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Article 10
***Expression and advertising of political
positions through the media/Internet in the
context of elections/referendums***

COUNCIL OF EUROPE



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STUDY OF THE ECHR CASE-LAW
ARTICLE 10

SUMMARY

The present report provides an overview of the Court's case-law on the expression and advertising of political positions through the media, including Internet platforms, in the context of elections/referendums.

The report looks into the manner in which the heightened protection afforded to political expression in the Court's case-law operates in the media/Internet context. It also identifies the scope of the States' margin of appreciation in applying measures restricting the expression and advertising of political positions through the media and Internet platforms. In this connection, particular emphasis is placed on freedom of political expression in the context of elections and referendums. It is noted, in particular, that in the specific context of elections and referendums, freedom of political expression must be balanced against other relevant considerations aimed at establishing and maintaining the functioning of an effective and meaningful democracy. These considerations play an important role in determining the breath of the margin of appreciation afforded to the States concerning the expression and advertising of political positions under Article 10. The report also identifies the concept of the "protection of rights of others" under Article 10 § 2 as the legitimate aim on which the Court usually relies when the restriction (on freedom of expression and advertising of political positions through the media/Internet platforms) aims at the protection of the orderly conduct of democratic processes.

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INTRODUCTION

1. This report outlines the Court’s case-law on expression and advertising of political positions through media, including Internet, and the special rules applicable in the context of elections and referendums. It further looks into the legitimate aims that have been found to be relevant in this context and in particular into the concept of “protection of rights of others” under Article 10 § 2 of the Convention.

EXPRESSION AND ADVERTISING OF POLITICAL POSITIONS THROUGH THE MEDIA/INTERNET

A. Preliminary points

2. Freedom of opinion and expression is often seen as a cornerstone of democracy. This is particularly true for free political debate and the freedom of political expression to which the Court attaches “a particular importance”.¹ The Court has emphasised in this context that there is little scope under Article 10 § 2 of the Convention for restrictions on political expression.² It explained that allowing broad restrictions on political speech in individual cases would undoubtedly affect respect for the freedom of expression in general in the State concerned.³

3. This, however, does not mean that the freedom of political expression is absolute in nature. It may be subject to certain “restrictions” or “penalties”, but it is for the Court to give a final ruling on the compatibility of such measures with the freedom of expression enshrined in the Convention.⁴

4. In this connection, it should be noted that, according to the Court’s case-law, whether an expression or speech is “political” has to be determined both with regard to its content and in the kind of terms employed.⁵ Thus, expressions reflecting controversial opinions pertaining to

¹. [Féret v. Belgium](#), no. 15615/07, § 63, 16 July 2009.

². See, for instance, [Perinçek v. Switzerland](#) [GC], no. 27510/08, § 197, ECHR 2015 (extracts), with further references.

³. [Feldek v. Slovakia](#), no. 29032/95, § 83, ECHR 2001-VIII.

⁴. See, for instance, [Incal v. Turkey](#), 9 June 1998, § 53, *Reports of Judgments and Decisions* 1998-IV.

⁵. [Ceylan v. Turkey](#) [GC], no. 23556/94, § 33, ECHR 1999-IV; [TV Vest AS and Rogaland Pensjonistparti v. Norway](#), no. 21132/05, § 64, ECHR 2008 (extracts).

modern society in general and also lying at the heart of various political debates could be considered as “political”.⁶

5. This may be, for instance, a television advertisement for the protection of animals,⁷ the display of symbols associated with a political movement or entity expressing identification with ideas or representing them,⁸ a parliamentary debate,⁹ or a lecture on constitutional issues which inevitably have political implications.¹⁰ On the other hand, if a particular expression is mainly aimed at drawing people to the cause of a civil society organisation and not to address matters of political debate, such expression would not be considered political.¹¹

6. The Court has accepted that different forms and modalities of “expression” of political opinions and positions could fall under Article 10 of the Convention. Indeed, the protection under Article 10 extends not only to the substance of the ideas and information expressed but also to the form in which they are conveyed.¹²

7. The “expression” of political opinions and positions includes, for instance, the publication of a political programme on the Internet site managed by the applicant,¹³ or paid political advertising in the media,¹⁴ as well as posting of artistic and political content on the Internet.¹⁵ It also concerns instances such as the display of symbols in order to express a political position,¹⁶ or distribution of leaflets expressing the political position of a civil society organisation,¹⁷ as well as the distribution of a newspaper to military personnel.¹⁸

8. It should also be noted that Article 10 guarantees freedom of expression to “everyone”. With regard to the responsibility of those who provide a medium for the expression of political opinion and position, the Court stressed the following:

⁶ *VgT Verein gegen Tierfabriken v. Switzerland*, no. 24699/94, § 57, ECHR 2001-VI.

⁷ *Ibid*; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, ECHR 2013 (extracts).

⁸ *Fáber v. Hungary*, no. 40721/08, § 36, 24 July 2012.

⁹ *Karácsony and Others v. Hungary* [GC], nos. 42461/13 and 44357/13, § 137, 17 May 2016; see also *Jerusalem v. Austria*, no. 26958/95, § 40, ECHR 2001-II.

¹⁰ *Wille v. Lichtenstein* [GC], no. 28396/95, § 67, ECHR 1999 VII.

¹¹ *Mouvement raëlien suisse v. Switzerland* [GC], no. 16354/06, § 62, ECHR 2012 (extracts).

¹² *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298.

¹³ *Féret*, cited above, §§ 66-71.

¹⁴ *VgT Verein gegen Tierfabriken; TV Vest AS and Rogaland Pensjonistparti; Animal Defenders International*, all cited above.

¹⁵ *Mariya Alekhina and Others v. Russia*, no. 38004/12, § 251, 17 July 2018 (not final).

¹⁶ *Fáber*, cited above.

¹⁷ *Bowman v. the United Kingdom*, 19 February 1998, § 38, Reports of Judgments and Decisions 1998 I; *Brosa v. Germany*, no. 5709/09, § 35, 17 April 2014.

¹⁸ *Vereinigung demokratischer Soldaten Österreichs and Gubi v. Austria*, 19 December 1994, § 27, Series A no. 302.

“No distinction is made in [Article 10] according to the nature of the aim pursued or the role played by natural or legal persons in the exercise of that freedom (see, *mutatis mutandis*, the *Casado Coca v. Spain* judgment of 24 February 1994, Series A no. 285-A, pp. 16-17, § 35). It applies not only to the content of information but also to the means of dissemination, since any restriction imposed on the means necessarily interferes with the right to receive and impart information (see, *mutatis mutandis*, the *Autronic AG v. Switzerland* judgment of 22 May 1990, Series A no. 178, p. 23, § 47). Admittedly, publishers do not necessarily associate themselves with the opinions expressed in the works they publish. However, by providing authors with a medium they participate in the exercise of the freedom of expression, just as they are vicariously subject to the “duties and responsibilities” which authors take on when they disseminate their opinions to the public (see, *mutatis mutandis*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 63, ECHR 1999-IV; see also paragraph 31 above).”¹⁹

9. Against this general background, the research report will first address the relevant principles related to the expression and advertising of political positions through media, including Internet platforms, in general and then more specifically, during elections and referendums. It will next look into the legitimate aims for a restriction of the expression and advertising of political positions that have been found to be relevant in this context.

10. The report will be limited to the expression and advertising of *political* positions through *media*, including Internet platforms and, where appropriate, other similar means of expression such as literary work. Moreover, the report will not deal with the balancing of Articles 8 (reputation) and 10 rights, which often arises as an issue in the context of political expression. The cases cited in the report are representative and not necessarily exhaustive.

B. Expression and advertising of political positions through the media in general

(1) General considerations

11. In the Court’s early jurisprudence, the question of expression and advertising of political positions through media was usually determined on the basis of the general case-law on freedom of polemical and controversial expression through media. In particular, the Court required “imperative necessities” to justify an interference with that freedom of expression since, as the Court stressed, “exceptions to the freedom of expression must be interpreted narrowly.”²⁰ Moreover, the Court often referred to the general case-law on the heightened level of protection of the political expression under Article 10 of the Convention.²¹

¹⁹. [Öztürk v. Turkey](#) [GC], no. 22479/93, § 49, ECHR 1999-VI.

