at the material time, they were nevertheless found by the Estonian courts to constitute crimes against humanity under international law at the time of their commission. Just as in *Kolk and Kislõi (Kislyiy) v. Estonia* no statutory limitation was found applicable to crimes against humanity, irrespective of the date of their commission. The complaint was also found to be manifestly ill-founded and rejected.<sup>180</sup>

Despite not directly quoting *Veeber (no. 2)* but relevant domestic provisions based on the same principles, these two cases made a significant contribution to the clarification of the prohibition of the retrospective application of criminal law. The judgment in *Kolk and Kislõi (Kislyiy) v. Estonia* was also published in the Case Reports of the Court. Both *Kolk and Kislõi (Kislyiy)* and *Penart* were later used in similar decisions concerning countries with an analogical historical background to analyse whether the convictions of crimes were based on the retrospective application of criminal law. For example, in relation to a conviction for genocide during the Soviet occupation and under the USSR repressive structures in Lithuania<sup>181</sup> and convictions for war crimes,<sup>182</sup> crimes against humanity and genocide<sup>183</sup> committed in similar historical circumstances in Latvia. The case originating from Lithuania was also selected for the Case Reports for its influence on the case law of the Court.

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<sup>177</sup> *Kolk and Kislyiy v. Estonia* (dec.).

<sup>178</sup> ECtHR 14685/04, 24.01.2006, *Penart v. Estonia* (dec.).

<sup>179</sup> *Penart v. Estonia* (dec.), part A.

<sup>180</sup> *Penart v. Estonia* (dec.).

<sup>181</sup> ECtHR 35343/05, 20.10.2015, *Vasiliauskas v. Lithuania*.

<sup>182</sup> ECtHR 36376/04, 24.07.2008, *Kononov v. Latvia* (dec.).

<sup>183</sup> ECtHR 45520/04 and 19363/05, 25.11.2014, *Larionovs and Tess v. Latvia* (dec.).

To sum up, if one wanted to mention aspects in which Estonian cases have been particularly relevant for the application of Convention rights, Article 7(1) would be one of them.<sup>184</sup> The assessment of the Court in *Liivik* was mostly based on *Veeber (no. 2)*. The Court also examined the particular circumstances of *Puhk* in the light of the application of the foregoing principles in *Veeber (no. 2)*. In *Penart and Kolk and Kislõi* the Court took national provision prohibiting retrospective application of criminal law into consideration, not the explanation of the same principle in *Veeber (no. 2)*. However, its analysis seriously contributed to the clarification of the interpretation of Article 7 and complemented one given in *Veeber (no. 2)* in relation to war crimes and crimes against humanity.

It cannot be said that *Veeber (no. 2)* influenced only those decisions of the Court that were made against Estonia or former USSR countries. This is only confirmed by the fact that the approach of the Court in the case against the Czech Republic, *Rohlina*, was mainly based on *Veeber (no. 2)*. In *Aras* the ECtHR upheld the principles as given in its previous case law thus showing their lasting relevance.

#### 2.4. Effect of *Veeber v. Estonia (no. 2)* on Case Law of Supreme Court of Estonia

Experience of Estonia, one of EU Member States, can be used as an example of an application of the principles found in the case law of the ECtHR in the domestic proceedings. And the Supreme Court of Estonia did not leave the decision of the ECtHR in *Veeber (no. 2)* unnoticed. It relied on these cases on four independent occasions,<sup>185</sup> in cases Nos 3-1-1-93-15,<sup>186</sup> 3-1-1-40-14,<sup>187</sup> 3-1-1-60-07<sup>188</sup> and 3-1-1-24-05.<sup>189</sup> This does not include the domestic proceedings in relation to the applicant in *Veeber (no. 2)* himself - that issue is discussed in a separate subsection of this chapter.

The decision of the Supreme Court in 3-1-1-93-15 is even more interesting, considering the Court relied on the analysis found both in *Veeber* and *Liivik*. This decision concerned three individuals charged with forgery of documents and the opening of another person's email box

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<sup>184</sup> K. Merusk, M. Susi, p 340.

<sup>185</sup> As of 05.03.2018.

<sup>186</sup> Supreme Court of Estonia Criminal Law Chambers judgment in the case No 3-1-1-93-15, 20.11.2015.

<sup>187</sup> Supreme Court of Estonia Criminal Law Chambers judgment in the case No 3-1-1-40-14, 03.11.2014.

<sup>188</sup> Supreme Court of Estonia Criminal Law Chambers judgment in the case No 3-1-1-60-07, 28.01.2008.

<sup>189</sup> Supreme Court of Estonia Criminal Law Chambers decision in the case No 3-1-1-24-05, 28.06.2005.

in order to get the information about the contents of the messages. Both of them were found guilty on all charges.<sup>190</sup>

The Supreme Court of Estonia admitted that the wording of a relevant provision was not successful in terms of legal clarity. The concept of surveillance of the other person was ambiguous. There also was a certain inconsistency between the specifications of different provisions. However, for many years precedent to the commission of the acts, there had been a long-established case law of the Supreme Court that defined the concept of unauthorised surveillance of a person.<sup>191</sup> Thus, the principle of legality as given in *Veeber (no. 2)* quoting other relevant decisions and *Liivik*, stressing the admissibility of judicial interpretation in the context of fulfilling the prerequisites of Article 7, allowed the Supreme Court to reach a conclusion that the accused could reasonably foresee the criminal consequences of their intended acts.<sup>192</sup>

The conclusion reached by the ECtHR in *Veeber* was found to be relevant in another complex case tried at the Supreme Court of Estonia - No 3-1-1-60-07. The later part of a continuing act (tax offence) corresponded to the description of an act criminalized by the time of its commission. The Estonian court agreed to the ECtHR that it does not automatically mean that the remaining parts of an act submitted during the period of validity of the previous version of the Penal Code could also be considered a criminal offense.<sup>193</sup> However, on that particular occasion, there were other provisions, left unnoticed by the prosecution, that criminalized the earlier part of a continuing act.<sup>194</sup> *Veeber*, thus, was distinguished on the facts.

In its ruling concerning passing the case 3-1-1-24-05 to the Great Chamber of the Supreme Court of Estonia, the Court once more upheld the principle<sup>195</sup> given in *Veeber (no. 2)* that the requirements of clarity and foreseeability are satisfied where the individual can know about potential criminal liability from the wording of the relevant provision or from courts' interpretation of it. The Criminal Chamber expressed doubts that without earlier case law, it may not be possible to foresee with sufficient clarity that an abuse of an official position

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<sup>190</sup> *Veeber v. Estonia (no. 2)*, para 1; ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 16.

<sup>191</sup> No 3-1-1-93-15, para 96.

<sup>192</sup> No 3-1-1-93-15, para 97.

<sup>193</sup> No 3-1-1-60-07, para 18.

<sup>194</sup> No 3-1-1-60-07, para 20.

<sup>195</sup> No 3-1-1-24-05, para 16.

involving non-material damage is punishable as a criminal offense.<sup>196</sup> The accused was later found not guilty on the grounds that his acts did not constitute the incriminated offence.<sup>197</sup>

The decision in the case No 3-1-1-40-14 concerned a situation with a factual matrix less similar to *Veeber (no. 2)*. However, the Supreme Court used this decision in order to show that the principle of legality presupposes the law was created by the legislative branch and published according to the relevant provisions of a state. The Supreme Court reached a conclusion that no legal basis for punishing a person could be created only by interpreting an EU directive and that independently of national legal norms.<sup>198</sup>

The important role of case law was once more accentuated in relation to the decision in a case No 1-16-5792. In the applicant's opinion, the relevant provisions of Penal Code were insufficiently clear when it came to legal definitions such as "act of sexual nature", "manner other than sexual intercourse" and "erotic situation".<sup>199</sup> The Supreme Court noted once more that the formulation of a legal provision in a way that needs to be interpreted does not necessarily mean the provision is unconstitutional.<sup>200</sup> Its analysis was based on the same principles as were given in *Veeber*, but quoting mostly *Liivik*, which was in turn based on the analysis provided in *Veeber (no. 2)*.

## 2.5. Reopening of Domestic Proceedings

No case is terminated at the moment when judgment has been delivered - the question then arises whether the judgment will in fact be executed.<sup>201</sup> In this regard, declaratory relief has an important role in preventing a violation that is threatened but has not yet caused measurable harm. Generally, however, a declaratory judgment will not be an adequate remedy.<sup>202</sup> To grant redress for the damaged applicant is essential, and this is not always achieved even by the payment of a pecuniary sum for damages.

The adoption of specific individual measures may be required to put an end to the illicit situation or to put the damaged in the situation it was before the violation of his rights took

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<sup>196</sup> No 3-1-1-24-05, para 22.

<sup>197</sup> No 3-1-1-24-05, para 15.

<sup>198</sup> No 3-1-1-40-14, para 86.

<sup>199</sup> No 1-16-5792, para 12.

<sup>200</sup> ECtHR 12157/05, 25.06.2009, *Liivik v. Estonia*, para 93; *Veeber v. Estonia (no. 2)*, para 31.

<sup>201</sup> C. Tomuschat. *Human Rights: Between Idealism and Realism*. 3rd edition. Croydon: Oxford University Press 2014, p 299.

<sup>202</sup> D. Shelton. *Remedies in International Human Rights Law*. 2nd edition. Oxford: Oxford University Press 2005, p 268.

place. This is particularly evident in cases where the procedural safeguards of the defendant have been violated but the applicant is continuing to serve the sentence.<sup>203</sup> In legal literature the reopening of domestic proceedings was found to be a “necessary consequence”,<sup>204</sup> “the most efficient approach”<sup>205</sup> and “an appropriate measure”.<sup>206</sup> It seems only logical that it was endorsed by the Court in its recent case law. For example, in its Interim Resolution<sup>207</sup> on the execution of the judgment *Hulki Güneş v. Turkey*,<sup>208</sup> the Court firmly recalled the obligation of the Turkish authorities under Article 46(1) of the Convention to redress the violations found in respect of the applicant, and strongly urged them to promptly remove the legal lacuna preventing the reopening of domestic proceedings in the applicant's case.

Furthermore, the reopening of domestic proceedings was made obligatory to the states by Recommendation R(2000)2 of 19 January 2000 of the Committee of Ministers.<sup>209</sup> This recommendation suggests that re-examination or re-opening shall take place when the ECtHR finds a violation of European Convention on Human Rights and when an injured person by the national final judgment continues to suffer negative consequences which are not appropriately remedied by just satisfaction.<sup>210</sup> States all over Europe have amended and improved their legal procedures to comply with the Court's rulings.<sup>211</sup>

However, whether the reopening of a case in the domestic legal order is a direct consequence of a judgment of the ECtHR and whether there is a duty of the states to reopen cases, in particular, criminal procedures, had been a disputed question for a long time.<sup>212</sup>

This issue became pressing for Estonia because of the ECtHR judgments *Puhk* and *Veeber (no. 2)*. In both cases the retroactive application of criminal law to the applicant's

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<sup>203</sup> L. Bachmaier Winter. The Implementation of the ECtHR's Case-Law and the Execution Procedure after Protocol No. 14. - *Lex ET Scientia International Journal*, Vol 17, Issue 2, 2010, p 13.

<sup>204</sup> G. Ress. The Effect of Decisions and Judgments of the European Court of Human Rights in the Domestic Legal Order. - *Texas International Law Journal*, Vol 40, Issue 3, 2005, p 381.

<sup>205</sup> Recommendation of the Committee of Ministers on the re-examination or reopening of certain cases at domestic level following judgments of the European Court of Human Rights, R(2000)2, 21.01.2000, point 11.

<sup>206</sup> E. Lambert-Abdelgawad. The Execution of Judgments of the European Court of Human Rights, Volume 88. Strasbourg: Council of Europe Publishing 2002, p 23.

<sup>207</sup> Interim Resolution of the Committee of Ministers, CM/ResDH(2007)150, on Execution of the judgment of the ECHR *Hulki Güneş v. Turkey*, 05.12.2013. Available online: <https://hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-140755&filename=001-140755.pdf&TID=thkbhnilzk> (10.04.2018).

<sup>208</sup> ECtHR 28490/95, 19.06.2003, *Hulki Güneş v. Turkey*.

<sup>209</sup> Recommendation R(2000)2, point 11.

<sup>210</sup> I. Olari. The National Mechanism of Enforcement of the European Court of Human Rights Judgments by the Republic of Moldova. - *Korea University Law Review*, Vol 16-17, 2015, p 36.

<sup>211</sup> R. White, C. Ovey. Jacobs, White & Ovey: The European Convention on Human Rights. Oxford: Oxford University Press 2010, p 307.

<sup>212</sup> G. Ress, p 380.

disadvantage called for the reopening of proceedings and for a reversal of the conviction.<sup>213</sup> The Supreme Court of Estonia noted that there were no legal provisions that would allow the reopening of proceedings after and because of a judgment of the ECtHR at the time.<sup>214</sup> However, the national judicial system was to guarantee the rights established by the Convention.<sup>215</sup> The Supreme Court suggested an amendment to the procedural laws in order to solve this problem,<sup>216</sup> but in order to fulfill its international obligations reopened the proceedings. The Supreme Court noted that reopening was only justified because there was no other remedy available, a continuing and considerable violation of the individual's rights was taking place and, as a result of the reopening, the legal status of the person could be improved.<sup>217</sup> Both Puhk and Veeber were acquitted of the charges.<sup>218</sup> It is noteworthy that the procedural laws were, indeed, later amended and now comprise a legal provision that allows for the reopening of the proceedings.<sup>219</sup> What is, perhaps, even more important, is the fact that decision of the Supreme Court of Estonia concerning the reopening of the proceedings after *Veeber*, No 3-1-3-13-03, has opened a way for the Supreme Court to rely directly on the decisions of the ECtHR, without the principles of those judgments being introduced into the national legislation in form of legal provisions.

The decision of the Supreme Court of Estonia is different when it comes to another case<sup>220</sup> that also concerned reopening of proceedings after a decision of the ECtHR, this time, however, in *Liivik*. This case had a slightly different factual basis. The conviction was also based on the retroactive application of criminal law to the applicant's disadvantage but expired by the time the person applied for the reopening of proceedings.<sup>221</sup>

This approach, taken by the Estonian Supreme Court, shows the realization of an obligation to reopen domestic proceedings, in particular, the Estonian approach to its implementation. It also exposes a possible influence of the Court's judgment on a Member State. It could inspire other EU countries to join this example and give the national courts courage to ask for a change of the domestic legal provisions to allow it. It seems, however, to be more probable

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<sup>213</sup> K. Merusk, M. Susi, p 362.

<sup>214</sup> Supreme Court of Estonia *en banc* decision in the case No 3-1-3-13-03, 06.01.2004 para 31; Supreme Court of Estonia Criminal Law Chambers judgment in the case No 3-1-3-5-04, 22.11.2004, para 18.

<sup>215</sup> No 3-1-3-13-03, para 31; No 3-1-3-5-04, para 12.

<sup>216</sup> No 3-1-3-13-03, para 31.

<sup>217</sup> No 3-1-3-13-03, para 32.

<sup>218</sup> No 3-1-3-13-03, para 43; No 3-1-3-5-04, para 30.

