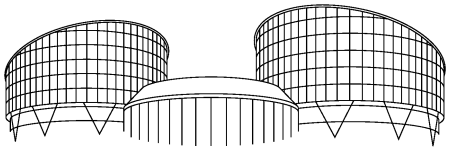

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FOURTH SECTION

# CASE OF VERLAGSGRUPPE NEWS GMBH v. AUSTRIA

*(Application no. 60818/10)*

JUDGMENT

STRASBOURG

25 October 2016

*This judgment will become final in the circumstances set out in Article 44 § 2 of the Convention. It may be subject to editorial revision.*

COUNCIL OF EUROPE
CONSEIL DE L'EUROPE

**In the case of Verlagsgruppe News GmbH v. Austria,**

The European Court of Human Rights (Fourth Section), sitting as a Chamber composed of:

András Sajó, *President,*
Nona Tsotsoria,
Paulo Pinto de Albuquerque,
Egidijus Kūris,
Iulia Motoc,
Gabriele Kucsko-Stadlmayer,
Marko Bošnjak, *judges,*

and Andrea Tamietti, *Deputy Section Registrar,*

Having deliberated in private on 4 October 2016,

Delivers the following judgment, which was adopted on that date:

# PROCEDURE

1. The case originated in an application (no. 60818/10) against the Republic of Austria lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by Verlagsgruppe News GmbH ("the applicant company"), on 14 October 2010.

2. The applicant company was represented by Mr H. Simon, a lawyer practising in Vienna. The Austrian Government ("the Government") were represented by their Agent, Ambassador H. Tichy, Head of the International Law Department at the Federal Ministry of Foreign Affairs.

3. The applicant company alleged a violation of its right to freedom of expression.

4. On 16 October 2013 the application was communicated to the Government.

# THE FACTS

## I. THE CIRCUMSTANCES OF THE CASE

### A. The background to the case

5. The applicant company is a limited liability company based in Vienna. It is the owner and publisher of the weekly news magazine *Profil*.

6. Until 2007 the *Land* of Carinthia (*Land Kärnten*) owned almost 50% of the shares of Hypo Alpe-Adria Bank. From 1996 until 2006 a man called

Mr. Rauscher was in charge of the treasury department of the bank. In that capacity he was responsible for authorising foreign currency transactions. He was answerable only to the bank's executive board, which consisted of three members. While Mr. Rauscher was head of the treasury department, his father, who had been a regional government member responsible for finance until 1996, was also on the bank's supervisory board. The father had that position until 2003.

7. At the beginning of 2006 the bank's executive board informed the Financial Market Authority (*Finanzmarktaufsicht*, "the FMA") that the bank had financial difficulties. On 31 March 2006 the executive board held a meeting with the executive board of the FMA and informed it that the bank had made a loss of several hundred million euros in 2004. Mr Kulterer, the chief executive of the bank, informed the FMA that the treasury department had gone over its internal transaction limit of 100 million euros (EUR) by EUR 47 million.

8. Between 1 and 6 April 2006 a number of daily newspapers published reports on the investigation and mentioned Mr Rauscher by name as responsible for the speculative transactions in question. Among those articles was one by newspaper *Der Standard* published on 4 April 2006 (see *Standard Verlags GmbH v. Austria (no. 3)*, no. 34702/07, §§ 6-17, 10 January 2012).

9. On 5 April 2006 the FMA filed criminal information (*Strafanzeige*) about offences committed in relation to the business of Hypo Alpe-Adria Bank against the three members of the executive board and Mr Rauscher, accusing them of embezzlement by investing money entrusted to the bank contrary to the instructions of the executive board. In substance, the FMA alleged that Mr Rauscher had authorised highly speculative transactions with foreign currency derivatives (swaps), disregarding instructions by the executive board.

## B. The article

10. In its issue of 10 April 2006, the applicant company published an article on the investigations into the heavy losses incurred by Hypo Alpe-Adria Bank. The front cover of *Profil* had the words: "*Kärntner Hypo-Affäre – Wie viel wusste Haider?*" ("Carinthian Hypo affair - How much did Haider know?").

