The European Court accepts strict application of law on data protection and narrow interpretation of journalistic activity in Finland

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland, 21 July 2015 (Appl. 931/13)

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By Dirk Voorhoof, Ghent University

After proceedings at national level during eight years, and after a preliminary ruling by the EU Court of Justice in Luxembourg on 16 December 2008 (Case C-3/07), the European Court of Human Rights (Fourth section) in Strasbourg has delivered a controversial judgment in the domain of protection of personal data and data journalism. The Court comes to the conclusion that a prohibition issued by the Finnish Data Protection Board that prohibited two media companies (further: Satamedia) from publishing personal data in the manner and to the extent they had published these data before, is to be considered as a legal, legitimate and necessary interference with the applicants’ right to freedom of expression and information.

The European Court agrees with the Finnish authorities that the applicants could not rely on the exception of journalistic activities within the law of protection of personal data. In finding no violation of the right to freedom of expression and information, the Court not only accepts a restrictive interpretation of the notion of journalistic activity, it also reduces drastically the impact of the right to information of public interest.

The judgment

The Court considers that the prohibition issued by the Data Protection Board did not prevent the applicant companies from publishing taxation data as such. However, it prohibited them from collecting, saving and processing such data to a large extent, with the result that an essential part of the information previously published in Veropörssi magazine and via an SMS-service for taxation data, could no longer be continued. Therefore the Court had to examine whether the interference with the applicant companies’ right to impart information complied with Article 10 of the Convention.

The Court starts by referring to its recently developed set of principles to be applied when examining the necessity of an instance of interference with the right to freedom of expression in the interests of the “protection of the reputation or rights of others”. It noted that in such cases the Court may be required to verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8. These criteria are: (see Von Hannover v. Germany (no. 2) [GC], §§ 109-113 and Axel Springer AG v. Germany [GC], §§ 89-95)

“(i) contribution to a debate of general interest;
(ii) how well-known is the person concerned and what is the subject of the report;
(iii) prior conduct of the person concerned;
(iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken;
(v) content, form and consequences of the publication; and
(vi) severity of the sanction imposed”.

The European Court recognizes that a general subject-matter was at the heart of the publication in question, namely the taxation data about natural persons’ taxable income and assets, while such data are a matter of public record in Finland, available to everyone. The Court agrees explicitly that as such this taxation information was a matter of public interest. And the Court notes that “from the point of view of the general public’s right to receive information about matters of public interest, and thus from the standpoint of the press, there were justified grounds for imparting such information to the public” (§ 65). The Court is aware that taxation data of individual persons are public in Finland, in accordance to the Act on the Public Disclosure and Confidentiality of Information, and it emphasizes that there was no suggestion that Satamedia had obtained the taxation data by subterfuge or other illicit means. The Court equally observes that the accuracy of the published information was not in dispute. The Court also refers to the preliminary ruling of the Court of Justice of the EU of 16 December 2008, that found that the activities of Satamedia related to data from documents which were in the public domain under Finnish legislation, could be classified as “journalistic activities”, if their object was to disclose to the public information, opinions or ideas, irrespective of the medium which was used to transmit it.

However, the problematic issue was the extent of the published information by Satamedia, as the Veropörssi magazine had published in 2002 taxation data on 1.2 million persons. According to the domestic authorities the publishing of taxation information to such an extent could not be considered as journalism, but as processing of personal data which Satamedia had no right to do. Leaving a broad margin of appreciation, the European Court of Human Rights accepts the finding by the Finnish authorities that the publication of personal data by Satamedia could not be regarded as journalistic activity, in particular because that derogation for journalistic purpose in the Personal Data Act (see also Article 9 of Protection of Personal Data Directive 95/46/EC of 24 October 1995) was to be interpreted strictly. The Court refers to the finding by the Finnish Supreme Administrative Court “that the publication of the whole database collected for journalistic purposes could not be regarded as journalistic activity” and that the public interest did not require such publication of personal data to the extent that had been seen in the present case (§ 70).