<sup>219</sup> Code of Criminal Procedure of the Republic of Estonia. - RT I, 05.12.2017, 8, para 366(8).

<sup>220</sup> Supreme Court of Estonia Criminal Law Chambers judgment in the case No 3-1-2-5-09, 17.02.2010.

<sup>221</sup> No 3-1-2-5-09, para 9.2.

that an EU member state would change its legal norms not because of the behaviour of the Estonian courts and the Parliament, but after a direct decision in relation to that particular state. This happened in Romania, for instance, as a consequence of the Court's decision in the case *Maria Atanasiu and others v. Romania*.<sup>222</sup>

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<sup>222</sup> ECtHR 30767/05, 33800/06, 12.10.2010, *Maria Atanasiu and Others v. Romania*.

### 3. *Tammer v. Estonia*

#### 3.1. General principles concerning freedom of expression

##### 3.1.1. Role of freedom of expression

In the context of effective political democracy and respect for human rights mentioned in the Preamble to the Convention, freedom of expression is not only important in its own right, but also plays a central part in the protection of other rights under the Convention.<sup>223</sup> It constitutes one of the essential foundations of a democratic society, one of the basic conditions for its progress and for the development of every man.<sup>224</sup>

In relation to the press the Court has created a concept of the Public Watchdog with the emphasis on its vital role in democratic society that is analogous to the guardianship of the public interest. Article 10 was intended to broaden the terms of political debate.<sup>225</sup>

The role of the press as political watchdog was first mentioned by the Court in the *Lingens* case.<sup>226</sup> In newspaper articles the journalist had criticised the then Austrian Federal Chancellor for announcing a coalition with a party led by a person with a Nazi background. The journalist (Mr Lingens) had referred to the Chancellor's behaviour as "immoral", "undignified", demonstrating "the lowest opportunism".<sup>227</sup> Following a private prosecution brought by the Chancellor, the Austrian courts found these statements to be defamatory and imposed a fine on the journalist.<sup>228</sup> The Court argued that freedom of the press affords the public one of the best means of forming an opinion about the ideas and attitudes of political leaders. More generally, freedom of political debate is at the very core of the concept of a democratic society.<sup>229</sup> In *Jersild*<sup>230</sup> and *Thoma*<sup>231</sup> the Court reiterated that punishment of a journalist for assisting in the dissemination made by another person would seriously hamper the contribution of the press to discussion of matters of public interest and should not be envisaged unless there are particularly strong reasons for doing so.

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<sup>223</sup> M. Macovei. Freedom of expression. A guide to the implementation of Article 10 of the European Convention on Human Rights. - Council of Europe Human rights handbooks, no 2. Available online: [https://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02\(2004\).pdf](https://www.echr.coe.int/LibraryDocs/DG2/HRHAND/DG2-EN-HRHAND-02(2004).pdf) (10.04.2018), p 6.

<sup>224</sup> *Handyside v. the United Kingdom*, para 49.

<sup>225</sup> H. Thorgeirsdottir. Journalism Worthy of the Name: An Affirmative Reading of Article 10 of the ECHR. - *Netherlands Quarterly of Human Rights*, Vol 22, Issue 4, 2004, p 611.

<sup>226</sup> M. Macovei, p 11.

<sup>227</sup> ECtHR 9815/82, 08.07.1986, *Lingens v. Austria*, para 43.

<sup>228</sup> M. Macovei, p 11.

<sup>229</sup> *Lingens v. Austria*, para 42.

<sup>230</sup> ECtHR 15890/89, 23.09.1994, *Jersild v. Denmark*, para 35.

<sup>231</sup> ECtHR 38432/97, 29.03.2001, *Thoma v. Luxembourg*, para 62.

### 3.1.2. Object of Protection

The “expression” protected under Article 10 is not limited to words, written or spoken, but it extends to pictures,<sup>232</sup> images and actions intended to express an idea or to present information.<sup>233</sup>

Moreover, Article 10 protects not only the substance of the ideas and information expressed, but also the form in which they are conveyed.<sup>234</sup> It follows that the means for the production and communication, transmission or distribution of information and ideas are covered by Article 10, and the Court must be aware of the rapid developments of such means in many areas.<sup>235</sup>

Article 10(2) is applicable not only to “information” or “ideas” that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb the State or any sector of the population. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no “democratic society”.<sup>236</sup> In this connection, the Court reiterated that journalistic freedom also covers possible recourse to a degree of exaggeration or even provocation.<sup>237</sup> In the Court’s opinion sufficient consideration must be given to the context in which the impugned statement was made, the style used,<sup>238</sup> and the aim of the criticism. In matters of public controversy or public interest, during political debate, in electoral campaigns or where the criticism is levelled at government, politicians or public authorities, strong words and harsh criticism may be expected and will be tolerated to a greater degree by the Court.<sup>239</sup> For example, in *Thorgeirson* phrases such as “beasts in uniform”, “individuals reduced to a mental age of a newborn child”, “bullying, forgery, unlawful actions, superstitions, rashness and ineptitude” were not regarded as excessive by the Court, having in view the aim of urging reform of police.<sup>240</sup>

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<sup>232</sup> ECtHR 10737/84, 24.05.1988, *Müller and Others v. Switzerland*, para 27.

<sup>233</sup> ECtHR 13308/87, 25.08.1993, *Chorherr v. Austria*, para 23.

<sup>234</sup> ECtHR 11662/85, 23.05.1991, *Oberschlick v. Austria*, para 57; *Thoma v. Luxembourg*, para 45; and ECtHR 31611/96, 21.03.2002, *Nikula v. Finland*, para 46.

<sup>235</sup> M. Macovei, p 15.

<sup>236</sup> *Handyside v. the United Kingdom*, para 49.

<sup>237</sup> ECtHR 15777/89, 16.09.1996, *Lopes Gomes da Silva v. Portugal*, cited above, para 34; ECtHR 12697/03, 07.11.2006, *Mamère v. France*, para 25.

<sup>238</sup> ECtHR 20981/10, 17.04.2014, *Mladina d.d. Ljubljana v. Slovenia*, para 46.

<sup>239</sup> M. Macovei, p 16.

<sup>240</sup> ECtHR 13778/88, 25.06.1992, *Thorgeir Thorgeirson v. Iceland*, para 67.

### 3.1.3. “Duties and Responsibilities”

The idea according to which the exercise of freedom of expression carries with it duties and responsibilities is unique in the Convention, and it cannot be found in any of the other provisions regulating rights and freedoms.<sup>241</sup> This text, however, is not to be interpreted as automatically limiting the freedom of expression of individuals belonging to certain professional categories.<sup>242</sup> At the same time, the notion of “duties and responsibilities” has been invoked in relation to different bearers of expression rights, including politicians, civil servants, lawyers, the press, journalists, editors, authors and publishers, novelists. This notion assumes marked importance with respect to special categories of civil servants, such as diplomats, judges, intelligence agents and police officers.<sup>243</sup> The scope of the “duties and responsibilities” depends on the situation and the technical means used, which means that an individual in his private capacity has no such obligations.<sup>244</sup>

The need to exercise the freedom with regard to “duties and responsibilities” also applies to the press. These “duties and responsibilities” are liable to assume significance when there is question of attacking the reputation of private individuals and undermining the “rights of others”.<sup>245</sup> The safeguard afforded by Article 10 to journalists in relation to reporting on issues of general 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.<sup>246</sup> These considerations play a particularly important role nowadays, given the influence wielded by the media in contemporary society: not only do they inform, they can also suggest by the way in which they present the information how it is to be assessed. In a world in which the individual is confronted with vast quantities of information circulated via traditional and electronic media and involving an ever-growing number of players, monitoring compliance with journalistic ethics takes on added importance.<sup>247</sup>

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<sup>241</sup> M. Macovei, p 21.

<sup>242</sup> M. Macovei, p 21.

<sup>243</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley (note X), 494.

<sup>244</sup> H. Thorgeirsdottir, p 611.

<sup>245</sup> ECtHR 21980/93, 20.05.1999, *Bladet Tromsø and Stensaas v. Norway*, para 65.

<sup>246</sup> ECtHR 17488/90, 27.03.1996, *Goodwin v. the United Kingdom*, para 39; ECtHR 29183/95, 21.01.1999, *Fressoz and Roire v. France*, para 54.

<sup>247</sup> ECtHR 69698/01, 10.12.2007, *Stoll v. Switzerland*, para 104.

### 3.1.4. Three Stage Test

Freedom of expression guaranteed by Article 10 ECHR is not unlimited. It is true, that this freedom amounts to a principal right, necessary for a dignified human existence and therefore should receive, in some sense, absolute protection.<sup>248</sup> But this view should not be misunderstood as permitting all types of expressions, for example the publication of child pornography, in principle.<sup>249</sup> That is but one of many reasons for Article 10(2) to specify the conditions upon which States may restrict freedom of expression.<sup>250</sup> The Court has to examine whether the interference was “prescribed by law”, whether it had an aim or aims that is or are legitimate under Article 10(2) and whether it was “necessary in a democratic society” for the aforesaid aim or aims.

The restriction clauses contained in the second paragraph are themselves quite broad. In order to prevent the abuse of power inherent in this breadth, the Court has established rules of strict interpretation for these clauses.<sup>251</sup> Strict interpretation means that no other criteria than those mentioned in the exception clause itself may be at the basis of any restrictions, and these criteria, in turn, must be understood in such a way that the language is not extended beyond its ordinary meaning.<sup>252</sup> Basically, the Court established a legal standard that in any borderline case, the freedom of the individual must be favourably weighted against the State’s claim of overriding interest.<sup>253</sup>

According to the first requirement, any interference with the exercise of freedom of expression must have a basis in the national law. As a rule, this would mean a written and public law adopted by the Parliament,<sup>254</sup> however, the Court has established in its case law that both common-law<sup>255</sup> and public international law<sup>256</sup> rules satisfy this requirement. It also

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<sup>248</sup> P. Baehr, M. Castermans-Holleman. *The Role of Human Rights in Foreign Policy*. 3rd edition. Basingstoke: Palgrave Macmillan 2004, p. 9.

<sup>249</sup> S. Kirchner, *Outlawing Hate Speech in Democratic States: The Case against the Inherent Limitations Doctrine concerning Article 10(1) of the European Convention on Human Rights*. - *Brazilian Journal of International Law*, Vol 12, Issue 1, 2015, p 418.

<sup>250</sup> L. Woods (note 22), p 374.

<sup>251</sup> D. Gomie. *Short Guide to the European Convention on Human Rights*. 3rd edition. Strasbourg: Council of Europe Publishing 2005, p 74.

<sup>252</sup> M. Macovei, p 29.

<sup>253</sup> M. Macovei, p 30.

<sup>254</sup> M. Macovei, p 30.

<sup>255</sup> ECtHR 6538/74, 26.04.1979, *Sunday Times v. the United Kingdom (no. 1)*, para 47.

<sup>256</sup> ECtHR 12726/87, 22.05.1990, *Autronic AG v. Switzerland*, para 57.

encompasses the rules enacted by different administrative or professional bodies to which the law-making and disciplinary authorities are delegated.<sup>257</sup>

In the Court's opinion, there are two additional requirements that flow from the expression "prescribed by law". Firstly, the law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case. Secondly, a norm cannot be regarded as a "law" unless it is formulated with sufficient precision to enable the citizen to regulate his conduct: he or she must be able - if need be with appropriate advice<sup>258</sup> - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail.<sup>259</sup> Whilst certainty is highly desirable, it may cause excessive rigidity. The law, however, 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.<sup>260</sup> Even in areas affecting national security or fighting organised crime where the foreseeable character of the law can be weaker, the wording of the law must be nevertheless sufficiently clear. It should give individuals an adequate indication of the legal conduct and the consequences of acting unlawfully.<sup>261</sup>

Once a measure is found to breach the legal basis test, the examination should terminate. Yet, in the case the question relating to the sub-test of foreseeability remains inconclusive, the Court may focus on examining the compatibility with the standard "necessary in a democratic society".<sup>262</sup>

The second paragraph of Article 10 lists nine legitimate purposes for which restrictions of the freedom of expression can be justified.<sup>263</sup> The list of the possible grounds for restricting the freedom of expression is exhaustive. Domestic authorities may not legitimately rely on any other ground falling outside the list provided for in paragraph 2.<sup>264</sup> The ECtHR usually

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<sup>257</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 472; ECtHR 8734/79, 25.03.1985, *Barthold v. Germany*, para 46.

<sup>258</sup> For example ECtHR 14234/88 and 14235/88, 29.10.1992, *Open Door and Dublin Well Woman v. Ireland*, paras 59-60.

<sup>259</sup> ECtHR 6538/74, 26.04.1979, *Sunday Times v. the United Kingdom (no. 1)*, para 49.

<sup>260</sup> ECtHR 6538/74, 26.04.1979, *Sunday Times v. the United Kingdom (no. 1)*, para 49.

<sup>261</sup> M. Macovei, p 33.

<sup>262</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 474.

<sup>263</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 474.

<sup>264</sup> M. Macovei, p 34.

accepts a State's assessment of the legitimate aim, reserving more detailed scrutiny for other aspects of Article 10(2).<sup>265</sup>

When there is a legitimate aim behind an interference with freedom of expression, the third requirement of paragraph 2 comes into play - proportionality. It must be decided whether an interference is "necessary in a democratic society".<sup>266</sup> According to the Court's case law, the adjective "necessary", within the meaning of Article 10(2), implies the existence of a "pressing social need".<sup>267</sup> Proportionality has a number of elements: whether the measure is appropriate to achieve its stated aim; and whether no other, less intrusive effective measure is available.<sup>268</sup> The Court must also determine whether the interference at issue was "proportionate to the legitimate aim pursued".<sup>269</sup> The ECtHR has not always been consistent in how it sees proportionality<sup>270</sup> and different factual circumstances might mean a different outcome, even with the application of the same test.<sup>271</sup>

By reason of their direct and continuous contact with the vital forces of their countries, State authorities are found (by the Court) to be in a better position than the international judge to give an opinion on the exact content of these requirements as well as on the "necessity" of a "restriction" or "penalty".<sup>272</sup> This approach is called "margin of appreciation". Furthermore, where two or more Convention rights are in direct conflict in this way, Member States will have a particularly wide margin of appreciation to determine the balance between them.<sup>273</sup> It goes, however, hand in hand with a European supervision, embracing both the law and the decisions applying it, even those given by independent courts. The Court is therefore empowered to give the final ruling on whether a "restriction" is reconcilable with freedom of expression as protected by Article 10.<sup>274</sup> In sum, the Court's task in exercising its supervision is not to take the place of national authorities but rather to review under Article 10, in the light of the case as a whole, the decisions they have taken pursuant to their power of appreciation.<sup>275</sup>

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<sup>265</sup> L. Woods (note 22), p 376.

<sup>266</sup> M. Macovei, p 35.

<sup>267</sup> ECtHR 13585/88, 26.11.1991, *Observer and Guardian v. the United Kingdom*, para 59.

<sup>268</sup> L. Woods (note 22), p 376.

<sup>269</sup> *Lingens v. Austria*, para 40.