²⁰. *Ibid.*, § 37.

²¹. See, for instance, [Ayşe Öztürk v. Turkey](#), no. 24914/94, § 67(iv), 15 October 2002.

12. In each case, when determining whether the Article 10 rights have been complied with, the Court takes account of the case as a whole, including the very nature of the speech in question and the general context in which it was made and/or broadcast. The nature and severity of the penalties imposed are also factors to be taken into account when assessing the proportionality of the interference. However, if the interference with the freedom of expression is not based on sufficient reasons for the purposes of Article 10, it may be unnecessary to look into the proportionality of the sanction itself.²²

13. Given the importance attached to the nature of the speech in question and the general context in which it was made and/or broadcast, it is particularly valuable to note several examples from the Court's case-law demonstrating its approach on the matter.

14. In *Vereinigung demokratischer Soldaten Österreichs and Gubi* (cited above, § 36) the Court took into account the fact that the author of a polemical political expression through the written media (criticism of certain actions taken within the military) sought its distribution in the military context. However, in view of the very nature of the publication at issue, which had a polemical tenor but did not overstep the bounds of what permissible in the context of a mere discussion of ideas, the Court considered the ban on its distribution within the army disproportionate and thus in breach of Article 10 of the Convention.

15. In *Zana v. Turkey*, when assessing whether the applicant's statement published in the national daily newspaper purportedly supporting the PKK cause remained within the permissible scope of acceptable controversial political expression, the Court considered it important "to analyse the content of the applicant's remarks in the light of the situation prevailing in south-east Turkey at the time".²³ Thus, relying on the fact that the expression, although on the face of it very ambiguous, was likely to exacerbate an already explosive situation in that region, the Court found no violation of Article 10 of the Convention. However, when there was no such a risk of incitement to violence, the Court was not ready to accept that the interference with the expression of polemical opinions related to the PKK matters was compatible with the requirements of Article 10.²⁴

16. *Arslan v. Turkey* concerned the expression and promotion of a controversial political position through a literary work. The Court considered that its intended publication by means of a literary work, rather than through the mass media, limited the potential impact of the impugned

²². See, for instance, *Gündüz v. Turkey*, no. 35071/97, §§ 42 and 52, ECHR 2003-XI.

²³. *Zana v. Turkey*, 25 November 1997, § 56, *Reports of Judgments and Decisions* 1997-VII.

²⁴. See, for instance, *Şener v. Turkey*, no. 26680/95, 18 July 2000; *Seher Karataş v. Turkey*, no. 33179/96, 9 July 2002.

expression on the competing interests to a substantial degree.²⁵ However, in that case, relying notably on the severity of the sentence imposed (imprisonment), the Court found a violation of Article 10 of the Convention.²⁶ This therefore demonstrates that the severity of the sanction, although secondary to the very nature of the speech in question and the general context in which it was made, forms part of the Court's assessment of a case as a whole.

17. Further, in the case of *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey (no. 1)*²⁷ the Court dealt with the question of the compatibility of an interruption of a radio broadcast due to its polemical political expression with the Article 10 guarantees. The Court stressed the particular importance of radio diffusion for the expression of opinions of public relevance. It also noted that the diffused polemical information had already been made public and that the radio presentations had always made reference to the source of information. Lastly, the Court considered that the published information had not incited to violence or hatred and that, in the circumstances, the general ban on broadcasting was a disproportionate sanction. It therefore found a breach of Article 10 of the Convention.

18. Similar considerations led the Court to find a violation of Article 10 in the subsequent case brought by the same applicant concerning the publication of a controversial song *via* its radio channels.²⁸

19. On the other hand, in the case of *Leroy v. France*²⁹ the Court did not consider that a fine imposed for the condoning of terrorism through a political expression in the form of satirical illustration in a newspaper had been excessive from the perspective of Article 10 of the Convention. It thus follows that although controversial polemical expression is a generally acceptable form of political expression, it should not overstep certain limits, notably when it impinges on the level of protection afforded to other competing considerations.

(2) *The landmark case-law on the expression and advertising of political positions through media*

20. On the issue of expression and advertising of political positions through media in general, two landmark cases are particularly instructive:

²⁵. [Arslan v. Turkey](#) [GC], no. 23462/94, § 48, 8 July 1999; see also *Öztürk v. Turkey*, cited above.

²⁶. See also [E.K. v. Turkey](#), no. 28496/95, §§ 83-90, 7 February 2002; [Yalçın Küçük v. Turkey](#), no. 28493/95, 5 December 2002.

²⁷. [Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey \(no. 1\)](#), nos. 64178/00 and 4 others, 30 March 2006.

²⁸. [Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. v. Turkey \(no. 2\)](#), no. 11369/03, 4 December 2007.

²⁹. [Leroy v. France](#), no. 36109/03, 2 October 2008.

VgT Verein gegen Tierfabriken v. Switzerland,³⁰ and *Animal Defenders International v. the United Kingdom* (both cited above).

21. The case of *VgT Verein gegen Tierfabriken v. Switzerland* concerned a refusal to broadcast on the national television a commercial for the applicant civil society organisation in which it wanted to show the inadequate conditions for the rearing of animals and raise awareness concerning the meat consumption. The broadcast of the commercial was refused on the grounds that it had a “clear political character” and the domestic law prohibited political advertising.

22. The Court accepted that the refusal to broadcast the applicant association’s commercial had amounted to “interference by public authority” in the exercise of the rights guaranteed by Article 10. With regard to the parties’ disagreement over the “political” nature of the commercial, and thus lawfulness of the interference, the Court noted that the commercial indubitably fell outside the regular commercial context inciting the public to purchase a particular product. With its concern for the protection of animals, expressed partly in dramatic pictures, and its exhortation to reduce meat consumption, the commercial rather reflected controversial opinions pertaining to modern society in general and also lying at the heart of various political debates. The Court thus accepted that the commercial was “political” in nature and that the impugned interference had been lawful. It also considered that the interference pursued the legitimate aim of the “protection of the ... rights of others” within the meaning of Article 10 § 2 of the Convention.

23. As to the proportionality of the interference, the Court first noted that due to the political nature of the commercial, the extent of the margin of appreciation of the domestic authorities was reduced. It stressed that in some instances powerful financial groups could obtain competitive advantages in the area of commercial advertising and might thereby exercise pressure on, and eventually curtail the freedom of, the radio and television stations broadcasting the commercials. In the Court’s view, such situations undermine the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention.

24. However, in the case at issue, the Court criticised the fact that the prohibition of political advertising applied only to radio and television broadcasts, and not to other media such as the press. In the Court’s opinion, while the domestic authorities might have had valid reasons for this differential treatment, a prohibition of political advertising which applied only to certain media, and not to others, did not appear to be of a particularly pressing nature.

³⁰. See also [Verein gegen Tierfabriken Schweiz \(VgT\) v. Switzerland \(no. 2\)](#) [GC], no. 32772/02, ECHR 2009.

25. In the context of the proportionality analysis, the Court also took into account the fact that the applicant association itself was not a powerful financial group which, with its proposed commercial, aimed at endangering the independence of the broadcaster, at unduly influencing public opinion or at endangering equality of opportunity among the different forces of society. The Court noted that the applicant association had only intended to participate in an ongoing general debate on animal protection and the rearing of animals. Moreover, in the Court's view, the domestic authorities had not identified the disturbing nature of any particular sequence, or of any particular words, of the commercial as a ground for refusing to broadcast it. It therefore mattered little that the pictures and words employed in the commercial at issue might have appeared provocative or even disagreeable.