11. The article, headlined "*Schwere Hypothek*" ("Heavy Mortgage"), ran to nine pages. It reported on the enormous loss of EUR 328 million incurred by Hypo Alpe-Adria Bank in 2004, the question of who was responsible for the damage and whether there were failings in the bank's risk management. It accused the bank's executive board of failing to give information to the supervisory board, the bank's accountants and the FMA, and of trying instead to hush up the losses by manipulating the balance sheets for 2004,

which meant that the full extent of the damage was only discovered by external accountants when examining the balance sheets for 2005. The accountants had then informed the FMA. Furthermore, the article featured an interview with Mr Kulterer, confronting him with those accusations. Mr Kulterer was quoted as accusing Mr Rauscher of having disregarded internal guidelines in his foreign currency transactions.

The relevant passages of the article read as follows:

> "By the time the warning system was triggered the disaster had long since run its course. On Wednesday 17 November 2004 the risk management and control software programme in the head offices of Hypo Alpe-Adria Bank in Klagenfurt showed, in all the relevant departments of the bank, exactly the kind of figures which bring managers of credit institutions out in a cold sweat: staggering losses on investment operations. In the treasury division, which manages the bank's liquidity and for that purpose trades, among other things, in interest rates and currencies, there was a shortfall of more than 100 million euros. 'At that point we immediately called a halt' said CEO Wolfgang Kulterer. However, as several similar operations were in progress simultaneously, it was impossible 'to close the floodgates at once'. When that was eventually done, the losses stood at 328 million euros, several times higher than the self-imposed threshold of 100 million.
>
> Treasury manager Christian Rauscher, who was responsible for authorising the transactions, was immediately told to clear his desk. (This son of the former SPÖ regional finance chief Max Rauscher was not available for comment). However, the consequences of the orgy of speculation, which lasted just two weeks, continue to preoccupy the bank's management. And they are not the only ones: in particular, the manner in which Kulterer and his colleagues dealt with the loss-making transactions has also come to the attention of the authorities in recent days. Last Wednesday the financial markets supervisory authority (the FMA) even saw fit to lodge a criminal complaint against the entire executive board. Rauscher is the object of a preliminary enquiries [*Vorerhebungen*] (file no. 3 St 79/06x) before the Klagenfurt Regional Court on suspicion of embezzlement. The executive board faces charges of misrepresenting the end-of-year accounts, in other words, falsifying the balance sheets.
>
> ...
>
> The transactions in question were all performed between 20 September and 5 October 2004. According to Hypo boss Kulterer, Rauscher – in breach of internal regulations – gambled, by means of so-called swaps, on the occurrence of a highly explosive combination of two trends on the financial markets: on the one hand a fall in interest rates and on the other a rise in the dollar and the yen against the euro. A few weeks later, on 17 November 2004, the perfect storm hit.
>
> ...
>
> Lack of controls. Rapid rates of growth motivate not just the boss, but also the employees – including the now ex-treasury manager Christian Rauscher. According to inside sources, Rauscher may have set the stakes so high precisely because he wanted to make his mark as a candidate for the vacant post of department manager. After all, high stakes mean correspondingly high profits if all goes according to plan. A marked surplus on his account would undoubtedly have boosted his chances of securing the post."

12. The article continued with an overview of the history of Hypo Alpe-Adria Bank, which had gone from being a regional bank to an international investment bank in the space of fifteen years. The article looked at previous business transactions which had resulted in risks and losses for the bank and the conduct of the executive board. Finally, the article examined the relationship between the bank's management and local politicians and asked how much Mr Haider, the then regional governor of Carinthia, knew of the losses, and when he had found out about them. It noted that the *Land* of Carinthia owned 49.4% of the bank and that funds from the bank had financed a number of political projects in the region, in particular Mr Haider's Future Fund (*Zukunftsfonds*), designed to fund infrastructure and other large-scale projects.

### C. Proceedings in the Austrian Courts

13. On 14 June 2006 Mr Rauscher brought proceedings against the applicant company for disclosing his identity in breach of section 7a of the Media Act (*Mediengesetz*). He submitted that he was not a public figure and that his position at the bank had not been such as to justify the disclosure of his name. He asserted that when authorising the transactions at issue he had acted in accordance with his instructions and with the approval of his superiors. The publication of his name had had negative repercussions on his professional advancement and had not been justified by any public interest.