<sup>270</sup> P. van Dijk, G. van Hoof. *Theory and Practice of the European Convention on Human Rights*. 3rd edition. Hague: Kluwer Law International 1998, p 81.

<sup>271</sup> L. Woods (note 22), p 376.

<sup>272</sup> *Handyside v. the United Kingdom*, para 48.

<sup>273</sup> J. Bosland, A. Kenyon, S. Walker. *Protecting Inferences of Fact in Defamation Law: Fair Comment and Honest Opinion*. - Cambridge Law Journal, Vol 74, Issue 2, 2015, p 256.

<sup>274</sup> ECtHR 13585/88, 26.11.1991, *Observer and Guardian v. the United Kingdom*, para 59.

<sup>275</sup> ECtHR 29183/95, 21.01.1999, *Fressoz and Roire v. France*, para 45.

### 3.2. Judgment of European Court of Human Rights in *Tammer v. Estonia*

As it was mentioned before, the second paragraph of Article 10 lists nine legitimate purposes for the restrictions of the freedom of expression. One of them, “the protection of... rights of others”, has been frequently invoked to ascertain the degree to which the privacy or reputation and honour of public figures can be guaranteed.<sup>276</sup> On several occasions the Court has observed that not only private individuals, but also public persons have a legitimate expectation of protection of and respect for their private life.<sup>277</sup> Just as the ECtHR has protected the ability of individuals to control the use of their images, voice and personal data, it also has upheld laws that protect the ways in which individuals are presented to the general public in the press. *Tammer v. Estonia* provides an excellent example of this principle in action<sup>278</sup> and has remained one of the best-known cases emerging from Estonia and is often referred to in textbooks and manuals dealing with the case law of the Strasbourg court.<sup>279</sup>

The applicant was convicted on the basis of the remarks he had made in his capacity as a journalist in a newspaper interview on publication of a well-known politician's wife, Ms Laanaru, personal memoirs.<sup>280</sup> The applicant used words such as “*rongaema*” and “*abielulõhkaja*”.<sup>281</sup> These words cannot be translated into English precisely, but stand for someone who deliberately breaks up another person's marriage and who is a negligent parent to her child.<sup>282</sup> The Court observed that Ms Laanaru resigned from her governmental position, but remained involved in the political party.<sup>283</sup>

The Court noted that the case involved a conflict between the right to impart ideas and the reputation and rights of others.<sup>284</sup> It was found that the burden was “prescribed by law” in a relevant provision of penal code, and that the law in question furthered a legitimate government purpose, namely, protection of personal honor and reputation.<sup>285</sup>

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<sup>276</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 480.

<sup>277</sup> D. Voorhoof. Freedom of Expression under the European Human Rights System. From Sunday Times (No. 1) v. U.K. (1979) to Hachette Filipacchi Associates (Ici Paris) v. France (2009). - Inter-American and European Human Rights Journal, Vol 2, 2009, p 22.

<sup>278</sup> R. Krotoszynski. Reconciling Privacy and Speech in the Era of Big Data: A Comparative Legal Analysis. - William and Mary Law Review, Vol 56, Issue 4, 2015, p 1309.

<sup>279</sup> K. Merusk, M. Susi, p 335.

<sup>280</sup> *Tammer v. Estonia*, para 64.

<sup>281</sup> *Tammer v. Estonia*, para 67.

<sup>282</sup> K. Merusk, M. Susi, p 337.

<sup>283</sup> *Tammer v. Estonia*, para 68.

<sup>284</sup> *Tammer v. Estonia*, para 69.

<sup>285</sup> R. Krotoszynski, p 1311.

The Court used proportionality analysis to determine whether applicant's conviction and sentence were not disproportionate to the legitimate aim pursued and that the reasons advanced by the domestic courts were sufficient and relevant to justify such interference. The Court did not find it established that the use of the impugned terms in relation to Ms Laanaru's private life was justified by considerations of public concern or that they bore on a matter of general importance.<sup>286</sup> It considered that the applicant could have formulated his criticism of Ms Laanaru's actions without resorting to such insulting expressions.<sup>287</sup> The Court also noted the limited amount of the fine imposed on the applicant as a sanction<sup>288</sup> and reached a conclusion that the interference with the applicant's right to freedom of expression could reasonably be considered necessary in a democratic society for the protection of the reputation or rights of others within the meaning of Article 10(2) of the Convention.<sup>289</sup>

Thus, the Court showed that freedom of the press does not extend to idle gossip about intimate or extra-marital relations merely serving to satisfy the curiosity of a certain readership.<sup>290</sup> A newspaper is not free to use harsh words to characterize a person if it does not relate to his or her official duties. Nor does a person being active in politics make his or her private life automatically a matter of public concern. Essentially, the ECtHR held that even a person on an important government positions, and active in politics, has a right to demand privacy with respect to his or her personal life.<sup>291</sup> In addition to this, the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photographs and articles made to a debate of general interest.<sup>292</sup> The Court has also made clear that once politicians or civil servants withdraw from their political or civic life, they regain the status of private persons entitled to a broader scope of privacy rights.<sup>293</sup>

There will usually be a wide margin accorded if the State is required to strike a balance between competing private and public interests or Convention rights.<sup>294</sup> On the other hand, it might be more likely that interference with Article 8 is considered disproportionate if

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<sup>286</sup> *Tammer v. Estonia*, para 68.

<sup>287</sup> *Tammer v. Estonia*, para 67.

<sup>288</sup> *Tammer v. Estonia*, para 69.

<sup>289</sup> *Tammer v. Estonia*, para 70.

<sup>290</sup> D. Voorhoof, p 22.

<sup>291</sup> R. Krotoszynski, p 1312.

<sup>292</sup> H. Thorgeirsdottir, p 609.

<sup>293</sup> D. Harris, M. O'Boyle, E. Bates, C. Buckley, p 501.

<sup>294</sup> ECtHR 44362/04, 04.12.2007, *Dickson v. United Kingdom*, para 78.

comment on matters not in the public interest is protected, where the countervailing Article 10 interest is likely to have less weight.<sup>295</sup>

### 3.3. Influence of *Tammer v. Estonia (no. 2)* on Case Law of European Court of Human Rights

The Court has since quoted *Tammer* on many occasions. Most of the times the Court reminded that under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing the necessity and scope of any interference in the freedom of expression protected by that Article, in particular when a balance has to be struck between conflicting private interests.<sup>296</sup> This principle was not developed in *Tammer*, but was quoted there in order to remind of its lasting relevance.

The same is true in relation towards another principle upheld in many cases, not starting, but including and quoting *Tammer*. The Court reiterated that the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference.<sup>297</sup>

*Tammer* is also quoted among the other authorities when it comes to recognition of the impossibility of attaining absolute precision in the framing of laws, especially in fields in which the situation changes according to the prevailing views of society. That was found to be especially true in the field of the freedom of speech<sup>298</sup> and its enjoyment by the press. Two other cases are of a much bigger importance and relevance when it comes to analysing the influence of *Tammer* on the case law of the ECtHR and thus EU law in that regard. The first one is *Von Hannover v. Germany*.<sup>299</sup>

The case concerned the photos of the applicant, the princess Caroline von Hannover, that showed her in scenes from her daily life, involving activities of a purely private nature such as engaging in sport, out walking, leaving a restaurant or on holiday. The photos illustrated a series of articles with such innocuous titles as “Pure happiness”, “Out and about with Princess Caroline in Paris” and “The kiss. Or: they are not hiding anymore”.<sup>300</sup> Both *Tammer* and

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<sup>295</sup> J. Bosland, A. Kenyon, S. Walker, p 256.

<sup>296</sup> ECtHR 17224/11, 27.06.2017, *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, para 121; ECtHR 16354/06, 13.07.2012, *Mouvement raëlien suisse v. Switzerland*, para 59.

<sup>297</sup> ECtHR 48898/99, 06.05.2003, *Perna v. Italy*, para 39; ECtHR 49017/99, 17.12.2004, *Pedersen and Baadsgaard v. Denmark*, para 93.

<sup>298</sup> ECtHR 27510/08, 15.10.2015, *Perinçek v. Switzerland*, para 133.

<sup>299</sup> ECtHR 59320/00, 24.06.2004, *Von Hannover v. Germany*.

<sup>300</sup> *Von Hannover v. Germany*, para 61.

*Hannover* thus dealt with the private lives of individuals who did not exercise official functions but were nevertheless “public figures”. The Court used the same line of reasoning and general principles as in *Tammer*<sup>301</sup> when it reached a conclusion that merely classifying a person as a celebrity does not suffice to justify such an intrusion into his or her private life.<sup>302</sup> Both in *Tammer* and *Von Hannover* the Court considered that the public does not have a legitimate interest in finding out general details of private lives of people being well known to the public.<sup>303</sup> From now on, courts should engage in an analysis of the nature of the publication and its general importance<sup>304</sup> and some form of public interest will be necessary to justify invasions into the privacy.<sup>305</sup> The courts should also look into the value of the speech concerned and decide on its protection accordingly to the contribution it makes to an open debate on matters of general importance.<sup>306</sup>

However, even a slight change in the factual matrix of the case can overturn the Court’s decision as it happened in *Von Hannover v. Germany (no. 2)*. Photos of Princess Caroline von Hannover and Prince Ernst August von Hannover during a skiing holiday were placed next to the articles about the illness affecting Prince Rainier III, the reigning sovereign of the Principality of Monaco at the time, and the conduct of the members of his family during that illness.<sup>307</sup> The Court reiterated that its task is to determine whether the manner in which national authorities concluded balancing of the rights of the publishing companies to freedom of expression against the right of the applicants to respect for their private life.<sup>308</sup> The Court observed that the national courts attached fundamental importance to the question whether the photos, considered in the light of the accompanying articles, had contributed to a debate of general interest. They also examined the circumstances in which the photos had been taken<sup>309</sup> which constitutes one of the factors that are normally examined when the competing interests are balanced against each other.<sup>310</sup> The Court accepted that the photos in question, considered in the light of the accompanying articles, did contribute, at least to some degree, to a debate of

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<sup>301</sup> *Von Hannover v. Germany*, paras 58-60.

<sup>302</sup> *Von Hannover v. Germany*, para 75.

<sup>303</sup> *Von Hannover v. Germany*, para 77.

<sup>304</sup> N. Hatzis. Giving Privacy Its Due: Private Activities of Public Figures in *Von Hannover v. Germany*. - King’s College Law Journal, Vol 16, Issue 1, 2005, p 154.

<sup>305</sup> H. Tomlinson, M. Thompson. Bad News for Paparazzi-Strasbourg Has Spoken. - New Law Journal, Vol 154, 2004, p 1041.

<sup>306</sup> N. Hatzis, p 157.

<sup>307</sup> ECtHR 40660/08 and 60641/08, 07.02.2012, *Von Hannover v. Germany (no. 2)*, para 117.

<sup>308</sup> *Von Hannover v. Germany (no. 2)*, para 116.

<sup>309</sup> *Von Hannover v. Germany (no. 2)*, para 124.

<sup>310</sup> *Von Hannover v. Germany (no. 2)*, para 123.

general interest.<sup>311</sup> There was nothing to indicate that the photos had been taken surreptitiously or by equivalent secret means such as to render their publication illegal under the case law of the German courts.<sup>312</sup> This decision has been presented in the media as a step forward for the freedom of speech over Article 8 privacy rights. That would seem to overstate the results.<sup>313</sup> The factual balance between what is found to be an intrusive depiction of a celebrity figure and a realization of right to impart information is a fine one.<sup>314</sup> In *von Hannover (no. 2)* it was emphasized that although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case - despite the person concerned being well known to the public - where the published photos and accompanying commentaries relate exclusively to details of a person's private life and have the sole aim of satisfying public curiosity in that respect.<sup>315</sup> In his concurring opinion judge Cabral Barreto expressed an idea that being at an open place frequented by the general public and, moreover, visible from the neighbouring buildings, excludes a reasonable expectation of not being exposed to public view or to the media.<sup>316</sup> However, allowing this approach to become dominant in relation to privacy of public figures could result in an uncontrollable hunt by the media. Every time a public person leaves home or private premises, he or she embarks on the same routes as are "frequented by the general public" without any expectation of privacy left. This does not seem to be consistent with the general inclination of the Court to protect public people from continual harassment which induces in the person concerned a very strong sense of intrusion into their private life or even of persecution.<sup>317</sup>

Both *Von Hannover v. Germany* and *Von Hannover v. Germany (no. 2)* have since been quoted and used in the Court's reasoning on multiple occasions.<sup>318</sup> They have also become a part of the Court's case law of the highest level of importance by being published in the Court's official Reports of Judgments and Decisions.

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<sup>311</sup> *Von Hannover v. Germany (no. 2)*, para 118.

<sup>312</sup> *Von Hannover v. Germany (no. 2)*, para 122.

<sup>313</sup> R. Smith. From *von Hannover (1)* to *von Hannover (2)* and *Axel Springer AG*: Do Competing ECHR Proportionality Factors Ever add up to Certainty. - Queen Mary Journal of Intellectual Property, Vol 2, Issue 4, 2012, p 392.

<sup>314</sup> R. Smith, p 389.

<sup>315</sup> *Von Hannover v. Germany (no. 2)*, para 110.

<sup>316</sup> *Von Hannover v. Germany (no. 2)*, concurring opinion of the judge Cabral Barreto.

<sup>317</sup> *Von Hannover v. Germany*, para 59.

<sup>318</sup> HUDOC database lists 10 related cases as of 30.03.2018.

The principles of both *Tammer* and *Von Hannover* were later used in another important judgment<sup>319</sup> of the ECtHR - in the case of *Karhuvaara and Iltalehti v. Finland*. The applicant company published in its newspaper some articles on a criminal trial concerning the drunken and disorderly behaviour, including an assault on a police officer, of Mr A. He was convicted and sentenced to six months' suspended imprisonment. It was reported and mentioned in the headlines of those articles that the defendant was the husband of Mrs A., a member of the Finnish parliament and the chairperson of its Committee for Education and Culture.<sup>320</sup> The trial of Mr A. had been widely publicised and discussed locally, and the role of Mrs A. – who was in no way involved in the criminal proceedings – had become the subject of, *inter alia*, political satire in a television programme.<sup>321</sup> Mrs A., who did not dispute the facts as presented by *Iltalehti*, instituted proceedings against the applicant company and its editor-in-chief, Mr Karhuvaara.<sup>322</sup> Domestic court convicted the first applicant and the two other journalists on one count of invasion of privacy. In addition, all the defendants, including both applicants, were ordered to pay damages as requested by the plaintiff.<sup>323</sup>

The defendants argued that they had only mentioned in their articles that Mrs A. was married to Mr A. Moreover, the case had already been reported locally and their article contained no new information as such. They also argued that a member of parliament, as a public political figure, must tolerate more from the media than an “average citizen” and that it was particularly disturbing that a member of parliament was trying to limit the applicants' freedom of expression.<sup>324</sup>

The District Court found that protection of the private life of Mrs A., as a member of parliament, was narrower than that of other persons, but only in so far as the matters in question were connected to her public functions and there was a public interest justifying their publication. The fact that the conviction of the spouse of a politician could affect people's voting intentions did not in itself render the matter of public interest such as to justify the publication and the infringement of the plaintiff's protected private domain.<sup>325</sup> The fines imposed on the applicants were severe - EUR 37 365 in total.<sup>326</sup>

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<sup>319</sup> Published in Case Reports.