26. The Court also refused the Government's suggestion that other means of broadcast were open to the applicant organisation. For the Court, it was legitimate for the applicant organisation to seek to broadcast its commercial on the national television. In this respect, the Court also noted that the private regional television channels and foreign television stations could not be viewed throughout Switzerland.

27. In view of all the above consideration, the Court found a breach of Article 10 of the Convention. In the subsequent follow-up case, *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland (no. 2)* (cited above), in which the applicant organisation complained of a continued prohibition on broadcasting the television commercial in issue, the Grand Chamber found a violation of the domestic authorities' positive obligations under Article 10 to take the necessary measures to allow the television commercial in issue to be broadcast following the Court's finding of a violation of Article 10 in the first case.

28. The case of *Animal Defenders International v. the United Kingdom* was brought by the applicant NGO which campaigns against the use of animals in commerce, science and leisure. The applicant's complaint under Article 10 concerned a refusal by the relevant domestic authority to allow the broadcast of its paid advertisement directed against the keeping and exhibition of primates and their use in television advertising. The refusal was based on the finding that the applicant's objectives were "wholly or mainly of a political nature" and thus the broadcast of the advertisement was subject to a statutory prohibition of paid political advertising on radio and television.

29. The parties in *Animal Defenders International* agreed that the prohibition had amounted to an interference with the applicant's rights under Article 10 and that the interference was "prescribed by law". The Court also found that the legitimate aim pursued by the interference corresponded to the legitimate aim of protecting the "rights of others" under Article 10 § 2 of the Convention. The dispute between the parties concerned whether the prohibition was disproportionate because it prohibited paid

“political” advertising by social advocacy groups outside of electoral periods.

30. In its assessment of proportionality of the impugned prohibition, the Court first referred to the principles concerning pluralism in the audio-visual media, which read as follows:³¹

“... As it has often noted, there can be no democracy without pluralism. ... It is of the essence of democracy to allow diverse political programmes to be proposed and debated ... provided that they do not harm democracy itself ...

The audiovisual media, such as radio and television, have a particularly important role in this respect. ...

A situation whereby a powerful economic or political group in society is permitted to obtain a position of dominance over the audiovisual media and thereby exercise pressure on broadcasters and eventually curtail their editorial freedom undermines the fundamental role of freedom of expression in a democratic society as enshrined in Article 10 of the Convention, in particular where it serves to impart information and ideas of general interest ...

The Court observes that in such a sensitive sector as the audiovisual media, in addition to its negative duty of non-interference, the State has a positive obligation to put in place an appropriate legislative and administrative framework to guarantee effective pluralism ...”

31. As to the breadth of the margin of appreciation, the Court referred to its case-law related to the limited scope for restrictions in debates on questions of public interest. Moreover, in view of the applicant’s specific position of an NGO raising an issue of a general concern, namely the protection of animals, the Court considered that it performed a public watchdog role of similar importance to that of the press. In these circumstances, the Court found that the margin of appreciation to be accorded to the State was, in principle, a narrow one.

32. Given the fact that the case in essence concerned a blanket ban on paid political advertising, the Court referred to its case-law related to the general measures. In this connection, the Court stressed that a State can, consistently with the Convention, adopt general measures which apply to pre-defined situations regardless of the individual facts of each case even if this might result in individual hard cases. As to the proportionality of a general measure, the Court stressed that several factors were important: (1) the quality of the parliamentary and judicial review of the necessity of the measure; (2) the risk of abuse if a general measure were to be relaxed; (3) whether the general measure was a more feasible means of achieving the legitimate aim than a provision allowing a case-by-case examination, when the latter would give rise to a risk of significant uncertainty, of litigation, expense and delay, as well as of discrimination and arbitrariness. In sum,

³¹. See further [Centro Europa 7 S.R.L. and Di Stefano v. Italy](#) [GC], no. 38433/09, §§ 129-134, ECHR 2012.

the Court explained that the more convincing the general justifications for the general measure are, the less importance the Court will attach to its impact in the particular case.

33. On the facts of the case, the Court found that the impugned prohibition was based on an exceptional examination by parliamentary bodies of its cultural, political and legal aspects as part of the broader regulatory system governing broadcasted public interest expression in the domestic order. Moreover, it was a subject of a thorough and careful judicial review at the domestic level.

34. The Court also took into account the fact that the impugned prohibition was very narrow and specific as it concerned only the precise risk of distortion the State sought to avoid with the minimum impairment of the right of expression. It observed that the prohibition was confined to certain media (radio and television) which were considered to be the most influential and expensive media that constitute a cornerstone of the regulatory system at issue. The Court also noted that a range of alternative media were available to the applicant. In addition, the Court was satisfied that the impugned measure adequately addressed the risk of abuse, discrimination and arbitrariness, as well as uncertainty, litigation, expense and delay that could arise in case of a case-by-case distinction between advertisers and advertisements in the context of political expression. The Court also noted that there was no European consensus between Contracting States on how to regulate paid political advertising in broadcasting, which broadened the otherwise narrow margin of appreciation to be accorded as regards restrictions on public interest expression. Having regard to all these considerations, the Court found no violation of Article 10 of the Convention.

(3) Conclusion

35. The following conclusions can be drawn from the above summary of the Court's case-law on the issue of expression and advertising of political position through media channels.

Firstly, as it is borne out from the general case-law on the freedom of political expression through media, the very nature of the expression in question and the manner in which it was made/broadcast sets the grounds for the Court's examination of the case. Moreover, the Court looks into the applicant's individual circumstances and his or her specific position.

Secondly, in view of the fact that the speech in question concerns a political expression and as such a matter of public interest, the margin of appreciation afforded to the State is, in principle, a narrow one. However, an absence of a European consensus on the question of regulation restricting the freedom of political expression in question and the heightened

importance of the necessity for that regulation may broaden the normally narrow margin of appreciation.

Thirdly, the Court examines the scope of restriction on the expression and advertising of political position through media channels. In this respect, it examines the existence of alternative means of diffusion/broadcast of the relevant information.

Lastly, the Court looks into the effectiveness of the judicial and/or, if appropriate (in cases of general ban), parliamentary review at the domestic level of the impugned restriction on the expression and advertising of political position through media channels.

C. Expression and advertising of political positions through the Internet platforms

(1) Freedom of expression on the Internet³²

36. The Court has recognised in its case-law under Article 10 that due to its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general.³³ The Court has also observed that an increasing amount of services and information is available only on the Internet.³⁴ Moreover, the evidence shows that Internet platforms are capable of being used and playing an important role in electoral processes.

37. The following forms of expression on the Internet have been found in the Court's case-law as falling under Article 10 of the Convention:

- Internet archives of importance for the operation of the Internet site at issue;³⁵
- publication of photographs for commercial purposes or free use;³⁶
- publication of political statements in various forms, such as party programmes and messages,³⁷ posters,³⁸ or artistic material with a political message;³⁹

³². For further details see the research report [Internet: case-law of the European Court of Human Rights](#).

³³. [Times Newspapers Ltd v. the United Kingdom \(nos. 1 and 2\)](#), nos. 3002/03 and 23676/03, § 27, ECHR 2009.

³⁴. [Kalda v. Estonia](#), no. 17429/10, § 52, 19 January 2016; [Jankovskis v. Lithuania](#), no. 21575/08, § 49, 17 January 2017.

³⁵. [Times Newspapers Ltd](#), cited above §§ 27 and 45; [M.L. and W.W. v. Germany](#), nos. 60798/10 and 65599/10, § 90, 28 June 2018.

³⁶. [Ashby Donald and Others v. France](#), no. 36769/08, § 34, 10 January 2013.

³⁷. [Féret](#), cited above, §§ 66-71; [Willem v. France](#), no. 10883/05, §§ 36-38, 16 July 2009.

³⁸. [PETA Deutschland v. Germany](#), no. 43481/09, § 42, 8 November 2012.

³⁹. [Mariya Alekhina and Others](#), cited above, § 251.