The European Court is of the opinion that the Finnish judicial authorities have attached sufficient importance to Satamedia’s right to freedom of expression, while also taking into consideration the right to respect for private life of those tax-payers whose taxation information had been published. The fact that the prohibition issue by the Finnish authorities culminated to the discontinuation of Veropörssi magazine and Satamedia’s SMS-service was, according to the Court, not a direct consequence of the interference by the Finnish authorities, but an economic decision made by Satamedia itself. Furthermore the prohibition was not a criminal sanction, but
an administrative one and thereby of a less severe character. Having regard to all the foregoing factors, and taking into account the margin of appreciation afforded to the State in this area, the Court considers that the domestic courts struck a fair balance between the competing interests at stake. Therefore, with a 6/1 majority, the Court finds that there has been no violation of Article 10 of the Convention

The Court also rejects Satamedia’s claim that Article 14 of the Convention was violated. Satamedia had argued that they had been discriminated against vis-à-vis other newspapers which had been able to continue publishing the taxation information in question. According to the European Court Satamedia could not be compared with other newspapers publishing taxation data as the quantity published by them was clearly greater than elsewhere. Therefore Satamedia’s situation was not sufficiently similar to the situation of other newspapers, and hence there was no discrimination in the terms of Article 14. The Court finds this part of the application manifestly ill-founded and therefore inadmissible.

**Dissent and comment**

In her dissenting opinion in annex to the judgment, judge Tsotsoria emphasizes that the majorities’ approach does not follow the established case-law of the Court finding a violation of Article 10 in cases where national authorities have taken measures to protect publicly available and known information on matters of public interest from disclosure. It states further that “regrettably, the majority agreed with the respondent state that the applicant companies’ activities did not fall within the exception for the purposes of journalism in the Personal Data Act” and that this can lead to an interpretation “that journalists are so limited in processing data that the entire journalistic activity becomes futile (..), particularly in the light of the dynamic and evolving character of media”.

The outcome of what is known in Europe as the Satamedia case raises most fundamentally the question: “What is the problem of publishing in the media data which have originally been disclosed by the authorities and are publicly accessible to everyone?”. What is the “pressing social need” behind the prohibition of data from public record that are subject of public interest in Finland? There is no indication that the publication of these data caused harm or damage to individual persons or to society. The open policy on taxation in Finland is precisely a good example of transparency on matters of public interest. In such a context it is difficult to understand that the journalistic activity of Satamedia and the publication of data of public interest needed to be curtailed in order only to make a strict application of the law on the protection of personal data, *nota bene* with regard to data that were already in the public domain. One could assume that a ‘fair balance’ should rather lead to another outcome, as in earlier cases the European Court found that interferences with editors’ or journalists’ rights for making confidential or secret information public, could not be justified as being necessary in a democratic society, referring to the task of media to report on matters of public interest, in accordance with the principles of responsible journalism or professional ethics. In other cases the Court found that there were no legitimate reasons for interfering with the publication of information that was already in the public domain (see e.g. *Observer and Guardian v. UK*, *Bluf! t. the Netherlands* and *Fressoz and Roire v. France*). Furthermore, it is unclear for what reasons
a more limited publication of the taxation data in other media is acceptable under the exception of journalistic activity, and why precisely, from what extent onwards or under what type or form of journalistic presentation, the publication of the taxation data becomes illegal.

One of the first comments analyzing the Satamedia-judgment by the ECtHR pointed out that “the ruling in this case seems absurd since what the applicants were doing was to make the data more reader-friendly. The ECtHR has not really clarified what the proper way of using some publicly available data is. The only guideline given is whether the alleged activity was conducted for public interest. For instance, if a magazine made an analysis with the data, the article can be of public interest because people can look at demographic patterns or even assess the current taxation policy. Does it mean that publishing the data with some analysis would attract the derogation to apply? If that is the case, how much analysis will be needed? Therefore, it is really hard to draw a line here to determine whether certain publication can be recognized by the law as journalistic activity”.

The judgment of the Fourth section of the European Court is not final yet. A request for a referral to the Grand Chamber in application of Article 43 may be considered by the applicants, also taking into account the serious impact the judgment may have on interpreting notions of journalistic activity and public interest in the context of guaranteeing the right to freedom of expression in the world of data journalism, digital media and journalistic (big) data processing.

For the full record: the Court in this case found a violation of Article 6 § 1 (fair trial) of the Convention, as the length of the proceedings at domestic level (six years and six months) was excessive and failed to meet the “reasonable time” requirement, even taking into account the complexity of the case.