<sup>320</sup> ECtHR 53678/00, 16.11.2004, *Karhuvaara and Iltalehti v. Finland*, para 8.

<sup>321</sup> *Karhuvaara and Iltalehti v. Finland*, para 9.

<sup>322</sup> *Karhuvaara and Iltalehti v. Finland*, para 10.

<sup>323</sup> *Karhuvaara and Iltalehti v. Finland*, para 12.

<sup>324</sup> *Karhuvaara and Iltalehti v. Finland*, para 11.

<sup>325</sup> *Karhuvaara and Iltalehti v. Finland*, para 13.

<sup>326</sup> *Karhuvaara and Iltalehti v. Finland*, para 53.

The Court noted that dispute in this case related to the question whether the interference was “necessary in a democratic society”<sup>327</sup> without any allegation of factual misrepresentation or bad faith on the part of the applicants.<sup>328</sup> There was no allegation of the applicants having exceeded the bounds of journalistic freedom. The Court further distinguished *Karhuvaara* from *Tammer* by observing that no statements had been made against Mrs A., nor had the article revealed any details of her private life, save for the fact that she was married to the defendant in the reported proceedings.<sup>329</sup> However, the Court noted that public has the right to be informed, which is an essential right in a democratic society that, in certain special circumstances, may even extend to aspects of the private life of public figures, particularly where politicians are concerned<sup>330</sup> thus quoting *Von Hannover* judgment.<sup>331</sup> In this connection, the Court also noted that the conviction of the spouse of a politician could affect people’s voting intentions. In the Court’s opinion this indicates that, at least to some degree, a matter of public interest was involved in the reporting.<sup>332</sup> Despite that, the Court considered that severe penalties, viewed against the background of a limited interference with the private life of Mrs A., disclosed a striking disproportion between the competing interests of protection of private life and freedom of expression - the domestic courts failed to strike a fair balance between them.<sup>333</sup>

As could be seen from this chapter, *Tammer* was used by the ECtHR on multiple occasions. Some of the previous principles developed in the Court’s case law were quoted with reference to *Tammer* as a recent authority. That includes, for example, the doctrine of state discretion. However, considering such prominent judgment as *von Hannover* and *Karhuvaara*, partially inspired by *Tammer* and continuing the same line of reasoning, it is clear that *Tammer* has served as a good source of inspiration in cases concerning different EU Member States. The factual basis of *Tammer* is universal enough not to be bound to Estonia only. It is also proven by the fact that the general principle derived from *Tammer* was also used in the opinion of the advocate general Kokott.<sup>334</sup> In addition to this, press continues to fulfil its function of a public watchdog, enjoying even bigger influence and reach as a part of contemporary media culture.

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<sup>327</sup> *Karhuvaara and Iltalehti v. Finland*, para 43.

<sup>328</sup> *Karhuvaara and Iltalehti v. Finland*, para 44.

<sup>329</sup> E. Barendt. Balancing Freedom of Expression and Privacy: The Jurisprudence of the Strasbourg Court. - *Journal of Media law*, Vol 22, Issue 1, 2009, p 68.

<sup>330</sup> *Karhuvaara and Iltalehti v. Finland*, para 45.

<sup>331</sup> *Von Hannover v. Germany*, para 64.

<sup>332</sup> *Karhuvaara and Iltalehti v. Finland*, para 45.

<sup>333</sup> *Karhuvaara and Iltalehti v. Finland*, para 54.

<sup>334</sup> C-73/07, 16.12.2008, *Tietosuojavaltutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, opinion of the AG Kokott, para 73.

It has become even more important to draw a line between freedom of expression and protection of a private life. This allows one to presume the influence of *Tammer* will not decrease in near future, but is much more likely to grow.

## 4. *Delfi AS v. Estonia*

### 4.1. Judgment of European Court of Human Rights in *Delfi AS v. Estonia*

The right to a private life is also essential when it comes to emerging new technologies.<sup>335</sup> In a recent *Delfi* judgment it was analyzed whether an Estonian news site could be held liable for the anonymous defamatory comments posted online from its readers and removed upon request. The Grand Chamber of the ECtHR found that Estonia did not violate article 10 of the ECHR that guarantees the freedom of speech when held Delfi liable for the abovementioned comments.<sup>336</sup>

The Court noted that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. However, alongside these benefits, certain dangers may also arise.<sup>337</sup> Adjustments may be required to respond to new challenges,<sup>338</sup> because in a digital environment every expression has immediate and extensive influence. When it comes to opposing disclosure of defamatory comments, the victim has narrow options.<sup>339</sup> Defamatory and other types of clearly unlawful speech, including hate speech and speech inciting violence, can be disseminated like never before, worldwide, in a matter of seconds,<sup>340</sup> and have no time limits.<sup>341</sup> This implies a commensurate level of responsibility.<sup>342</sup> The rights under Article 10 and 8 of the ECHR deserve equal respect. Important benefits can be derived from the Internet in the exercise of freedom of expression. However, liability for defamatory or other types of unlawful speech must, in principle, be retained and constitute an effective remedy for violations of personality rights.<sup>343</sup>

The Grand Chamber found following aspects to be relevant for its analysis: the context of the comments, the measures applied by the applicant company in order to prevent or remove defamatory comments, the liability of the actual authors of the comments as an alternative to the applicant company's liability, and the consequences of the domestic proceedings for the

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<sup>335</sup> J. Laffranque. Estonia: Impact of the ECtHR Case Law on Democracy and Rule of Law: Some Reflections from Estonian Perspective. Published in I. Motoc, I. Ziemele (note 73), p 167.

<sup>336</sup> *Delfi AS v. Estonia*, para 162.

<sup>337</sup> *Delfi AS v. Estonia*, para 110.

<sup>338</sup> M. Hertig Randall. Freedom of Expression in the Internet. - Swiss Review of International and European Law, Vol 26, Issue 2, 2016, p 236.

<sup>339</sup> K. Turk. Digitaalkeskkonnas isiku tuvastamise meetmete poolt ja vastu. - Juridica, Issue 3, 2014, p 188.

<sup>340</sup> *Delfi AS v. Estonia*, para 110.

<sup>341</sup> M. Kuurberg. Eesti 20 aastat inimõiguste konventsiooni osalisena. - Juridica, Issue 7, 2016, p 530.

<sup>342</sup> *Delfi AS v. Estonia*, concurring opinion of Judge Zupančič.

<sup>343</sup> *Delfi AS v. Estonia*, para 110.

applicant company.<sup>344</sup> The Court also agreed with the Chamber's finding that the applicant company must be considered to have exercised a substantial degree of control over the comments published on its portal.<sup>345</sup> Moreover, The Grand Chamber used the same criteria as the chamber:<sup>346</sup> the majority of the impugned comments amounted to hate speech or incitements to violence and as such did not enjoy the protection of Article 10;<sup>347</sup> the comments were posted in reaction to an article published by the applicant company on its professionally managed news portal run on a commercial basis;<sup>348</sup> Delfi was one of the biggest Internet media publications in the country;<sup>349</sup> it invited its readers to comment on the articles<sup>350</sup> in order to profit from advertising revenue the more comments were posted; a possibility to effectively bring a claim against the authors of the comments was not certain;<sup>351</sup> measures taken by Delfi to remove the comments were insufficient<sup>352</sup> and slow;<sup>353</sup> compensation of 320€, also taking into account the fact that the applicant company was a professional operator of one of the largest Internet news portals in Estonia, was not found disproportionate.<sup>354</sup>

The Grand Chamber concluded that the relevant provisions along with the case-law made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments, of the type at issue in the present case, on its news portal.<sup>355</sup> Thus, the Court considered that the applicant company was in a position to assess the risks related to its activities and that it must have been able to foresee, to a reasonable degree, the consequences which these could entail. It therefore concluded that the interference in issue was "prescribed by law" within the meaning of the second paragraph of Article 10 of the Convention.<sup>356</sup> Delfi could not rely on the national implementation of the E-Commerce Directive<sup>357</sup> and its liability

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<sup>344</sup> *Delfi AS v. Estonia*, para 142.

<sup>345</sup> *Delfi AS v. Estonia*, para 145.

<sup>346</sup> J. Laffranque (note 9), p 540.

<sup>347</sup> *Delfi AS v. Estonia*, para 140.

<sup>348</sup> *Delfi AS v. Estonia*, para 140.

<sup>349</sup> *Delfi AS v. Estonia*, para 117.

<sup>350</sup> *Delfi AS v. Estonia*, para 115.

<sup>351</sup> *Delfi AS v. Estonia*, para 151.

<sup>352</sup> *Delfi AS v. Estonia*, para 162.

<sup>353</sup> *Delfi AS v. Estonia*, para 152.

<sup>354</sup> *Delfi AS v. Estonia*, para 160.

<sup>355</sup> *Delfi AS v. Estonia*, para 128.

<sup>356</sup> *Delfi AS v. Estonia*, para 129.

<sup>357</sup> *Delfi AS v. Estonia*, para 146. Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce), OJ L 178/1, 2000.

exemptions for Internet intermediaries<sup>358</sup> considering its economic interest in the publication.<sup>359</sup> The Grand Chamber agreed that the restriction of the Delfi's freedom of expression had pursued the legitimate aim of protecting the reputation and rights of others.<sup>360</sup>

Some critics considered the approach of the ECtHR to be ignorant towards the case-law of the CJEU.<sup>361</sup> However, the author of the thesis at hand does not believe that to be the case. The ECtHR cannot be found to have neglected the intermediary liability provisions and the relevant case-law. The ECtHR has considered at least six judgments of the CJEU: joined cases C-236/08 to C-238/08 *Google France and Google*,<sup>362</sup> case C-324/09 *L'Oréal and Others*,<sup>363</sup> case C-70/10 *Scarlet Extended*,<sup>364</sup> case C-360/10 *SABAM*,<sup>365</sup> case C-131/12 *Google Spain and Google*,<sup>366</sup> case C-291/13 *Papasavvas*.<sup>367</sup> The E-Commerce Directive provides a graduated scale of protection, with the greatest protection going to services that are the most technical. However, there have been questions about the interpretation of some of the phrases in Article 14(2) of the Directive and the extent of the protection in Article 15.<sup>368</sup> The ECtHR has not left these problems unnoticed which resulted in the positions of both courts reflecting each other. For example, similar conclusions that a filter might not be able to distinguish between lawful and illegal content, thus affecting users' freedom of expression (access to information) were reached in cases *SABAM v Netlog* and *Yildirim*.<sup>369</sup> Both courts seem to think that those acting in the course of their business are in a better place to assess where and when problems might arise. However, their point of view differs when it comes to commercial activities. The CJEU argued in *Google Adwords*<sup>370</sup> that the referencing service is subject to

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<sup>358</sup> Directive on electronic commerce, articles 12-15.

<sup>359</sup> A. Kuczerawy, P.-J. Ombelet. *Delfi AS vs Estonia*. Available online: <https://www.law.kuleuven.be/citip/blog/delfi-as-vs-estonia/> (10.03.2018).

<sup>360</sup> *Delfi AS v. Estonia*, para 130.

<sup>361</sup> L. Brunner. The Liability of an Online Intermediary for Third Party Content. The Watchdog Becomes the Monitor: Intermediary Liability after *Delfi v. Estonia*. - *Human Rights Law Review*, Vol 16, Issue 1, 2016, p 167.

<sup>362</sup> C-236/08, C-237/08, C-238/08, *Google France Google France SARL and Google Inc. v. Louis Vuitton Malletier SA, Google France SARL v. Viaticum SA and Luteciel SARL and Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others*.

<sup>363</sup> C-324/09, 12.07.2011, *L'Oréal SA and Others v. eBay International AG and Others*.

<sup>364</sup> C-70/10, 24.11.2011, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*.

<sup>365</sup> C-360/10, 16.02.2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*.

<sup>366</sup> C-131/12, 13.05.2014, *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*.

<sup>367</sup> C-291/13, 11.09.2014, *Sotiris Papasavvas v. O Fileleftheros Dimosia Etaireia Ltd and Others*.

<sup>368</sup> L. Woods. *Delfi v. Estonia*: Curtailing online freedom of expression? Available online: <http://eulawanalysis.blogspot.com/2015/06/delfi-v-estonia-curtailing-online.html> (10.03.2018).

<sup>369</sup> ECtHR 3111/10, 18.12.2012, *Ahmet Yildirim v. Turkey*.

<sup>370</sup> *Google France Google France SARL and Google Inc. v. Louis Vuitton Malletier SA, Google France SARL v. Viaticum SA and Luteciel SARL and Google France SARL v. Centre national de recherche en relations humaines (CNRRH) SARL and Others*, p 116.

payment, and Google sets the payment terms or provides general information to its clients. This cannot have the effect of depriving Google of the exemptions from liability provided in Directive 2000/31.<sup>371</sup> Both courts point to the idea about control over information. There are differences, however, in that the control over the defamatory material in *Papasavvas* was much more direct than in *Delfi*, and the predictive abilities of newspapers about their audience's response to stories not in issue.<sup>372</sup>

*Delfi* is no contradiction to the E-Commerce Directive's safe harbours. It simply says that the existence of these safe harbours is not indispensable from the human rights perspective.<sup>373</sup> The ECtHR upheld the decision of the domestic courts not to apply domestic norms transposing the E-Commerce Directive, since the latter related to activities of a merely technical, automatic and passive nature, unlike the applicant company's activities, and that the objective pursued by the applicant company was not merely the provision of an intermediary service.<sup>374</sup> The Court took into account the possibility left for some countries to choose the "differentiated and graduated approach" to the regulation of new media as recommended by the Council of Europe, which also found support in the Court's case-law. The Court noted that although various approaches are possible in legislation to take account of the nature of new media, the Court was satisfied on the facts of *Delfi* that the relevant provisions and case law made it foreseeable that a media publisher running an Internet news portal for an economic purpose could, in principle, be held liable under domestic law for the uploading of clearly unlawful comments, of the type at issue in the present case, on its news portal.<sup>375</sup> However, it should be remembered that even after the ECtHR judgment there is a chance that Estonia is found liable for breach of its international obligations,<sup>376</sup> this time, however, for not properly transposing (giving effect to) the E-Commerce Directive.<sup>377</sup> The question remains if the CJEU would accept the arguments of the ECtHR in *Delfi*, especially given its reasoning in *L'Oreal* regarding the 'promotion' of particular content and the requirements of a diligent economic operator.<sup>378</sup>

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<sup>371</sup> L. Woods (note 368).

<sup>372</sup> L. Woods (note 368).

<sup>373</sup> M. Husovec. General Monitoring of Third-party Content: Compatible with Freedom of Expression? - Journal of Intellectual Property Law & Practice, Vol 11, No 1, 2016, p 20.

<sup>374</sup> *Delfi AS v. Estonia*, para 128.

<sup>375</sup> *Delfi AS v. Estonia*, para 128.

<sup>376</sup> M. Husovec, p 20.

<sup>377</sup> C-6/90, 19.11.1991, *Andrea Francovich and Danila Bonifaci and others v. Italian Republic*.