- managing and use, including for commercial purposes, of Internet platforms (new media).⁴⁰

38. According to the Court's case-law, any measure bound to have an influence on the accessibility of the Internet would engage the responsibility of the State under Article 10. This is true even if the measure affecting the accessibility of the Internet would not constitute a wholesale ban but only a restriction on Internet access to a particular website. In this connection, in the *Ahmet Yıldırım v. Turkey* case (cited above) the Court explained as follows:

“54. ... Nevertheless, the fact that the effects of the restriction in issue were limited does not diminish its significance, especially since the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest.”

39. However, alongside the undisputable benefits of the Internet, certain dangers may also arise. Reprehensible and unacceptable expression can circulate worldwide, in a matter of seconds, and sometimes remain persistently available online. Thus, in some instances, the important benefits of the Internet will have to be balanced with other considerations commensurate with the particular type of expression online.⁴¹

40. When performing that balancing, the domestic authorities, notably the courts, have a procedural duty to take into account the specific nature of the Internet and in particular the fact that its reach is not geographically limited as it is the case with some other means of expression.⁴² In some instances, however, the generally worldwide circulation of information on the Internet may be limited. This will particularly be the case with statements made on a secure Internet forum which will therefore have an impact limited in range.⁴³

41. It should also be noted that in the case of *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* (cited above, § 61)⁴⁴ the Court stressed that the first applicant, as a self-regulatory body

⁴⁰. *Ahmet Yıldırım v. Turkey*, no. 3111/10, § 49, ECHR 2012; *Delfi AS v. Estonia* [GC], no. 64569/09, §§ 115-116, ECHR 2015; *Cengiz and Others v. Turkey*, nos. 48226/10 and 14027/11, §§ 51-52, ECHR 2015 (extracts); *Magyar Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary*, no. 22947/13, 2 February 2016. See also, from the perspective of Article 8, *Phil v. Sweden* (dec.), no. 74742/14, 7 February 2017.

⁴¹. *Delfi AS*, cited above, § 110.

⁴². *Annen v. Germany*, no. 3690/10, § 72, 26 November 2015.

⁴³. *Wrona v. Poland* [Committee] (dec.), no. 68561/13, § 23, 12 December 2017.

⁴⁴. The case of *Tartalomszolgáltatók Egyesülete and Index.hu Zrt v. Hungary* raised a similar issue as the *Delfi AS* case (both cited above), namely the responsibility of Internet portal providers for the comments posted by third parties. In the *Delfi AS* case (§ 162), when finding no violation of Article 10, the Court attached particular importance to the

of internet service providers, and the second applicant, as a large news portal, by allowing for a possibility of posting comments on the portal provided forum for the exercise of expression rights, enabling the public to impart information and ideas. Thus, the Court considered that the applicants' conduct must be assessed in the light of the principles applicable to the press.⁴⁵

42. Lastly, it should be noted that in its case-law the Court has recognised that anonymity is an important feature of the Internet. In the *Delfi AS* case (cited above) the Court explained that it was mindful of the interest of Internet users in not disclosing their identity. In this connection, it reasoned as follows:

“147. ... Anonymity has long been a means of avoiding reprisals or unwanted attention. As such, it is capable of promoting the free flow of ideas and information in an important manner, including, notably, on the Internet. At the same time, the Court does not lose sight of the ease, scope and speed of the dissemination of information on the Internet, and the persistence of the information once disclosed, which may considerably aggravate the effects of unlawful speech on the Internet compared to traditional media. It also refers in this connection to a recent judgment of the Court of Justice of the European Union in the case of *Google Spain and Google* [Case C-131/12], in which that court, albeit in a different context, dealt with the problem of the availability on the Internet of information seriously interfering with a person's private life over an extended period of time, and found that the individual's fundamental rights, as a rule, overrode the economic interests of the search engine operator and the interests of other Internet users ...”

43. In this connection, it is important to note that anonymity is a complex concept in the context of the exchange of information on the Internet. The Court has observed in the *Delfi AS* case that there may be different degrees of anonymity on the Internet. An Internet user may be anonymous to the wider public while being identifiable by a service provider through an account or contact data that may be either unverified or subject to some kind of verification – ranging from limited verification (for example, through activation of an account via an e-mail address or a social

fact that the posted comments amounted to hate speech and speech inciting violence, that there was no possibility to remove without delay after publication the comments made and that there was no realistic prospect of the authors of such comments being held liable. On the other hand, in *Tartalomszolgáltatók Egyesülete and Index.hu Zrt*, the Court found a violation of Article 10 stressing that the objective responsibility of Internet portal providers for the comments made by third parties, as it operated in the relevant domestic law, was not in conformity with Article 10. The Court also noted that there was no hate speech or speech inciting to violence and that the mechanism for the removal of inappropriate content had been put in place.

⁴⁵. On the principles related to the press and the Internet see, for instance, [Stoll v. Switzerland](#) [GC], no. 69698/01, § 104, CEDH 2007-V; *Times Newspaper Ltd*, cited above, §§ 42-47; [Fatullayev v. Azerbaijan](#), no. 40984/07, §§ 94-95, 22 April 2010; *Delfi AS*, cited above, § 134; [Ólafsson v. Iceland](#), no. 58493/13, §§ 53-57, 16 March 2017.

network account) to secure authentication, be it by the use of national electronic identity cards or online banking authentication data allowing rather more secure identification of the user. A service provider may also allow an extensive degree of anonymity for its users, in which case the users are not required to identify themselves at all and they may only be traceable – to a limited extent – through the information retained by Internet access providers. The release of such information would usually require an injunction by the investigative or judicial authorities and would be subject to restrictive conditions. It may nevertheless be required in some cases in order to identify and prosecute perpetrators.

44. These different degrees of anonymity must be borne in mind since anonymity may be used for unlawful purposes. Thus, anonymity on the Internet, although an important value, cannot operate as an absolute protection from unlawful or harmful conduct. Indeed, it follows from the Court’s case-law that it must be balanced against other relevant rights and interests protected in a democratic society.⁴⁶

(2) *Internet as a means of expression and advertising of political positions*

45. The research of the Court’s case-law does not reveal that, as regards the heightened level of protection afforded to the political expression under Article 10, the expression and advertising of political positions through the Internet platforms is subject to standards essentially different from those developed in the above-cited general case-law on the matter.⁴⁷ This therefore corresponds to the principle of “what applies offline, also applies online” developed by the United Nations Human Rights Council in its seminal Resolution concerning human rights and the Internet.⁴⁸

46. However, in matters concerning the freedom of expression on the Internet, its special features must be taken into consideration. Thus, the Court has taken into account its capacity of diffusion of information. In the case of *Willem v. France* (cited above), the Court considered that a discriminatory – and therefore reprehensible – nature of a political message, first delivered orally and then published in a newspaper outlet, was exacerbated by its publication on the Internet.

⁴⁶. *Delfi AS*, cited above, § 148.

⁴⁷. See, for instance, *Renaud v. France*, no. 13290/07, 25 February 2010; *Tierbefreier e.V. v. Germany*, no. 45192/09, § 56, 16 January 2014, and *De Lesquen du Plessis-Casso v. France (no. 2)*, no. 34400/10, § 35, 30 January 2014. See also *Delfi AS* (cited above, § 113), where, in the context of the journalistic duties on the Internet, the Court held that the “duties and responsibilities” that are to be conferred on an Internet news portal for the purposes of Article 10 may differ to some degree from those of a traditional publisher, as regards third-party content.

⁴⁸. United Nations Human Rights Council, The promotion, protection and enjoyment of human rights on the Internet, [A/HRC/RES/20/8](#), 5 July 2012.