<sup>378</sup> L. Woods (note 368).

## 4.2. Impact of *Delfi AS v. Estonia* on case law of European Court of Human Rights and European Court of Justice

The ECtHR has quoted *Delfi* on many occasions in order to uphold principles well established in the Court's case law. These include the requirement of precision and foreseeability of legal provisions;<sup>379</sup> the need to balance freedom of expression and protection of private life;<sup>380</sup> to separate legal properties of traditional print and audiovisual media v. Internet-based media;<sup>381</sup> to note the significant role played by the Internet in enhancing the public's access to news and facilitating the dissemination of information<sup>382</sup> and to emphasize that safeguards afforded to the press are of particular importance to the society.<sup>383</sup>

For example, in *Selmani and Others v. the former Yugoslav Republic of Macedonia* the case concerned the forcible removal of journalists from the national Parliament gallery where they were reporting on a parliamentary session about approval of the State budget for 2013.<sup>384</sup> During the debate a group of opposition parties' members of parliament (MPs). MPs had started creating a disturbance in the parliamentary chamber, and had been ejected by security officers.<sup>385</sup> The applicants, accredited journalists, had refused to leave the gallery, a designated area for journalists, and ended up being forcibly removed by security.<sup>386</sup> They brought proceedings before the Constitutional Court to complain about the incident, and contest the fact that there was no oral hearing before this court for them to challenge the facts as disputed between the parties.<sup>387</sup> The Court quoted the general principles concerning the necessity of an interference with freedom of expression as summarised in the *Delfi* and, after applying those principles, established that there was no pressing social need to remove the applicants from the Parliament gallery.<sup>388</sup> In particular, there was no indication of any danger deriving from the protests which had taken place outside the Parliament building on the day

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<sup>379</sup> ECtHR 41844/09, 17.09.2013, *Güzel v. Turkey*, para 34; ECtHR 42461/13 and 44357/13, 17.05.2016, *Karácsony and Others v. Hungary*, para 124; *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina*, para 70.

<sup>380</sup> ECtHR 33677/10 and 52340/10, 17.05.2016, *Fürst-Pfeifer v. Austria*, para 40; ECtHR 3690/10, 26.11.2015, *Annen v. Germany*, para 55. ECtHR 67259/14, 09.02.2017, *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 71.

<sup>381</sup> ECtHR 42911/08, 21.02.2017, *Orlovskaya Iskra v. Russia*, para 109.

<sup>382</sup> ECtHR 18030/11, 08.11.2016, *Magyar Helsinki Bizottság v. Hungary*, para 168; ECtHR 48226/10 and 14027/11, 01.12.2015, *Cengiz and Others v. Turkey*, para 52.

<sup>383</sup> ECtHR 35105/04, 21.06.2011, *Kania and Kittel v. Poland*, para 62.

<sup>384</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 73; ECtHR 931/13, 27.06.2017, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, para 123.

<sup>385</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 74.

<sup>386</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 81.

<sup>387</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 41.

<sup>388</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 71 and 85.

of the incident, from the applicants themselves (who had neither contributed to nor participated in the disturbance in the chamber) or from the MPs who had been at the origin of the disorder.<sup>389</sup> Nor was the Court convinced that the applicants had effectively been able to view the ongoing removal of the MPs, a matter which had been of legitimate public concern.<sup>390</sup> This shows that *Delfi* is an authority not only in the cases related to the Internet defamation, but is also a source of summarised general principles concerning the necessity of an interference with freedom of expression.

However, in a case that factual basis was the closest to the one of *Delfi*, the Court reached an opposite conclusion as compared to *Delfi* itself. *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* and *Delfi* were distinguished on the facts. One applicant was a self-regulatory body of internet content providers and the other was the owner of an Internet news portal. Both applicants allowed users to comment on publications appearing on their portals. Comments could be uploaded following registration and were not edited or moderated by the applicants before publication. The applicants' portals contained disclaimers stating that the comments did not reflect the applicants' own opinion<sup>391</sup>, and a notice-and-take-down system, which allowed readers to request the deletion of comments that caused concern.<sup>392</sup>

In February 2010 the first applicant published an opinion about two real-estate management websites the full text of which was subsequently also published on the second applicant's portal. The opinion attracted user comments some of which criticised the real-estate websites in derogatory terms. As a result, the company operating the websites brought a civil action against the applicants alleging damage to its reputation. The applicants immediately removed the offending user comments. They were nevertheless found by the domestic courts to bear objective liability for their publication, and ordered to pay procedural fees.

The Court considered that the interference with the applicant company's right to freedom of expression was "prescribed by law", foreseeable and had legitimate aim in the light of paragraph 2 of Article 10. However, the Court noted that Hungarian courts did not assess how the application of civil liability to a news portal operator will affect freedom of expression on the Internet. When allocating liability in the case, those courts did not perform any balancing

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<sup>389</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 83.

<sup>390</sup> *Selmani and Others v. the former Yugoslav Republic of Macedonia*, para 84.

<sup>391</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 7.

<sup>392</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 8.

at all between competing interests.<sup>393</sup> The Court noted that the domestic authorities accepted without any further analysis or justification that the impugned statements were unlawful as being injurious to the reputation of the plaintiff's company.<sup>394</sup> Due to these reasons the Court itself assessed the relevant criteria as laid down in *Delfi* to the extent that the domestic authorities failed to do so,<sup>395</sup> but reached an opposite conclusion as compared to *Delfi*.

The main difference between two cases was that offensive and vulgar comments did not constitute clearly unlawful speech; and they certainly did not amount to hate speech or incitement to violence.<sup>396</sup> The domestic courts imposed objective liability on the applicants for "having provided space for injurious and degrading comments" and did not perform any examination of the conduct of either the applicants or the plaintiff when it came to the removal of such comments.<sup>397</sup> Furthermore, while the second applicant is the owner of a large media outlet which must be regarded as having economic interests, the first applicant is a non-profit self-regulatory association of Internet service providers, with no known such interests.<sup>398</sup>

Another important difference between *Delfi* and *Magyar Tartalomszolgáltatók Egyesülete* is that the second judgment considered the defamation of a legal, not a private, person. The Court found a difference between the commercial reputational interests of a company and the reputation of an individual concerning his or her social status.<sup>399</sup> As in *Delfi*, the Court decided that if accompanied by effective procedures allowing for rapid response, the notice-and-take-down-system could function in many cases as an appropriate tool for balancing the rights and interests of all those involved. On the other hand, in cases where third-party user comments take the form of hate speech and direct threats to the physical integrity of individuals, the rights and interests of others and of the society as a whole might entitle Contracting States to impose liability on Internet news portals if they failed to take measures to remove clearly unlawful comments without delay, even without notice from the alleged victim or from third parties. However, *Magyar Tartalomszolgáltatók Egyesülete* did not involve such utterances.<sup>400</sup> Together with *Delfi* this case helped to further developed

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<sup>393</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 88.

<sup>394</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 65.

<sup>395</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 71.

<sup>396</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 64.

<sup>397</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 83.

<sup>398</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 64.

<sup>399</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 66.

<sup>400</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 91.

principles that help to ascertain the liability of Internet news portals. For example, one of these rules states that the outcome of the balancing exercise will be acceptable in so far as courts applied the appropriate criteria and, moreover, weighed the relative importance of each criterion with due respect paid to the particular circumstances of the case.<sup>401</sup>

These improved principles of *Delfi* and *Magyar Tartalomszolgáltatók Egyesülete* have already been used in a recent decision on admissibility in the case dealing with defamatory comments in the Internet - *Pihl v. Sweden*.<sup>402</sup> The matter concerned a blog post accusing the applicant of being involved in a Nazi party. Although the blog allowed comments to be posted, it was clearly stated that such comments were not checked before publication and that commentators were responsible for their own statements.<sup>403</sup> Commentators were also requested to display good manners and obey the law.<sup>404</sup> The day after publication of the post, an anonymous person posted a comment calling the applicant “a real hash-junkie”.<sup>405</sup> The post and the comment were removed and an apology with an explanation for the error published when the applicant notified the association of the inaccuracy of the post.<sup>406</sup> The applicant, however, sued the association and claimed symbolic damages of approximately 0,10 EUR.<sup>407</sup>

The Court observed that the comment about the applicant did not concern his political views and had nothing to do with the content of the blog post. It could therefore hardly have been anticipated by the association.<sup>408</sup> The Court also noted that, as concerns the alleged possibility of still being able to find the comment via search engines, the applicant is entitled to request<sup>409</sup> that the search engines remove any such traces of the comment.<sup>410</sup> The Court considered especially important that the comment, although offensive, did not amount to hate speech or incitement to violence and was posted on a small blog run by a non-profit association which took it down the day after the applicant’s request and nine days after it had been posted. Because of those reasons the Court found that the domestic courts acted within their margin of appreciation and struck a fair balance between the applicant’s rights under

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<sup>401</sup> *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, para 68.

<sup>402</sup> ECtHR 74742/14, 07.02.2017, *Pihl v. Sweden* (dec.).

<sup>403</sup> *Pihl v. Sweden* (dec.), para 3.

<sup>404</sup> *Pihl v. Sweden* (dec.), para 32.

<sup>405</sup> *Pihl v. Sweden* (dec.), para 4.

<sup>406</sup> *Pihl v. Sweden* (dec.), para 30.

<sup>407</sup> *Pihl v. Sweden* (dec.), para 7.

<sup>408</sup> *Pihl v. Sweden* (dec.), para 30.

<sup>409</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, p 99.

<sup>410</sup> *Pihl v. Sweden* (dec.), para 33.

Article 8 and the association's opposing right to freedom of expression under Article 10.<sup>411</sup> The application was thus rejected.<sup>412</sup>

The Court has used the basic principles of balancing the competing interests under Article 8 and Article 10 as summarised in *Delfi*.<sup>413</sup> The circumstances of the case were also contrasted to those of *Delfi*. For example, the association was a small non-profit association, unknown to the wider public, and it was thus unlikely that it would attract a large number of comments or that the comment about the applicant would be widely read as compared to a large news portal in *Delfi*.<sup>414</sup> In addition to this, the comment had been on the blog for about nine days in total, as compared to *Delfi*, where the clearly unlawful comments were removed only about six weeks after their publication.<sup>415</sup>

The Court also used principles of a case that was partially based on *Delfi* and discussed above - *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt.* The Court found that expecting the association to assume that some unfiltered comments might be in breach of the law would amount to requiring excessive and impractical forethought capable of undermining the right to impart information via internet.<sup>416</sup> Furthermore, liability for third-party comments may have negative consequences on the comment-related environment of an internet portal and thus a chilling effect on freedom of expression via Internet. This effect could be particularly detrimental for a non-commercial website.<sup>417</sup> However, one should not expect that to mean an automatic immunity to be given to these types of websites, for the Court made it clear in *Delfi*, as discussed before, that the rights under Article 8 and Article 10 had to be balanced against each other in each individual case. This point of view is also supported by the fact that the Court stressed the importance of the particular factual matrix of *Pihl* by, for example, drawing multiple comparisons with the circumstances of *Delfi* and *Magyar*.

Moreover, the principles of *Delfi* were used in a recent judgment *Egill Einarsson v. Island*. The applicant was a well-known person in Iceland who for years had published articles, blogs and books and appeared in films, on television and other media.<sup>418</sup> A picture of the applicant was published on the front page of a newspaper that presented its readers with an interview

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<sup>411</sup> *Pihl v. Sweden* (dec.), para 37.

<sup>412</sup> *Pihl v. Sweden* (dec.), para 38.

<sup>413</sup> *Pihl v. Sweden* (dec.), para 27.

<sup>414</sup> *Pihl v. Sweden* (dec.), para 31.

<sup>415</sup> *Pihl v. Sweden* (dec.), para 32.

<sup>416</sup> *Pihl v. Sweden* (dec.), para 28.

<sup>417</sup> *Pihl v. Sweden* (dec.), para 35.

<sup>418</sup> ECtHR 24703/15, 07.11.2017, *Egill Einarsson v. Island*, para 5.

where the applicant discussed the rape accusation against him.<sup>419</sup> X took a copy of the picture of the applicant, drew and wrote a comment on it, added the caption “Fuck you rapist bastard” in small letters under the picture, and posted the edited picture on his Instagram account. It was widely distributed and the applicant brought defamation proceedings against X.<sup>420</sup>

The Court has considered the necessity and relevant rules for balancing Articles 8 and 10 of the Convention in respect to well-known persons and the risks posed by content and communications on the Internet that were summarised and described in *Delfi*<sup>421</sup> and *Von Hannover*<sup>422</sup> (discussed above). There is thus a strong connection between *Delfi*, *Tammer* (as an important source of the principles of principles later applied in *Von Hannover* judgment) and *Egill Einarsson*. The Court reminded that even persons known to the public have legitimate expectations of protection of, and respect for, their private life despite the limits to acceptable criticism being accordingly wider in case of an individual who is well-known.<sup>423</sup> The Court also noted that, in the light of the fact that the applicant was a well-known person and the impugned statement was a part of a debate concerning accusations of a serious criminal act, it was an issue of general interest.<sup>424</sup> Nevertheless, the Court found that Article 8 of the Convention must be interpreted to mean that persons, even disputed public persons that have instigated a heated debate due to their behaviour and public comments, do not have to tolerate being publicly accused of violent criminal acts without such statements being supported by facts. That was especially relevant in the light of the discontinuance of the criminal proceedings against the applicant just prior to the publication of the applicant’s newspaper interview.<sup>425</sup>

The dissenting opinion of Judge Lemmens concerned one relevant aspect of this case - the question whether the expression “Fuck you rapist bastard” was a statement of fact or a value judgment. The judge believed that Supreme Court read the term in its context - the altered picture and the comment taken as a whole. By using the picture as the “medium” for his message, X was manifestly negatively and disapprovingly reacting to the interview. The judge noted that the Supreme Court’s assessment that in this context the word “rapist” had lost its

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<sup>419</sup> *Egill Einarsson v. Island*, para 7.

<sup>420</sup> *Egill Einarsson v. Island*, dissenting opinion of judge Lemmens, para 1.

<sup>421</sup> *Egill Einarsson v. Island*, para 34 and 46.

<sup>422</sup> *Egill Einarsson v. Island*, para 32 and 39.

<sup>423</sup> *Egill Einarsson v. Island*, para 43.

<sup>424</sup> *Egill Einarsson v. Island*, para 45.