47. In this connection, it should be noted that the Court held that the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of other human rights and freedom is certainly higher than that posed by the press. The policies governing reproduction of material from the printed media and the Internet may therefore differ. The latter undeniably have to be adjusted according to the technology's specific features in order to secure the protection and promotion of the rights and freedoms concerned.⁴⁹

48. On the other hand, the Court has considered that the impact of the expression of information via Internet is much more limited than the impact which the traditional audio-visual media are capable to produce. In *Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland*,⁵⁰ concerning the limitation on a private radio and television broadcasting company to film inside a prison to prepare a television programme and interview one of the detainees, the Court addressed the issue of viable alternatives for the publication of the information that the applicant company wanted to convey. The Court reasoned as follows:

“64. ... [T]he fact that a telephone interview with A. was included in the applicant company's ‘Schweiz aktuell’ programme on 19 August 2004, available on its Internet site, is not in itself relevant as it used different techniques and means, had a less direct impact on viewers and was broadcast in a different programme. Consequently, the airing of that interview by no means remedied the interference caused by the refusal of authorisation to film inside the prison, which is the only subject in issue here.”

49. In the particular context of political expression, this principle was elaborated in the above-cited *Animal Defenders International* case. The Court explained the relevance of newer media, such as the Internet, in comparison to the traditional audio-visual media concerning the expression and advertising of political position in the following manner:

“119. In the first place, the applicant argued, referring to paragraph 77 of the *VgT* judgment, that limiting the prohibition to radio and television was illogical given the comparative potency of newer media such as the Internet. However, the Court considers coherent a distinction based on the particular influence of the broadcast media. In particular, the Court recognises the immediate and powerful effect of the broadcast media, an impact reinforced by the continuing function of radio and television as familiar sources of entertainment in the intimacy of the home (*Jersild v. Denmark*, § 31; *Murphy v. Ireland* [no. 44179/98, § 74, ECHR 2003-IX (extracts)]; *TV Vest*, at § 60; and *Centro Europa 7 S.R.L. and Di Stefano v. Italy*, § 132 ...). In addition, the choices inherent in the use of the Internet and social media mean that the information emerging therefrom does not have the same synchronicity or impact as broadcasted information. Notwithstanding therefore the significant development of the Internet and social media in recent years, there is no evidence of a sufficiently

⁴⁹. [Editorial Board of Pravoye Delo and Shtekel v. Ukraine](#), no. 33014/05, § 63, ECHR 2011 (extracts); [Cicad v. Switzerland](#), no. 17676/09, § 59, 7 June 2016.

⁵⁰. [Schweizerische Radio- und Fernsehgesellschaft SRG v. Switzerland](#), no. 34124/06, 21 June 2012.

serious shift in the respective influences of the new and of the broadcast media in the respondent State to undermine the need for special measures for the latter.

120. Secondly, the applicant contended that broadcasted advertising was no longer more expensive than other media and the Government contested this. The Court considers that it is sufficient to note, as did Ousley J in the High Court (paragraph 17 above), that broadcasted advertisements had an advantage of which advertisers and broadcasters were aware and for which advertisers would pay large sums of money, far beyond the reach of most NGOs who would wish to participate in the public debate.

...

124. Finally, the Court does not consider that the impact of the prohibition in the present case outweighs the above-described convincing justifications for the general measure (paragraph 109 above).

The Court notes, in this respect, the other media which remain open to the present applicant and it recalls that access to alternative media is key to the proportionality of a restriction on access to other potentially useful media (*Appleby and Others v. the United Kingdom*, no. 44306/98, § 48, ECHR 2003-VI; and *Mouvement raëlien suisse v. Switzerland*, cited above, §§ 73-75). In particular, it remains open to the applicant NGO to participate in radio or television discussion programmes of a political nature (ie. broadcasts other than paid advertisements). It can also advertise on radio and television on a non-political matter if it sets up a charitable arm to do so and it has not been demonstrated that the costs of this are prohibitive. Importantly, the applicant has full access for its advertisement to non-broadcasting media including the print media, the Internet (including social media) as well as to demonstrations, posters and flyers. Even if it has not been shown that the Internet, with its social media, is more influential than the broadcast media in the respondent State (paragraph 119 above), those new media remain powerful communication tools which can be of significant assistance to the applicant NGO in achieving its own objectives.”

50. With regard to the use of Internet platforms in political expression on the Internet, the Court’s findings in the case of *Cengiz and Others v. Turkey* (cited above) concerning the blocking of the YouTube platform are instructive. The Court stressed the following:

“51. ... YouTube, however, not only hosts artistic and musical works, but is also a very popular platform for political speeches and political and social activities. The files shared by YouTube contain information that could be of particular interest to anyone (see, *mutatis mutandis*, *Khurshid Mustafa and Tarzibachi v. Sweden*, no. 23883/06, § 44, 16 December 2008). Accordingly, the measure in issue blocked access to a website containing specific information of interest to the applicants that is not easily accessible by other means. The website also constitutes an important source of communication for the applicants.

“52. ...[T]he Court observes that YouTube is a video-hosting website on which users can upload, view and share videos and is undoubtedly an important means of exercising the freedom to receive and impart information and ideas. In particular, as the applicants rightly noted, political content ignored by the traditional media is often shared via YouTube, thus fostering the emergence of citizen journalism. From that perspective the Court accepts that YouTube is a unique platform on account of its

characteristics, its accessibility and above all its potential impact, and that no alternatives were available to the applicants.”

51. It follows from the above that the Court in its case-law takes into account the high capacity of diffusion of information on the Internet and recognises the special importance of Internet platforms as a means of diffusion of political expression. In this sense, the importance of the Internet is much higher than that of the press. However, the Court has not so far been ready to attribute the same importance to the Internet as to the traditional audio-visual media, the latter still considered to have more immediate and powerful impact on the diffusion of information to the general public.

D. Expression and advertising of political positions through the media/Internet platforms in the context of elections and referendums

(1) Introductory remarks concerning elections and referendums

52. It is borne out from the Court’s case-law that the freedom of expression and advertising of political positions in the context of political campaigning aimed at influencing the popular vote has to be viewed against other relevant considerations arising in this specific context.

53. In particular, in the context of elections, the freedom of expression under Article 10 has to be balanced against the relevant considerations and principles under Article 3 of Protocol No. 1 that aim at establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law.⁵¹

54. This interplay between the Article 10 and Article 3 of Protocol No. 1 rights was first defined in the case of *Mathieu-Mohin and Clerfayt v. Belgium*⁵² and then further elaborated in the *Bowman* case (cited above). The relevant principles in this context were recently extensively set out in the *Orlovskaya Iskra v. Russia* case,⁵³ where the Court stressed the following:

“110. The Court also reiterates that the rights guaranteed by Article 3 of Protocol No. 1 are crucial to establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law (see *Hirst v. the United Kingdom (no. 2)* [GC], no. 74025/01, § 58, ECHR 2005 IX). Free elections and freedom of expression, particularly freedom of political debate, together form the bedrock of any democratic system (see *Mathieu-Mohin and Clerfayt v. Belgium*, 2 March 1987, § 47,

⁵¹. For the general principles on Article 3 of Protocol No. 1 see, for instance, [Davydov and Others v. Russia](#), no. 75947/11, §§ 271-277, 30 May 2017.

⁵². [Mathieu-Mohin and Clerfayt v. Belgium](#), 2 March 1987, Series A no. 113.

⁵³. [Orlovskaya Iskra v. Russia](#), no. 42911/08, 21 February 2017.

Series A no. 113, and the *Lingens v. Austria* judgment of 8 July 1986, Series A no. 103, §§ 41–42). The two rights are inter-related and operate to reinforce each other: for example, freedom of expression is one of the “conditions” necessary to “ensure the free expression of the opinion of the people in the choice of the legislature” (see *Mathieu-Mohin and Clerfayt*, cited above, § 54). For this reason, it is particularly important in the period preceding an election that opinions and information of all kinds are permitted to circulate freely. In the context of election debates, the unhindered exercise of freedom of speech by candidates has particular significance (see *Kudeshkina v. Russia*, no. 29492/05, § 87, 26 February 2009).