<sup>425</sup> *Egill Einarsson v. Island*, para 52.

objective meaning and had to be understood as a swear word against the applicant<sup>426</sup> was within its margin of appreciation. Having regard to the subsidiary nature of the European Court's role, there was, in the judge's opinion, no cogent reason to depart from this assessment. Because of those reasons the judge agreed to the Supreme Court's conclusion that X had acted within the limits of his freedom of expression. In his opinion, the Supreme Court thus struck a fair balance between the competing rights at stake.<sup>427</sup>

Coming back to the assessment of the wider impact of the case law of the ECtHR - its influence on the Luxembourg Court jurisprudence - it is noteworthy that *Delfi* is the only judgment under the scope of this thesis that the CJEU directly quoted in its judgment. This happened on one occasion<sup>428</sup> - in *Dmitrii Konstantinovich Kiselev v. Council of the European Union*.<sup>429</sup> The CJEU did not apply any particular found in *Delfi*, but used it as an example<sup>430</sup> of the important role played by the media, in particular the audiovisual media, in modern society. This allowed the CJEU to draw a conclusion that a large-scale media support for the actions and policies of the Russian Government destabilising Ukraine, provided, in particular during very popular television programmes, by a person appointed by a decree of President Putin as Head of RS, a news agency that the applicant himself describes as a "unitary enterprise" of the Russian State, could be covered by the criterion based on the concept of "active support", provided that the resulting limitations on the freedom of expression comply with the other conditions that must be satisfied in order for that freedom to be legitimately restricted.<sup>431</sup>

This analysis shows that the ECtHR has become more sensitive as regards the protection of private life, in particular the protection of personal data.<sup>432</sup> It is also reasonable to say that *Delfi* provided a frame of reference for shaping media policy in EU Member States. As in *Tammer*, its factual basis is not overly connected to the country the case originated from. *Delfi* has already been quoted as an authority in judgments related to Island, Sweden and Hungary.

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<sup>426</sup> *Egill Einarsson v. Island*, dissenting opinion of Judge Lemmens, para 4.

<sup>427</sup> *Egill Einarsson v. Island*, dissenting opinion of Judge Lemmens, para 6.

<sup>428</sup> As of March 2018.

<sup>429</sup> T-262/15, 15.06.2017, *Dmitrii Konstantinovich Kiselev v. Council of the European Union*.

<sup>430</sup> *Delfi AS v. Estonia*, para 134.

<sup>431</sup> *Dmitrii Konstantinovich Kiselev v. Council of the European Union*, para 76.

<sup>432</sup> C. Grabenwarter, p 105.

### 4.3. Effect of *Delfi AS v. Estonia* on Case Law of Supreme Court of Estonia

The Supreme Court of Estonia used principles explained in *Delfi* only twice.<sup>433</sup>

In its judgment in the case No 3-3-1-85-15 the Court found, similarly to the ECtHR in *Delfi*,<sup>434</sup> that the rights guaranteed under Articles 8 and 10 of the Convention deserve equal respect when balancing them in order to apply domestic law, in particular when it comes to disclosure of personal data.<sup>435</sup> The Supreme Court of Estonia did not agree that Article 8 gives an absolute protection that cannot be restricted by Article 10. The Court found that right to the freedom of speech can constitute a solid legal basis for restricting the right to respect for one's private and family life in media. Freedom of the press would be significantly limited if the media could process personal information and publish it only with the consent of a person. Similar line of reasoning can be found in the relevant national provision itself: personal data may be processed and disclosed in the media for journalistic purposes without the consent of the data subject, if there is predominant public interest therefore and this is in accordance with the principles of journalism ethics. Disclosure of data shall not cause excessive damage to the rights of a data subject. To sum up, the Courts shared the approach that in the event of a conflict, a balance must be struck between privacy and public interest and the rights of others.<sup>436</sup>

In his opinion that concerned case No 3-2-1-37-15, the judge of the Supreme Court of Estonia, Jaak Luik, agreed to the position of the ECtHR in *Delfi*<sup>437</sup> that it was primarily for the national authorities, notably the courts, to resolve problems of interpretation of domestic legislation. In addition to this, he noted that the Chamber was satisfied that the relevant provisions of the civil law – although they were quite general and lacked detail – along with the relevant case-law, made it clear that a media publisher was liable for any defamatory statements made in its publication.<sup>438</sup>

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<sup>433</sup> As of February 2018.

<sup>434</sup> *Delfi AS v. Estonia*, para 139.

<sup>435</sup> Supreme Court of Estonia Administrative Law Chambers judgment in the case No 3-3-1-85-15, 19.12.2003.

<sup>436</sup> No 3-3-1-85-15, para 21.

<sup>437</sup> *Delfi AS v. Estonia*, para 62.

<sup>438</sup> Supreme Court of Estonia Civil Law Chambers judgment in the case No 3-2-1-37-15, 20.11.2015, concurring opinion of judge Jaak Luik, para 16.

#### 4.4. *Delfi AS v. Estonia* and Role of Intermediaries in Europe

The conclusion of the Court can to some extent be confined to its own facts.<sup>439</sup> That would limit the precedential value of *Delfi*. The Court emphasised that *Delfi* case relates to a large professionally managed Internet news portal run on a commercial basis which published news articles of its own and invited its readers to comment on them.<sup>440</sup> The Court also ruled that the case did not concern other fora on the Internet where third-party comments could be disseminated, for example an Internet discussion forum or a bulletin board where users could freely set out their ideas on any topics without the discussion being channelled by any input from the forum's manager; or a social media platform where the platform provider did not offer any content and where the content provider could be a private person running the website or a blog as a hobby.<sup>441</sup> It could be found useful to consider the criteria proposed in joint concurring opinion of judges Raimondi, Karakas, De Gaetano and Kjølbros. The assessment of whether the news portal knew or ought to have known that clearly unlawful comments may be or have been published on the portal may take into account all the relevant specific circumstances of the case. They could include the nature of the comments in question, the context of their publication, the subject matter of the article generating the comments, the nature of the news portal in question, the history of the portal, the number of comments generated by the article, the activity on the portal, and how long the comments have appeared on the portal.<sup>442</sup> The judges found that in *Delfi* the nature of the comments in question was clearly unlawful and they remained on the news portal for six weeks before they were removed. That resulted in a fact that the Court did not find it disproportionate to hold *Delfi* liable. In fact, not being aware of such clearly unlawful comments for such an extended period of time almost amounts to wilful ignorance, which cannot serve as a basis for avoiding civil liability.<sup>443</sup>

On the other hand, the principles of *Delfi* were later used in some newer judgments.<sup>444</sup> Same criteria were used for both news portals and a non-profit industry self-regulation body.<sup>445</sup> It gives a reason to think that those principles may be applicable to other types of websites as

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<sup>439</sup> J. Laffranque (note 9), p 541.

<sup>440</sup> *Delfi AS v. Estonia*, para 115.

<sup>441</sup> *Delfi AS v. Estonia*, para 116.

<sup>442</sup> *Delfi AS v. Estonia*, concurring opinion of judges Raimondi, Karakas, De Gaetano and Kjølbros p 12.

<sup>443</sup> *Delfi AS v. Estonia*, concurring opinion of judges Raimondi, Karakas, De Gaetano and Kjølbros p 15.

<sup>444</sup> Detailed case law analyzed in 1.1.1. of this thesis.

<sup>445</sup> M. Griffith. Downgraded to "Netflix And Chill": Freedom of Expression and the Chilling Effect on User-Generated Content in Europe. - The Columbia Journal of European Law, Vol 22, Issue 2, 2016, p 369.

well, for example to large “hobby” and bulletin board websites (that were supposed to be beyond the scope of *Delfi* judgment) and consisting almost exclusively of user-generated content and relying heavily on advertising revenue. One typical example is Reddit,<sup>446</sup> where users can create their own topics, choose what to post as the starting point for a conversation (as contrasted with news portals where the article provides the fodder for comments), comment on these posts, and up- or down-vote posts and comments based on what they like. Reddit also allows for advertisements to run on the main page and in subreddits.<sup>447</sup> The ECtHR may hold that the importance of compensating the victim may outweigh the freedom of expression of the platform. However, one would expect immunity to be given to these types of websites, as they provide the strongest platform for user-generated content and therefore to speech.<sup>448</sup> That is partially confirmed by the approach the Court preferred in *Pihl* - the comment was written on a small blog run by a non-profit association which took it down the day after the applicant’s request and nine days after it had been posted.

By merely ascertaining the compatibility of domestic judicial decisions with the Convention, rather than taking the place of national courts, the *Delfi* judgment does not supersede the ability of service providers to rely on other defences available to them in domestic law.<sup>449</sup> National courts are only obliged to construe these defences in a manner that is compatible with the Convention, rather than being strictly bound by the *Delfi* reasoning. However, *Delfi* may yet be used as a persuasive authority before the national courts.<sup>450</sup>

*Delfi* is also likely to influence a broader range of policy decisions involving the role of intermediaries in Europe. The European Court’s proposition that certain intermediaries should play an active role in minimizing the spread of particularly harmful content will resonate with European governments that request cooperation from the largest online intermediaries in preventing the spread of hate speech and extremist content.<sup>451</sup> Governments may not always be directly censoring expression, but by putting pressure and imposing liability on those who control the technological infrastructure, they create an environment in which collateral or private-party censorship is the inevitable result.<sup>452</sup> Entirely excluding intermediaries from any

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<sup>446</sup> Reddit is an American social news aggregation, web content rating, and discussion website.

<sup>447</sup> M. Griffith, p 372.

<sup>448</sup> M. Griffith, p 372.

<sup>449</sup> H. J. McCarthy. Is the Writing on the Wall for Online Service Providers - Liability for Hosting Defamatory User-Generated Content under European and Irish Law. - *Hibernian Law Journal*, Vol 14, 2015, p 44.

<sup>450</sup> H. J. McCarthy, p 44.

<sup>451</sup> L. Brunner, p 173.

<sup>452</sup> *Delfi AS v. Estonia*, joint dissenting opinion of judges Sajó and Tsotsoria, para 2.

civil liability would not be compatible with the Convention. However, this does not mean only strict liability as an obligation to generally monitor third-party content.<sup>453</sup> The Court was very cautious to note in this respect that certain circumstances may entitle Contracting States, but not oblige them, to impose such liability.<sup>454</sup> Because A is liable for someone else's speech, A has strong incentives to over-censor, to limit access, and to deny B's ability to communicate using the platform that A controls. A problem from the standpoint of free expression may look like an opportunity for governments that cannot easily locate anonymous speakers and want to ensure that harmful or illegal speech does not propagate.<sup>455</sup>

Another interesting aspect is that parties jointly liable for a particular harm have an interest in reducing their own shares of the burden. Any difficulty in identifying and pursuing speakers will result in greater expected liability for the content provider, so the latter has an incentive to facilitate the identification of anonymous speakers. To do so, content providers may collect user information and volunteer this information in the case of a lawsuit. Content providers might not be very keen to drag their users into court, because this may harm their business. But the ability to share the burden will surely result in some increase in the likelihood of data collection.<sup>456</sup>

Collateral censorship “occurs when the state holds one private party A liable for the speech of another private party B, and A has the power to block, censor, or otherwise control access to B's speech”.<sup>457</sup> That results in strong chilling effects on the intermediaries. Faced with a risk of being held liable for B's speech, an intermediary A is likely to stay on the side of safety and to censor content even if the conditions for limiting freedom of expression are not met<sup>458</sup> or to simply disable comments. Social media operators have already institutionalised over-censorship by allowing a policy of banning sites and posts which have been “reported”, without conducting a serious investigation into the matter. The policy adopted by Facebook is another victory for the troll mentality. Facebook requires (all) user-imposed censorship to take place in a legal environment that grants service providers immunity under the

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<sup>453</sup> M. Husovec, p 20.

<sup>454</sup> *Delfi AS v. Estonia*, para 159.

<sup>455</sup> *Delfi AS v. Estonia*, joint dissenting opinion of judges Sajó and Tsotsoria, para 2.

<sup>456</sup> R. Perry, T. Zarsky. Who Should Be Liable for Online Anonymous Defamation? - University of Chicago Law Review Dialogue, Vol 82, 2015, p 172.

<sup>457</sup> J. Balkin. Old-School/New-School Speech Regulation. - Harvard Law Review, Vol 127, Issue 8, 2014, p 2309.

<sup>458</sup> M. Hertig Randall, p 248.

Communications Decency Act 230(a). One can only imagine what will happen where there is no immunity.<sup>459</sup>

Another possible cause of chilling effect is coinfluence of *Delfi* and the CJEU judgment *Google Spain*. The case involved two pages of the Catalan newspaper *La Vanguardia*, which mentioned a Spanish national in connection with an auction to cover his debts. When the newspaper moved to an online format, Google indexed the pages, so they appeared in response to search queries for the persons name.<sup>460</sup> He requested that the AEPD<sup>461</sup> require *La Vanguardia* and Google to modify their pages to remove his personal data.<sup>462</sup> Although the AEPD rejected the complaint against the newspaper, it upheld the complaint against Google.<sup>463</sup> Google Inc. and Google Spain brought separate actions against the AEPD, which the Spanish high court joined and referred to the CJEU for a preliminary ruling on the Data Protection Directive<sup>464</sup> and the “right to be forgotten”.<sup>465</sup>

The CJEU considered that search engines are data controllers under Article 2 of the Directive<sup>466</sup> and a fair balance should be sought between the legitimate interest of Internet users in having access to the information and the data subject’s fundamental rights. The data subject’s fundamental rights, as a general rule, overrode the interest of Internet users, but that balance might, however, depend on the nature of the information in question and its sensitivity for the data subject’s private life and on the interest of the public in having that information.<sup>467</sup> The CJEU held that in certain cases the operator of a search engine was obliged to remove from the list of results displayed following a search made on the basis of a person’s name links to web pages, published by third parties and containing information relating to that person, even when its publication in itself on the web pages in question was

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<sup>459</sup> *Delfi AS v. Estonia*, joint dissenting opinion of judges Sajó and Tsotsoria, para 8.

<sup>460</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 14.

<sup>461</sup> The AEPD is the Spanish Data Protection Authority (DPA) within the meaning of Article 29 of the Data Protection Directive.

<sup>462</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 14-15.

<sup>463</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 16-17.

<sup>464</sup> European Parliament and Council Directive 95/46/EC, on the protection of individuals with regard to the processing of personal data and on free movement of such data (Data Protection Directive), OJ L 281/ 31, 1995.

<sup>465</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 17-20.

<sup>466</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 27, 28, 33.

<sup>467</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 81.

lawful.<sup>468</sup> That was so in particular where the data appeared to be inadequate, irrelevant or no longer relevant, or excessive in relation to the purposes for which they had been processed and in the light of the time that had elapsed.<sup>469</sup> The Court's reasoning sounds broad and could apply to other scenarios as well. In fact, the ECtHR in *Delfi* could have relied on *Google Spain* language to justify holding Delfi strictly liable for the content of user-generated comments.<sup>470</sup>

While both Delfi and Google Spain alone could have had widespread impact, the combination of them means that websites could be expected to control the content submitted to them as though they were the owners of the content. In particular, these judgments could lead to a dramatic chilling effect on user-generated content in the EU. As the petitioners and third-party interveners in Delfi argued,<sup>471</sup> regular enforcement of these responsibilities within Europe will give website owners an incentive to implement prior restraint mechanisms or bar entirely user-generated content to avoid defamatory remarks. The Google Spain judgment would then encourage search engines to prioritize websites with less user-generated content, as these websites would be less likely to have information that Europeans would ask to be erased from the search results. The combined effect would be a decrease in the number of opportunities Europeans have to express themselves online, as well as a decrease in the likelihood that anyone would read what they did manage to say. Over time, the freedom of speech could shift from individuals to organizations, and from user-generated content to consumption-only websites like Netflix and closed-comment news portals.<sup>472</sup>

This result is particularly unfortunate when one considers that free and low-cost platforms for user-generated content provide an outlet for many individuals with controversial but not unlawful views. This harms not only the speakers, but also the public.<sup>473</sup> Intermediaries play a fundamental role in enabling Internet users to enjoy their right to freedom of expression and access to information.<sup>474</sup> The Court also dismissed the concern of the cost of employing moderators to monitor content on the news portal.<sup>475</sup> The Internet is more than a uniquely

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<sup>468</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 88.

<sup>469</sup> *Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, para 93.

<sup>470</sup> M. E. Griffith, p 364.

<sup>471</sup> *Delfi AS v. Estonia*, para 66-80 and 94-109.

<sup>472</sup> M. E. Griffith, p 356.

<sup>473</sup> M. E. Griffith, p 373.

<sup>474</sup> Report to the Human Rights Council A/HRC/17/27, para 74.

<sup>475</sup> M. E. Griffith, p 379.

dangerous novelty. It is a sphere of robust public discourse with novel opportunities for enhanced democracy. Comments are a crucial part of this new enhanced exchange of ideas among citizens.<sup>476</sup>

The ECtHR appeared to ignore the argument from the applicants that what was at stake was not merely 320 EUR but rather the entire way in which it and similar portals did business. The cost to content hosts in applying more burdensome monitoring methods could be prohibitive either to the comments section or even to the website's business plan itself.<sup>477</sup> Despite the absence of automatic conflict between this ruling and the position under EU law, it is questionable whether this outcome is desirable from an Internet policy perspective. This case and its consequences will likely influence the review of intermediaries that the EU Commission is planning as part of its Digital Single Market strategy.<sup>478</sup>

To sum up, *Delfi* is likely to have a wide impact on EU law. Since there is no case law concerning every kind of the multiple types of Internet platforms, the principles provided in *Delfi* would be revoked over and over again in order to establish the rules on liability and immunity for these websites. The Court is expected to rely on them to both apply the rules provided in *Delfi* and to distinguish cases on the facts, if needed. It is also likely to play a notable role as a persuasive authority not only before the courts, but also when it comes to political decisions. In addition to this, *Delfi* might result in a strong chilling effect on the intermediaries, freedom of speech and cause a rise in the likelihood of data collection. Moreover, active interest of the legal scholars, large amounts of analysis and the arguments mentioned above let one presume it is the judgment in the case where Estonia was the defendant state that has the biggest influence on the case law of the ECtHR,<sup>479</sup> and through that on EU law. The same conclusion was also reached in legal literature.<sup>480</sup>

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<sup>476</sup> *Delfi AS v. Estonia*, joint dissenting opinion of judges Sajó and Tsotsoria, para 6.

<sup>477</sup> M. E. Griffith, p 373.

<sup>478</sup> L. Woods (note 368). The Digital Single Market aims to create the right environment and conditions for digital networks and services to flourish by providing high-speed, secure and trustworthy infrastructures and services supported by the right regulatory conditions. See also: Digital Single Market. Policy. Right environment for digital networks and services. Accessible at: <https://ec.europa.eu/digital-single-market/en/right-environment-digital-networks-and-services> (10.04.2018).

<sup>479</sup> As of 10.04.2018.

<sup>480</sup> J. Laffranque (note 23), p 99.

## CONCLUSION

The aim of this thesis is to investigate whether the Court's dialogue with Estonia through its judgments, dealing with the applications submitted against the state, has influenced the law of EU Member States and EU law in general. The hypothesis of this written work is that Estonia has influenced the ECtHR case law and through that EU law.

Within Europe both the Council of Europe and the European Union ensure human rights at the same supranational level. The CJEU has to regard the ECHR as one of the lawful criteria for examining the impact of EU Regulations and Directives in the specific field of human rights. Member States are also obliged to respect fundamental rights when implementing Community law. The case law of the ECtHR has often been cited by the Luxembourg judges in their decisions. Despite that, acts of the EU as such cannot be challenged before the Court because the EU is not a Contracting Party. They can, however, be successfully disputed before the CJEU if there is a breach of fundamental rights, as guaranteed by the ECHR.

Those fundamental rights constitute general principles of the Union's law under Article 6(3) of the Treaty of Lisbon. There is a presumption, however, that a State has not departed from the requirements of the Convention when it implements legal obligations flowing from its membership of the organisation, if an equivalent protection of fundamental rights is considered to be provided by the organisation. This presumption does not apply where the state has some discretion in its application of EU law. The two European Courts, the CJEU and the ECtHR, are expected to engage into a common European program on the fundamental rights protection.

There are some possible limitations on the implementation of the principles of the case law of the ECtHR in Member States. These limitations could potentially diminish the practical value of the judgments against Estonia on a national level in Member States. The most important of them is that the final judgment of the Court is binding only in relation to the parties of particular proceedings. Thus, the legal status of the Strasbourg case law is diverse among the Contracting States. Despite those differences, the role of the case law of the Court for the development of national legal systems cannot be appreciated enough. Sometimes the Court uncovers serious structural problems that can only be solved through adaptation and amendment of the legal system and gives guidelines to these changes. Besides that, it increasingly supplements national human rights guarantees. Described impact, future and

present, in turn, creates a possibility for the ECtHR judgments in cases where Estonia was the defendant state to influence EU law. This, however, presupposes that some new principles of high practical value were developed in cases submitted against Estonia.

Rule of law, one of the fundamental principles of a democratic society, is inherent in all the Articles of the Convention. Essential to the rule of law principle of legality is embodied in Article 7 of the Convention: no one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. The principle of legality is multifaceted and also incorporates the principle of legal certainty - an offence must be clearly defined in law. When it comes to the judgments in which Estonia was the defendant state, the best example of the application of the principles described in this subchapter is the judgment of the ECtHR in the case *Veeber v. Estonia (no. 2)*. In this case, the retroactive application of criminal law as well as the lack of clarity and foreseeability in the relevant criminal legislation amounted to a violation of Article 7(1) of the Convention. The legal rules given in *Veeber (no. 2)* were later used on many occasions, both to uphold the earlier principles given in the Court's previous case law and to develop new, more detailed approaches, in relation to particular cases adjudicated in the ECtHR. To sum up, if one wanted to mention aspects in which Estonian cases have been relevant for the development of interpretation and application of Convention rights, Article 7(1) would be one of them.

In the context of effective political democracy and respect for human rights mentioned in the Preamble to the Convention, freedom of expression is not only important in its own right, but also plays a central part in the protection of other rights under the Convention. Article 10(2) 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. Freedom of expression guaranteed by Article 10 ECHR is not unlimited. The second paragraph of Article 10 lists nine legitimate purposes for the restrictions of the freedom of expression. One of them, "the protection of... rights of others", has been frequently invoked to ascertain the degree to which the privacy or reputation and honour of public figures can be guaranteed. *Tammer v. Estonia* provides an excellent example of this principle in action and has remained one of the best-known cases emerging from Estonia. It is often referred to in textbooks and manuals dealing with the case law of the Strasbourg court. In this judgment the Court showed that that freedom of expression enjoyed by the press does not extend to idle

gossip about intimate or extra-marital relations merely serving to satisfy the curiosity of a certain readership. The Court has since quoted *Tammer* on many occasions, the most important being *Von Hannover v. Germany* and *Karhuvaara and Iltalehti v. Finland*. Both of them not only upheld the principles provided in *Tammer*, but noticeably contributed to their development. The factual basis of *Tammer* is universal enough not to be bound to Estonia only. Press continues to fulfil its function of a public watchdog, enjoying even bigger influence and reach as a part of contemporary media culture making it even more important to draw a line between freedom of expression and protection of a private life. This allows one to suppose the influence of *Tammer* will not decrease in near future, but is much more likely to grow.

The right to a private life is also essential when it comes to emerging new technologies. The Court noted that user-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression. However, analysis at hand shows that the ECtHR has become more sensitive as regards the protection of private life, in particular the protection of personal data. The judgment of the ECtHR in *Delfi* helped to develop principles that help to ascertain the liability of Internet news portals. It is also reasonable to say that *Delfi* provided a frame of reference for shaping media policy in EU Member States. As in *Tammer*, its factual basis is not overly connected to the country the case originated from. *Delfi* has already been quoted as an authority in judgments related to Iceland, Sweden and Hungary. It is also noteworthy that *Delfi* is the only judgment under the scope of this thesis that the CJEU directly quoted in its judgment. Since there is no case law concerning every kind of the multiple types of Internet platforms, the principles provided in *Delfi* would be revoked over and over again in order to establish the rules on liability and immunity for these websites. It is also likely to play a notable role as a persuasive authority not only before the courts, but also when it comes to political decisions. In addition to this, there is also a probability that *Delfi* might result in a strong chilling effects on the intermediaries, freedom of speech and cause a rise in the likelihood of data collection. Moreover, active interest of legal scholars towards *Delfi* and the arguments mentioned above let one suppose it is the judgment that has the biggest influence on the case law of the ECtHR, and through that on EU law, if compared to other cases in which Estonia was the defendant state in the ECtHR. The same conclusion has also been reached in legal literature.

To sum up, this thesis shows that there has indeed been an influence of the judgments and decisions of the ECtHR in which Estonia was the defendant state on the case law of the ECtHR. This case law can and is likely to influence both the law and the policy of the EU institutions and Member States. The biggest identified impact of these decisions concerned the freedom of expression.

# EESTI SUHTES TEHTUD EUROOPA INIMÕIGUSTE KOHTU LAHENDITE MÕJU EUROOPA LIIDU ÕIGUSELE

## Resümees

Pärast taasiseseisvumist avas Eesti ennast demokratiseerimisprotsessile. Selle käigus on Eesti ratifitseerinud Euroopa inimõiguste konventsiooni (EIÕK). EIÕK on aga elav instrument, mis vajab tõlgendamist tänapäeva tingimuste valguses. Pidev dialoog riigisiseste kohtute ja Euroopa Inimõiguste Kohtu (EIK) vahel on äärmiselt oluline inimõiguste arengu ja kaitse jaoks.

Magistritöö eesmärk on uurida, kas kohtupraktika kaudu toimuv EIK dialoog Eestiga on mõjutanud Euroopa Liidu (EL) ja selle liikmesriikide õigust. Töö hüpotees on väide, et Eesti suhtes tehtud lahendite kaudu toimuv EIK dialoog Eestiga on suutnud mõjutada ka Euroopa Liidu (EL) ja selle liikmesriikide õigust. Hüpoteesi kontrollimiseks on vaja eelkõige analüüsida, kas EIK praktiliselt on õiguslikult võimalik mõjutada EL institutsioonide ja liikmesriikide õigust. Samuti on oluline hinnata, kas see mõju on ka tegelikult avaldunud. Seejärel on vaja uurida, kuidas on mõjutanud Eesti suhtes tehtud EIK otsused EIK edaspidist praktikat.

Käesoleva töö autor ei ole kontrollinud, kas Eesti suhtes tehtud EIK otsuseid kasutati ka liikmesriikide kohtutes või poliitiliste otsuste vastuvõtmisel. See on tingitud vajadusest täita tööle ettenähtud mahtu. Samuti eeldaks vastupidine lähenemine sügavaid teadmisi konkreetsete liikmesriikide õiguskorrast ning sotsiaal-poliitilisest kontekstist.

Magistritöö jaoks valiti kolm olulisemat EIK otsust Eesti suhtes: *Veeber v. Eesti*, *Tammer v. Eesti* ja *Delfi v. Eesti*. Otsuste tähtsuse hindamiseks kasutati EIK ametlikus andmebaasis (HUDOC) antud kohtuotsuste liigitust. Olulisemad lahendid on koondatud raportitesse. Samuti viitas valitud kohtuotsuste tähtsusele asjaolu, et EIK on tihti kasutanud neid lahendeid oma hilisemas praktikas. Käesoleva töö autor võrdles EIÕK konkreetseid artikleid käsitlevate EIK otsuste mahtu ning Eesti suhtes tehtud lahendite osakaalu neis. Magistritöös kasutati ka üht otsust vastuvõetavuse kohta, *Kolk ja Kislõi v. Eesti*. Sellele on EIK viidanud kõige rohkem, võrreldes teiste Eesti suhtes tehtud otsustega vastuvõetavuse kohta, mis käsitlesid sama EIÕK artikli tõlgendamist. Magistritöö autor lähtus ka õiguskirjanduses väljendatud

seisukohtadest lahendite olulisuse kohta ning hindas, mis otsused said kõige rohkem tähelepanu akadeemilistes ringkondades.

Euroopas kaitsevad inimõigusi riigiülevalt nii Euroopa Nõukogu kui ka Euroopa Liit. Euroopa Nõukogu teeb seda EIÕK-ist lähtudes ning EIK kaudu. Euroopa Liit tegutseb inimõiguste kaitsmise vallas Euroopa Liidu Kohtu kaudu (ELK). Kuigi EL ei ole EIÕK osapool, näitab ELK kohtupraktika, et EL liikmesriigid on EL õiguse rakendamisel kohustatud austama fundamentaalseid õigusi EL õiguse rakendamisel. Ka Euroopa Liidu lepingu ja Euroopa Liidu toimimise lepingu konsolideeritud versioonide artikkel 6(3) ütleb, et Euroopa inimõiguste ja põhivabaduste kaitse konventsiooniga tagatud ja liikmesriikide ühistest põhiseaduslikest tavadest tulenevad põhiõigused on liidu õiguse üldpõhimõtted. Euroopa Liidu tegevus kui selline ei saa aga olla EIK-is vaidlustatud, kuna EL ei ole tervikuna EIÕK osapool. EL ei ole konventsiooniga magistritöö kirjutamise hetkeks liitunud. See tähendab, et EL liikmesriigid võivad olla kohustatud vastutama EL jurisdiktsiooni teostamise tulemusel tekkinud inimõiguste rikkumiste eest. Samas on EIK väljendanud seisukohta, et riikide tegevuse suhtes kehtib eeldus, et riik ei ole konventsiooni nõuetest kõrvale kaldunud, kui ta rakendab organisatsiooni liikmelisusest tulenevaid juriidilisi kohustusi, tingimusel, et organisatsioon tagab EIÕK-ga samaväärset põhiõiguste kaitset. See eeldus ei ole aga absoluutne.

EIK otsus on siduv vaid konkreetse kohtumenetluse osapooltele. Seetõttu sõltub EIK praktika koht riigisisese õiguses kohalikest põhiseaduslikest normidest ja kohtupraktikast. Sellele vaatamata on EIK mõju riigisisestele õiguskordadele olnud ikkagi märkimisväärne ja järjepidev. EIK on avastanud ka struktuurilisi probleeme, mida saab parandada vaid õiguskorra muutmise kaudu, ja on andnud selleks ka suuniseid. On suur tõenäosus, et avastatud mõju suureneb veelgi, kuna EIK jätkab nõu andmist oma otsuste rakendamiseks ning nende järgimiseks kestva võimetuse kritiseerimist.