111. In certain circumstances the rights under Article 10 of the Convention and Article 3 of Protocol No. 1 may come into conflict and it may be considered necessary, in the period preceding or during an election, to place certain restrictions, of a type which would not usually be acceptable, on freedom of expression, in order to secure the “free expression of the opinion of the people in the choice of the legislature”. In *Mathieu Mohin and Clerfayt*, cited above, §§ 52 and 54, the Court recognised that the Contracting States have a wide margin of appreciation with regard to their electoral systems. Referring to this, in *Bowman* the Court stated that, in striking the balance between the rights under Article 10 of the Convention and Article 3 of Protocol No. 1, the Contracting States have a margin of appreciation, as they do generally with regard to their electoral systems. More recently, in a case concerning advertisement of a political nature, the Court stated that the political nature of the advertisements that were prohibited called for strict scrutiny and a correspondingly circumscribed national margin of appreciation with regard to the need for the restrictions. The Court did not find it appropriate in that case to attach much weight to the various justifications for allowing States a wide margin of appreciation with reference to Article 3 of Protocol No. 1 to the Convention. Otherwise, the application of this provision would be left to the discretion of the Contracting States to a degree that might lead to results incompatible with the privileged position of free political speech under Article 10 of the Convention (see *TV Vest AS and Rogaland Pensjonistparti*, cited above, §§ 64 and 66).”

55. In the *TV Vest AS and Rogaland Pensjonistparti* case the Court held that Article 3 of Protocol No. 1 may not necessarily have the same significance for the expression and advertising of political opinions and positions out of the election campaign context as it does within it.⁵⁴ However, subsequently, in *Animal Defenders International v. the United Kingdom* (cited above), the Court explained that the risk to pluralist public debates, elections and the democratic process would evidently be more acute during an electoral period but may not be confined only to it. In particular, the Court reasoned as follows:

“111. In addition, the Court notes that the justification offered by the Government included the need to protect the electoral process as part of the democratic order and they relied on *Bowman v. the United Kingdom* (19 February 1998, § 41, Reports 1998 -I) in which the Court accepted that a statutory control of the public debate was necessary given the risk posed to the right to free elections. The applicant contested the relevance of that case as it concerned a restriction which only operated prior to and during elections. While the risk to pluralist public debates, elections and the

⁵⁴. *TV Vest AS and Rogaland Pensjonistparti*, cited above, § 66.

democratic process would evidently be more acute during an electoral period, the *Bowman* judgment does not suggest that that risk is confined to such periods since the democratic process is a continuing one to be nurtured at all times by a free and pluralist public debate. Indeed, in *Centro Europa 7 S.R.L. and Di Stefano v. Italy* (cited above, § 134), the Court did not suggest that the recognition of a positive obligation to intervene to guarantee effective pluralism in the audiovisual sector was limited to a particular period.

Accordingly, it is relevant to recall that there is a wealth of historical, cultural and political differences within Europe so that it is for each State to mould its own democratic vision (*Hirst v. the United Kingdom (no. 2)* [GC] [no. 74025/01, § 61, ECHR 2005-IX]; and *Scoppola v. Italy (no. 3)* [GC] [no. 126/05, § 83, 22 May 2012] ...). By reason of their direct and continuous contact with the vital forces of their countries, their societies and their needs, the legislative and judicial authorities are best placed to assess the particular difficulties in safeguarding the democratic order in their State (*Ždanoka v. Latvia* [GC] [no. 58278/00, § 134, ECHR 2006-IV]). The State must therefore be accorded some discretion as regards this country-specific and complex assessment which is of central relevance to the legislative choices at issue in the present case.”

56. With regard to referendums, it should be noted that according to the Court’s case-law referendums do not fall under the scope of Article 3 of Protocol No. 1.⁵⁵ Moreover, the Convention organs have repeatedly held that the right to vote in a referendum as such does not fall under Article 10 of the Convention.⁵⁶ Nor does Article 10 guarantee that that an opinion expressed, even by institutional means such as a referendum provided for in the Constitution, will produce the expected results.⁵⁷

57. However, the Court has held that voters’ rights related to referendums are rights of a political nature.⁵⁸ As the risk of abuse of referendums is always present,⁵⁹ there is a need for their proper regulation

⁵⁵. See, most recently, *Moohan and Gillon v. the United Kingdom* (dec.), nos. 22962/15 and 23345/15, 13 June 2017; *Cumhuriyet Halk Partisi v. Turkey* (dec.), no. 48818/17, 21 November 2017.

⁵⁶. *X v. the United Kingdom*, no. 7096/75, 3 October 1975; *Luksch v. Italy* (dec.), no. 27614/95, 21 May 1997; *Baskauskaitė v. Lithuania* (dec.), no. 41090/98, 21 October 1998; *Borghi v. Italy* (dec.), no. 54767/00, ECHR 2002-V (extracts), and *Moohan and Gillon*, cited above, § 48. On the other hand, the Commission has examined complaints of inadequate provision of information concerning the voting choices in a referendum under Article 10. However, such complaints were declared inadmissible on the grounds that there was no unfettered individual right to be informed by State authorities on issues of general interest in a specific way (see, for instance, *Bader v. Austria* (dec.), no. 26633/95, 15 May 1996; *Nurminen and Others v. Finland* (dec.), no. 27881/95, 26 February 1997, both concerning access of the respective countries to the EU).

⁵⁷. *Castelli and Others v. Italy* (dec.), nos. 35790/97 and 38438/97, 14 September 1998.

⁵⁸. *Kadiķis v. Latvia* (dec.), no. 47634/99, 29 June 2000.

⁵⁹. See further the EU study on Referendums on EU Matters (PE 571.402, January 2017). Available at: [http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU\(2017\)571402_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2017/571402/IPOL_STU(2017)571402_EN.pdf).

in many aspects including, in particular, referendum campaigning and media expressions.

58. It thus follows that although Article 3 of Protocol No. 1 is not directly applicable to the matters concerning referendums, the relevant considerations under that provision – related to the proper functioning of an effective and meaningful democracy governed by the rule of law – could be considered as being relevant also for referendums. Accordingly, in case of a competing interest related to the expression and advertising of political positions through the media/Internet, these considerations could accordingly be applied to the context of referendums.

(2) *Overview of the relevant case-law*

59. The research of the Court's case-law does not reveal that specific standards were established as regards the freedom of expression in the context of referendums. This overview will therefore primarily concern the freedom of expression in the context of elections. These considerations, for all practical purposes, could be applied to matters relating to referendums, which form part of an effective and meaningful democracy governed by the rule of law.

60. According to the Court's case-law, as a general rule, any opinions and information pertinent to elections, both local and national, which are disseminated during the electoral campaign, should be considered as forming part of a debate on questions of public interest.⁶⁰ As already stressed, it is the Court's established case-law that there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest and very strong reasons are required for justifying such restrictions.⁶¹ However, in the context of elections, the considerations related to Article 3 of Protocol No. 1 play an important role in determining the breath of the margin of appreciation concerning the expression and advertising of political positions under Article 10.

61. In the often-cited case of *Féret v. Belgium* (cited above), concerning the issue of political expression during electoral campaign, the Court examined the proportionality of the applicant's criminal conviction for, amongst other, publishing part of his party's electoral programme on its Internet site inciting racial discrimination and hatred against immigrants. In this particular case, although reiterating the narrow scope for the possibility of restriction of a political expression, in particular concerning the expression of a parliamentary opposition politician,⁶² the Court found no violation of Article 10 on the grounds that there had been a compelling social need to protect the rights of the immigrant community, as the Belgian

⁶⁰. See, for instance, *Kwiecień v. Poland*, no. 51744/99, § 51, 9 January 2007.

⁶¹. *Krasulya v. Russia*, no. 12365/03, § 38, 22 February 2007, with further references.

⁶². *Féret*, cited above, § 65; see also *Karácsony and Others*, cited above, § 137.

courts had done. Moreover, the Court held that the penalty imposed (ten-year period of ineligibility to stand for parliament and the mandatory community service) was compatible with the principle of restraint in criminal proceedings.

62. Political expression in the context of elections was the subject of the above-mentioned *TV Vest AS and Rogaland Pensjonistparti* case. The applicants were a television broadcasting company (the first applicant) and the regional branch of a small political party of pensioners (the second applicant). The case concerned the commercial broadcast of the political advertisements by the first applicant upon the request of the second applicant in the context of upcoming elections. As this was found to be in breach of the ban on political advertising on television, as provided under the relevant domestic law, the first applicant was fined by the relevant domestic authority.

63. In its assessment, the Court referred to the case-law according to which there is little scope under Article 10 § 2 of the Convention for restrictions on political speech or on debate on questions of public interest. With regard to the means of expression concerned, the Court stressed the more immediate and powerful effect of audio-visual media than the print media. Moreover, the Court referred to the principles related to the freedom of expression and the considerations under Article 3 of Protocol No. 1.

64. Accepting the parties' undisputed views that the impugned measure amounted to an interference with the applicants' right to freedom of expression, that it was lawful and that it pursued the legitimate aim of protecting "the rights of others", the Court went on to examine the proportionality of the interference.

65. In this connection, by way of introductory remarks, the Court noted that the prohibition was permanent and absolute and applied only to television, whilst political advertising through all other media was permitted. It also found that the content of the speech in question was indisputably of a political nature so the paid advertisement fell outside the commercial context, in which States traditionally enjoyed a wide margin of appreciation. There was also nothing to suggest that the advertisements included any content that might be liable to offend intimate personal convictions within the sphere of morals or religion.

66. As to the domestic authorities' margin of appreciation, the Court referred to the necessity of strict scrutiny in matters concerning political expression. With regard to the possible justifications for a wide margin of appreciation with reference to Article 3 of Protocol No. 1 and the fact that the impugned advertisement had occurred in the context of an election campaign, the Court noted that the ban of political advertising was absolute and permanent and did not apply specifically to elections. Thus, the Court did not accept these considerations as relevant. On the other hand, a comparative study available to the Court showed that there was no

consensus on the regulation of paid political advertising, which allowed for a somewhat wide margin of appreciation than that normally accorded with respect to restrictions on political speech in relation to Article 10 of the Convention.

67. Against the above considerations, the Court observed that there was nothing to suggest that the second applicant political party fell within the category of parties or groups that were the primary targets of the disputed prohibition, namely those which, because of their relative financial strength, might have obtained an unfair advantage over those with less resources by being able to spend more on television advertising. On the contrary, it fell within the category of those whom the legislation sought to protect. The Court noted that paid advertising on television became the only way for the applicant political party to put its message across to the public through that medium. It also stressed that there was nothing in the commercial that could have affected the quality of the political debate or, as noted above, otherwise offensive. Lastly, the Court rejected the Government's suggestion that there were other viable alternatives to the blanket ban on paid political advertising by referring to the immediate and powerful effect of the audio-visual media. In these circumstances, the Court found a violation of Article 10 of the Convention.

68. The Court dealt with the specific issue of "electoral campaigning" through the publications in printed media in the case of *Orlovskaya Iskra v. Russia* (cited above). The applicant in that case was a non-governmental organisation publishing newspapers associated with two political parties that were also listed as the applicant organisation's founders. In the context of a parliamentary election campaigning, the applicant organisation informed the relevant electoral authority that it would accept proposals by political parties for publication of their political material for a fee, which, however, did not apply to its founder. With one of its founders the applicant organisation signed an agreement for a special fee. Some of the publications in the applicant organisation's newspaper at the time of the campaign did mention the party's sponsorship, others did not. The applicant organisation was fined in the administrative offence proceedings for publishing two critical articles concerning an opposing politician which the relevant electoral authority found to be a political counter-campaigning that was not paid for from the official campaign fund of any party participating in the campaign. Before the Court, the applicant organisation complained of the classification of the two articles as a "political campaigning".

69. For its part, the Court considered that the fine imposed in the administrative offence proceedings amounted to an interference with the applicant organisation's freedom of expression. In this connection, the Court reiterated the principle that publishers, irrespective of whether they associate themselves with the content of publications, play a full part in the

exercise of freedom of expression by providing authors with a medium.⁶³ It also assumed that the interference was lawful and considered that it had a legitimate aim of ensuring “transparency of elections, including campaign finances, as well as at enforcing the voters’ right to impartial, truthful and balanced information via mass media outlets and the formation of their informed choices in an election”.

70. In its assessment of proportionality, relying on the principles applicable to the applicant organisation’s journalistic role and its right to impart information and ideas, the Court put the considerations under Article 3 of Protocol No. 1 into the balance with that right. On the basis of these principles, the Court considered that the domestic authorities’ margin of appreciation was restricted as the matter concerned the freedom to impart information and ideas related to a political debate in printed media. The Court was also not convinced that the impugned publication had been associated with the electoral campaigning of the applicant organisation’s founder. As to the domestic regulatory framework, the Court found that its distinction between campaigning and imparting information through media during an electoral campaign was vague and conferred a very wide discretion on the public authorities that were to interpret and apply it. The Court thus considered that such framework excessively and without compelling justification reduced the scope for expression by the press by restricting the number of participants and impinging upon the applicant organisation’s freedom to impart information and ideas during the election period and was not shown to achieve, in a proportionate manner, the aim of running fair elections. Accordingly, the Court found a violation of Article 10 of the Convention.

(3) Conclusion

71. It follows from the above discussion that the freedom of political expression during elections and *mutatis mutandis* referendums, must be balanced against other relevant considerations aimed at establishing and maintaining the functioning of an effective and meaningful democracy. In this context, the States normally have a wide margin of appreciation. Thus, considerations related to the functioning of an effective and meaningful democracy play an important role in determining the breath of the margin of appreciation afforded to the States concerning the expression and advertising of political positions under Article 10.

⁶³. See also *Öztürk v. Turkey*, cited above, § 49; *Editions Plon v. France*, no. 58148/00, § 22, ECHR 2004-IV.

E. Legitimate aims for a restricting freedom of expression and advertising of political opinions in the media/Internet platforms

(1) The concept of “protection of rights of others” as a legitimate aim for the restriction

72. The concept of the “protection of rights of others” is normally referred to as the legitimate aim for restrictions on freedom of political expression on the media/Internet platforms when balancing Article 8 (right to reputation) and Article 10 rights. In such instances, the general case-law on the balancing of the two rights is accordingly applicable.⁶⁴ Similarly, it applies to instances of political expression inciting to discrimination or violence or containing offending opinion against a particular individual or group.⁶⁵

73. However, the concept of the “protection of rights of others” is not only limited to these considerations. In the Court’s case-law, this concept has been given a broad meaning.

74. In the above-cited landmark case of *Animal Defenders International v. the United Kingdom* (§ 78) the Court considered that the impugned ban on political advertising, which aimed at the protection of the democratic process, corresponded to the legitimate aim of protecting the “rights of others” under Article 10 § 2 of the Convention.⁶⁶ Such a finding was based on an earlier ruling in the *VgT Verein gegen Tierfabriken v. Switzerland* case (cited above, §§ 61-62), where the Court stressed the following:

“61. The Court notes the Federal Council’s message to the Swiss Federal Parliament in which it was explained that the prohibition of political advertising in section 18(5) of the Swiss Radio and Television Act served to prevent financially powerful groups from obtaining a competitive political advantage. The Federal Court in its judgment of 20 August 1997 considered that the prohibition served, in addition, to ensure the independence of broadcasters, spare the political process from undue commercial influence, provide for a degree of equality of opportunity among the different forces of society and to support the press, which remained free to publish political advertisements.

62. The Court is, therefore, satisfied that the measure aimed at the “protection of the ... rights of others” within the meaning of Article 10 § 2 of the Convention.”

75. On the basis of the above case-law, in *Orlovskaya Iskra v. Russia* (cited above) the Court did not specify under which heading of Article 10

⁶⁴. See, for instance, *Delfi AS*, cited above, §§ 137-139.

⁶⁵. See, for instance, *Féret*, cited above, § 59; *Willem*, cited above, § 29; *Fatullayev*, cited above, 79; *PETA Deutschland*, cited above, § 44; *Tierbefreier e.V.*, cited above, § 49.