*Veeber v. Eesti (nr 2)* puudutas seaduslikkuse põhimõtte tõlgendamist EIÕK artikli 7(1) raames. Sellest lähtuvalt ei või kedagi tunnistada süüdi kuriteos – teos või tegevusetuses, mis selle toimepanemise ajal kehtinud riigisisese või rahvusvahelise õiguse järgi ei olnud kuritegu. Samuti ei või kohaldada raskemat karistust kui kuriteo toimepanemise ajal ettenähtu. Vastavalt kohtu pretsedendiõigusele saab ainult seadus mingi teo tunnistada kuriteoks ja kehtestada selle eest karistuse. Karistusseadust ei saa aga süüdistatava kahjuks laialdaselt tõlgendada. Nendest printsiipidest tuleneb, et rikkumine peab olema üheselt määratletud. See tingimus on täidetud, kui isik saab vastava sätte sõnastusest ja vajadusel kohtute tõlgendamise abil aru, milliste tegude ja tegevusetuse eest võetakse ta kriminaalvastutusele. Lahendis

*Veeber v. Eesti (nr 2)* mõisteti kaebaja süüdi selle eest, et ta varjas tahtlikult, pidevalt ja suures ulatuses maksustamisobjekte ja esitas maksuametile kindlal ajaperioodil moonutatud andmeid oma äriühingu kulude kohta. Kuna kaebaja tegude toimepanemise algusaeg eelnes seaduse, mille alusel ta süüdi mõisteti, jõustumisele, siis hinnati tema tegevus jätkuvaks kriminaalseks seisundiks vältava kuriteo raames. Kohus osundas, et vastavalt relevantse riigisisese normi sõnastusele sai isikut kriminaalvastutusele võtta maksude tasumise kõrvalehoidumisest ainult, kui samasuguse rikkumise eest oli süüdlase suhtes kohaldatud halduskaristust. Seega oli maksude tasumisest kõrvalehoidumine kuriteo tingimuseks, ilma milleta kriminaalvastust ei saanud järgneda. Kuna puudus vastaval perioodil ka asjakohane kohtupraktika, ei saanud kaebaja eeldada, et tema tegude avastamine tooks endaga kaasa kriminaalkorras süüdimõistmise.

Artikli 7(1) osas on EIK praktika vähene. Veel vähem kohtuasju puudutab olukordi, kus tegu oli kriminaliseeritud selle toimepanemise ja kohtuliku läbivaatamise vahel. *Veeber v. Eesti (nr 2)* on aga olnud eeskuju sarnaste asjade lahendamisel ning juba varasemas praktikas väljakujunenud printsiipide relevantsuse kinnitamisel. EIK mõttekäik kohtuasjas *Liivik v. Eesti* oli suuremas osas inspireeritud otsusest *Veeber (nr 2)*. Samuti hindas EIK kohtuasja *Puhk v. Eesti* asjaolusid *Veeber (nr 2)* antud printsiipidest lähtudes. Lahendites *Penart v. Eesti* ja *Kolk ja Kislõi v. Eesti* ei viidanud EIK otsusele *Veeber (nr 2)*, kuid lähtus analoogsetest riigisisestest õigusreeglitest. Kõik viidatud otsused on andnud olulise panuse karistusõiguse tagasiulatuva kohaldamise keelu põhimõtte selgitamisse. Ei saa aga öelda, et *Veeber (nr 2)* mõjutas vaid neid otsusi, mis puudutasid Eestit või endiseid NSV Liidu riike. Seda kinnitavad näiteks EIK otsused asjades *Rohlena v. Tšehhi Vabariik* ning *Aras v. Türgi*. *Veeber (nr 2)* on mõjutanud ka Riigikohtu praktikat näiteks õigusselguse ja jätkuva kriminaalse seisundi mõistete sisustamise osas. Eriti suur olulisus on asjaolul, et *Veeber (nr 2)* inspireeris Riigikohut tunnistama teistmise alusena EIK poolt on avastatud rikkumise, ka enne asjakohase normi vastuvõtmist parlamendi poolt. Võib eeldada, et analoogselt suudaksid käituda ka teiste EL liikmesriikide kohtud. Samas on aga tõenäolisem ning praktikas ka kinnitatud, et riigisisised kohtud ootavad ikkagi EIK otsust rikkumise kohta konkreetselt oma riigi suhtes, et alles siis võtta kirjeldatud võimaluse sisse.

Palju detailsem oli EIK pretsedendiõigus väljendusvabaduse puhul (EIÕK artikkel 10). See tagab ka poliitilise arutelu vabaduse, mis on demokraatliku ühiskonna tuum. Seejuures on oluline ka ajakirjanduse panus üldist huvi pakkuvate küsimuste väljaselgitamise ja kajastamise vormis. Väljendusvabaduse kaitseobjektiks on kirjutatud või öeldud sõnad; pildid ja tegevused; nii informatsiooni sisu kui ka vorm. Artikli 10(2) ettenähtud erandeid arvestades

kehtib see ka selliste ideede suhtes, mis võivad solvata, šokeerida või häirida. Seda nõuab pluralism, tolerantsus ja avatud mõttelaad, milleta ei oleks demokraatlikku ühiskonda. Sõnavabadusõigusesse sekkumine on vastuolus EIÕK artikliga 10, välja arvatud juhul, kui see on fikseeritud seaduses, sellel on artiklis 10(2) nimetatud õigustatud eesmärk või eesmärgid ning see on demokraatlikus ühiskonnas vajalik nende eesmärkide saavutamiseks.

*Tammer v. Estonia* on suurepärane ja tuntud näide õigustatud eesmärgi mõiste sisustamisest. Selles asjas mõisteti kaebaja süüdi solvavate märkuste eest, mida ta ajakirjanikuna tegi ajaleheintervjuus, mis käsitles V. Laanaru, tuntud poliitiku abikaasat, isiklike mälestuste avaldamise küsimust. Hoolimata tema jätkuvast seotusest erakonnaga, ei pidanud EIK tuvastatuks, et vaidlusaluste sõnade kasutamist oleks õigustanud avalik huvi. EIK leidis, et kaebaja oleks saanud sõnastada Laanaru käitumise kriitika, kasutamata solvavaid väljendeid “rongaema” ja “abielulõhkuja”. EIK arvestas ka väikse trahvisummaga, mis kaebajale karistusena mõisteti. Eeltoodut arvesse võttes leidis EIK, et kaebaja süüdimõistmine ja karistus ei olnud ebaproportsionaalsed taotletava õigustatud eesmärgiga. Seega võis põhjendatult pidada kaebaja sõnavabadusõigusesse sekkumist demokraatlikus ühiskonnas vajalikuks, et kaitsta kaasinimeste mainet või õigusi konventsiooni artikli 10(2) tähenduses.

Hilisemas praktikas kasutas EIK otsust *Tammer v. Eesti* ka selleks, et kinnitada üldisemaid artikli 10 tõlgendamise seotud õigusreeglite asjakohasust. Samuti kinnitas EIK printsiipi, et tema ülesanne järelevalve teostamisel ei ole asuda riigisiseste võimude asemele, vaid kogu kohtuasja silmas pidades vaadata artikli 10 alusel läbi riigisiseste võimude otsused, mida nad on teinud oma suvamäära piires. Palju olulisem on aga *Tammer v. Eesti* kasutamine EIK pretsedendiõiguse edaspidiseks arendamiseks.

EIK kasutas samu põhjendusi ja üldpõhimõtteid nagu *Tammer v. Eesti* lahendis *Von Hannover v. Saksamaa*. EIK jõudis järeldusele, et inimese tuntus ei ole piisav tegur, et õigustada sissetungi eraellu. Kohtud peavad analüüsima publikatsiooni olemust ja selle tähtsust ühiskonnale ehk avaliku huvi olemasolu. *Von Hannover v. Saksamaa (nr 2)* faktilised asjaolud olid varasema kohtuasjaga võrreldes natuke muutunud. Publikatsioonid ei puudutanud nüüd mitte printsessi vaba aja veetmist ja isiklikku elu laiemas plaanis, vaid tema tegevuste valikut ajal, kui Monaco vürst oli tõsiselt haigestunud. Viimane asjaolu põhjustas avaliku huvi olemasolu. Riigisisised kohtud uurisid asja otsustamisel ka avaldatud fotode tegemise tingimusi. EIK nõustus sellise lähenemisega ning kinnitas, et see on üks olulistest teguritest, mis tasakaalustab väljendusvabadust ja õigust eraelu kaitsele. Kahes viidatud otsuses välja kujundatud kriteeriumid on saanud EIK pretsedendiõiguse oluliseks osaks.

Lahenditele *Von Hannover v. Saksamaa* ja *Tammer v. Eesti* viidati ka teises olulises EIK otsuses – *Karhuvaara ja Iltalehti v. Soome*. Taotluse esitanud ajaleht avaldas artikleid Soome parlamendi liikme ning ühtlasi haridus- ja kultuurikomisjoni esimehe abikaasa suhtes toimunud kriminaalmenetluse kohta, mis käsitles joobeseisundis vääritud käitumisega seotud juhtumeid, sealhulgas rünnakut politseiametniku suhtes. EIK märkis, et poliitiku abikaasa süüdimõistmine võib mõjutada inimeste hääletuskavatsusi. Seetõttu esines viidatud otsuses avaliku huvi element. EIK arvestas määratud trahvide suurusega (37 365 eurot) ning leidis, et riigisisised kohtud ei suutnud leida õiglast tasakaalu konkureerivate õiguste vahel.

Õigus eraelule on aktuaalne ka uute tehnoloogiatega seoses. Hiljutises lahendis *Delfi AS v. Eesti* tuvastati, et uudisteportaal võib vastutada anonüümsete laimavate kommentaaride eest. Digitaalses keskkonnas on igal väljendil vahetu ja ulatuslik mõju. Suurkoda põhjendas otsust järgmiselt: tegemist oli äärmuslike vihakõnet ja vägivalda õhutavate kommentaaridega uudisteportaalis avaldatud artikli kohta; kaebaja kutsus lugejaid kommenteerima majandusliku kasu saamiseks; anonüümsete kommentaaride tegelike autorite vastutusele võtmine ei kujutanud endast reaalselt alternatiivi; Delfi võetud meetmed kommentaaride eemaldamiseks olid olnud ebapiisavad ja Delfilt välja mõistetud hüvitis 320 eurot ei käinud kindlasti üle jõu suurele äriühingule, jätkuvalt Eesti suurimale internetiportaalile. Suurkoda leidis, et asjakohased riigisisemed normid koos kohtupraktikaga tagasid võimaliku vastutuse ettenähtavuse. EIK nõustus Eesti kohtute otsusega mitte rakendada e-kaubanduse direktiivi ülevõtmiseks kasutatud infoühiskonna teenuse seaduse eriregulatsiooni, kuna erinevalt kaebaja tegevusest puudutas viimane üksnes tehnilise, automaatse ja passiivse iseloomuga tegevust, ning et kaebaja eesmärk ei olnud üksnes vahendusteenuse pakkumine.

EIK on korduvalt tsiteerinud *Delfi* otsust oma praktikas, et kinnitada pretsedendiõiguse varasemaid põhimõtteid. Nende hulka kuulub näiteks õigusnormide täpsuse ja ettenähtavuse nõue; vajadus tasakaalustada sõnavabadust ja eraelu kaitset; traditsiooniliste trükiste ja audiovisuaalse meedia seaduslike omaduste eraldamise reeglid. EIK tõi esile ka interneti olulist rolli teabe levitamisel hõlbustamisel ning rõhutas, et ajakirjandusele ettenähtud kaitsemeetmed on ühiskonna jaoks eriti olulised.

Otsustes *Magyar Tartalomszolgáltatók Egyesülete ja Index.hu Zrt v. Ungari* ning *Pihl v. Rootsi* lähtus EIK lahendis *Delfi AS v. Eesti* väljendatud seisukohtadest ning arendas internetiportaaali tsiviilvastutusele võtmise reegleid seoses publikatsioonide all postitatud laimavate kommentaaridega. *Delfi* otsusega võrreldes jõudis EIK vastupidisele järeldusele *Magyar Tartalomszolgáltatók Egyesülete* otsuses, kuna solvavad ja vulgaarsed kommentaarid

ei kujutanud endast vihakõnet ega vägivalda õhutamist. Teine oluline erinevus seisnes selles, et *Magyar Tartalomszolgáltatók Egyesülete* käsitles juriidilise, mitte füüsilise isiku laimamist. Hiljem lähtus EIK samadest printsiipidest ka uuemate kohtuasjade puhul, mis samuti panustasid internetiportaali tsiviilvastutuse tuvastamise reeglite väljatöötamisse, näiteks tuntud inimeste suhtes avaldatud solvavate kujutiste ja märkustega internetis.

Vaatamata sellele, et *Delfi AS v. Eesti* on mõjutanud ka Riigikohtu praktikat, on palju märkimisväärsem suur tähelepanu, mida sai otsus õiguskirjanduses.

*Delfi* otsusel on tõenäoliselt laiaulatuslik mõju EL õigusele. Kuna hetkel puudub EIK kohtupraktika, mis käsitleks iga konkreetset tüüpi veebiplatvormide vastutusele võtmise reegleid, võib eeldada, et *Delfi* lahendis sätestatud üldisi põhimõtteid ja neist tuletatud printsiipe kasutatakse ka edaspidi ning seda üha rohkem ja rohkem. Samuti võib EIK seisukoht *Delfi* otsuses mõjutada ka teiste liikmesriikide poliitilisi otsuseid. On ka tõenäoline, et veebiportaalid kas keelavad kommentaaride postitamise (et kaitsta ennast võimalike tagajärgete eest), teevad kommenteerimise reegleid rangemateks, kasutavad tõhusaid automatiseeritud tsensuurimehhanisme kommentaaride filtreerimiseks, välistades ka inetute kommentaaride postitamise, või suurendavad andmete kogumist, et vajadusel esitada kommentaare kirjutanud isiku vastu tsiviilõiguslikke nõudeid. See võib aga mõjuda pärssivalt sõnavabadusele veebikeskkonnas. Õigusteadlaste aktiivne huvi ja eespool nimetatud argumendid võimaldavad oletada, et *Delfi* otsusel on olnud suurim mõju EIK pretsedendiõigusele ja selle kaudu ka EL õigusele, võrreldes teiste Eesti suhtes tehtud lahenditega.

Teostatud analüüs näitab, et EIK lahendid Eesti suhtes on tõepoolest suutnud mõjutada EIK pretsedendiõigust. See on toimunud nii juba olemasolevate printsiipide edasiarendamise kui ka uute reeglite sõnastamise vormis. Kõige suurem on Eesti suhtes tehtud lahendite mõju sõnavabaduse valdkonnas. EIK praktika on pikka aega mõjutanud ka EL liikmesriikide õigust ning EL institutsioonid on kohustatud arvestama EIÕK artiklitele EIK praktikas antud tõlgendustega. Sellest võib järeldada, et Eesti suhtes tehtud lahendid, eriti olulisemad neist, mõjutavad ka EL ja liikmesriikide õigust.

## ABBREVIATIONS

ECHR European Convention on Human Rights

ECtHR European Court of Human Rights

EU European Union

CJEU Court of Justice of the European Union

TEU Treaty on European Union

TEEC Treaty establishing the European Economic Community

USSR Union of Soviet Socialist Republics

MP Member of Parliament

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3. kinnitan, et lihtlitsentsi andmisega ei rikuta teiste isikute intellektuaalomandi ega isikuandmete kaitse seadusest tulenevaid õigusi.

Tallinnas, 23.04.2018