⁶⁶. The Court reached the same conclusion, without extensive elaboration, in *TV Vest AS and Rogaland Pensjonistparti*, cited above, § 29.

§ 2 would a restriction aimed at ensuring the proper functioning of the electoral processes fall. It merely noted the following:

“104. It follows from the constitutional rulings of 30 October 2003 and 16 June 2006 (see paragraphs 44 and 51 above) that the applicable provisions of the Electoral Rights Act of 2002 were aimed at transparency of elections, including campaign finances, as well as at enforcing the voters’ right to impartial, truthful and balanced information via mass media outlets and the formation of their informed choices in an election. The Court will take it into account as a legitimate aim.

105. The Court will next examine whether the restrictions in question were “necessary” in the pursuit of that aim.”

76. In *Ahmed and Others v. the United Kingdom*,⁶⁷ the necessity of protection of the democratic process was considered necessary in order to protect an effective political democracy and thus fell under the concept of the “protection of rights of others” under Article 10 § 2.

77. It follows from the Court’s case-law that the measures aimed at the protection of democratic processes would correspond to the legitimate aim of the “protection of rights of others” under Article 10 § 2 of the Convention.

78. In this connection, it is worth noting that the concepts of “free” and “secret” vote are widely accepted as the hallmarks of an effective democratic process related both to elections and referendums. The two concepts are interrelated as ensuring a “free” vote by voters often means ensuring that their vote is “secret”, which is capable of protecting them from any form of pressure, intimidation or vote buying.

79. It is also worth noting that in its *Guidelines on the holding of referendums* of the European Commission for Democracy through Law (Venice Commission) reads, in so far as relevant, as follows:

“4. Secret suffrage

a. For the voter, secrecy of voting is not only a right but also a duty, non-compliance with which must be punishable by disqualification of any ballot paper whose content is disclosed.

...

d. There should be sanctions against the violation of secret suffrage.”

80. Accordingly, a measure restricting the possibility of disclosing the manner in which a ballot paper had been cast in a referendum could be considered as a measure aimed at the protection of democratic processes that would correspond to the legitimate aim of the “protection of rights of others” under Article 10 § 2 of the Convention.

⁶⁷. [*Ahmed and Others v. the United Kingdom*](#), 2 September 1998, §§ 52-54, Reports of Judgments and Decisions 1998-VI.

(2) *Other legitimate aims*

81. Some other legitimate aims under Article 10 § 2 of the Convention, referred to by the Court in the context of political expression in the media/Internet context, include:

- prevention of disorder and crime and maintaining public safety: concerning the preparation of a leaflet that was found by the domestic authorities to amount to propaganda capable of inciting the people to resist the government and commit criminal offences,⁶⁸ the publication of a book capable of inciting to violence,⁶⁹ as well as the publication of a satirical illustration in a newspaper condoning terrorism;⁷⁰
- maintaining national security, preventing disorder and preserving territorial integrity: concerning the publication of an article capable of fuelling additional violence in an on-going conflict,⁷¹ as well as the prohibition of the broadcast of a radio programme;⁷²
- maintaining public order, promoting civil stability and preserving judicial independence and impartiality: concerning the restriction on the publication of an article on constitutional issues, where the Court assumed that these were valid legitimate aims and found a violation of Article 10 on the basis of a lack of proportionality of the measure;⁷³
- protection/preserving of order: concerning discriminatory speech on, amongst other, the Internet;⁷⁴ concerning the restriction of the distribution of a newspaper in the army;⁷⁵
- preventing disorder in prison (and therefore protecting the rights of others): concerning the filming and interviewing of prisoner inside prison;⁷⁶
- protection of morals (and the rights of others): concerning statements made during a television broadcast related to perceived extremist religious precepts and the undermining of democracy,⁷⁷ and the

⁶⁸. *Incal*, cited above, § 42.

⁶⁹. *Öztürk*, cited above, § 52.

⁷⁰. *Leroy*, cited above, § 36.

⁷¹. See, amongst many others, *Ceylan*, cited above, §§ 27-28.

⁷². *Özgür Radyo-Ses Radyo Televizyon Yayın Yapım Ve Tanıtım A.Ş. (No. 1)*, cited above, § 74.

⁷³. *Wille*, cited above, §§ 54-56.

⁷⁴. *Féret*, cited above, § 59. In this particular case, the legitimate aim of the protection of the rights of others was considered to be relevant.

⁷⁵. *Vereinigung demokratischer Soldaten Österreichs and Gubi*, cited above, § 32.

⁷⁶. *Schweizerische Radio- und Fernsehgesellschaft SRG*, cited above, § 49.

⁷⁷. *Gündüz*, cited above, § 26.

posting of video-recordings online labelled as extremist by the domestic authorities.⁷⁸

CONCLUSION

82. In general, the Court attaches particular importance to the freedom of political expression. This means that, as a rule, there is a narrow scope under Article 10 § 2 for restrictions on the various forms and modalities of political expression. However, it does not mean that freedom of political expression is absolute in nature. Just like other forms of expression, it may be subject to certain “restrictions” or “penalties”, but it is for the Court to give a final ruling on the compatibility of such measures with the Convention.

83. When determining whether the Article 10 rights have been complied with in the context of the freedom of political expression through the media in general, the Court takes account of the case as a whole, including, in particular, the very nature of the speech in question and the general context in which it was made and/or broadcast. Moreover, the Court looks into the applicant’s individual circumstances and his or her specific position. The Court also examines the existence of a European consensus on the question of regulation restricting the freedom of political expression in question and the level of importance of that regulation. An absence of a European consensus and a heightened importance of the particular type of regulation might broaden the normally narrow margin of appreciation afforded to the States in this context. Further, the Court examines the scope of the restriction and the existence of alternative means of diffusion/broadcast of the relevant information. The Court also looks into the effectiveness of the judicial and/or, if appropriate (in cases of a general ban), parliamentary review at the domestic level of the impugned restriction on the expression and advertising of political opinions through media channels.

84. With regard to the expression and advertising of political opinions through the Internet, it could be said that, as regards the heightened level of protection afforded to political expression under Article 10, the Court’s case-law in general follows the logic of “what applies offline, also applies online”. However, the Court takes account of the special features of the Internet when determining whether the Article 10 rights have been complied with. In particular, the Court takes into account the high capacity of diffusion of information on the Internet and recognises the special importance of the Internet platforms as a means of diffusion of political expression. In this sense, the importance of the Internet is much higher than

⁷⁸. *Mariya Alekhina and Others*, cited above, § 259.

that of the press. However, the Court has not so far been ready to attribute the same importance to the Internet as to the traditional audio-visual media, which were considered to have a more immediate and a more powerful impact on the diffusion of information to the general public.

85. The relevant considerations of the Court's case-law related to the establishing and maintaining the foundations of an effective and meaningful democracy governed by the rule of law in the election context can also apply to referendums. These considerations concern the fact that freedom of political expression during elections and – *mutatis mutandis* – during referendums must be balanced against other relevant considerations aimed at establishing and maintaining the functioning of an effective and meaningful democracy. In this context, the States normally have a wide margin of appreciation. Thus, these considerations (the functioning of an effective and meaningful democracy) play an important role in determining the breath of the margin of appreciation afforded to the States concerning the expression / advertising of political opinions under Article 10.

86. With regard to the legitimate aims for a restriction on freedom of expression / advertising of political opinions through the media/Internet platforms under Article 10 § 2, the Court usually relies on the concept of the “protection of rights of others” when the restriction in question aims at the protection of the democratic processes. Although this case-law developed with regard to elections, there is nothing in the case-law indicating that the same considerations could not accordingly apply to referendums. Other legitimate aims under Article 10 § 2 were found to be relevant in other specific contexts: in all such cases, there was a direct connection between one of the enumerated legitimate aims and the particular type of political expression capable of putting at risk, for instance, public order, safety or national security.