14. On 19 August 2008 the Vienna Regional Criminal Court (*Landesgericht für Strafsachen*) dismissed Mr Rauscher's action. It found that the following facts had been established: the article had provided a comprehensive report on the losses of Hypo Alpe-Adria Bank. At the time the article had been published, the *Land* of Carinthia had owned 49.4% of the bank. The claimant's father had been a regional government member responsible for finances and had also been on the bank's supervisory board until April 2003. The claimant had been the head of the bank's treasury department since 1999. He had not been active in politics nor had he been in the public eye in connection with his professional activity. The Regional Court noted that the task of a bank's treasury department was to carry out liquidity and finance planning for the bank. Hypo Alpe-Adria's treasury department had been directly answerable to the executive board. The transactions which had subsequently led to such enormous losses had been carried out between the end of September and the beginning of October 2004 and the claimant had been the main person in charge. On 5 April 2006 the FMA had sent information to the Klagenfurt public prosecutor's office on three members of the executive board, who were suspected of manipulating the bank's balance sheets, and on the claimant who was suspected of embezzlement for carrying out unauthorised foreign currency

transactions. Following receipt of that information the public prosecutor's office had started preliminary enquiries. From 24 May 2006 preliminary investigations (*Voruntersuchung*) had been conducted by the Regional Court. Criminal proceedings against the claimant had been discontinued in 2008. After accusations against the claimant had been published in various media, his employment contract had been terminated. He had not been able to find a similar position in another bank.

15. The Regional Court noted that section 7a (1) of the Media Act required a weighing of the claimant's interest in the protection of his identity and the public interest in its disclosure. As a rule, adults who were suspected of having committed a crime were only protected against the disclosure of their identity if such disclosure disproportionately affected their professional advancement.

16. It observed that at the material time the *Land* of Carinthia owned almost 50% of Hypo Alpe-Adria Bank. That fact alone demonstrated an increased public interest as the taxpayer had a right to know who was responsible for the bank's losses. The applicant had been a senior employee at the bank, and had been suspected of embezzlement. Although the criminal proceedings had still been at an early stage, the Financial Market Authority, the competent controlling authority, had laid criminal information against the claimant. Moreover, the chief executive of the bank, Mr Kulterer, had levelled similar accusations against him. Having regard to the function of the press as a "public watchdog" and the circumstances of the case, the Regional Court found that the public interest of obtaining information outweighed the claimant's interest in not having his name disclosed.

17. On 20 April 2009 the Vienna Court of Appeal (*Oberlandesgericht*) granted an appeal by the claimant, declared that the disclosure of his identity in the article had violated his rights and ordered the applicant company to pay him EUR 3,000 euros in compensation and to reimburse his procedural costs.

18. The Court of Appeal found that the Regional Court's conclusion had been wrong after it had weighed the conflicting interests at issue. It shared the view of the Regional Court that there was a public interest in knowing who was responsible for Hypo Alpe-Adria Bank's losses due to the fact that the *Land* owned 50% of the bank. However, the article should have confined itself to mentioning the head of the bank's treasury department without disclosing his name. The public interest in reporting on the criminal offences at issue had not in itself been sufficient to justify disclosing the claimant's identity. The fact that the claimant had been answerable to the executive board, although he had an important position in the bank, and that the criminal proceedings against him had been at an early stage, meant that the claimant's interest in protecting his identity outweighed the public interest in the disclosure of his name.

19. The applicant company lodged an application under Article 363a of the Code of Criminal Procedure (*Strafprozeßordnung*) with the Supreme Court (*Oberster Gerichtshof*). It submitted in particular that the Vienna Court of Appeal's judgment had violated Article 10 of the Convention as there had been an overriding public interest in what it had reported, including the disclosure of Mr Rauscher's identity.

20. On 17 March 2010 the Supreme Court dismissed the applicant company's application. It examined in detail the reasons given by the Court of Appeal. Referring to the Court's findings in *"Wirtschafts-Trend" Zeitschriften-Verlagsgesellschaft mbH v. Austria (no. 2)* ((dec.), no. 62746/00, 14 December 2002), the Supreme Court found that the appeal court had correctly weighed the conflicting interests of the claimant under Article 8 on the one hand and of the applicant company under Article 10 on the other, especially because of the early stage of the criminal proceedings against the claimant.

21. The Supreme Court's judgment was served on the applicant company's counsel on 15 April 2010.

## II. RELEVANT DOMESTIC LAW

22. Section 7a of the Media Act, in so far as material, provides as follows:

> "(1) Where publication is made, through any medium, of a name, image or other particulars which are likely to lead to the disclosure to a larger not directly informed circle of people of the identity of a person who,
>
> 1. has been the victim of an offence punishable by the courts or
>
> 2. is suspected of having committed, or has been convicted of, a punishable offence, and where the legitimate interests of that person are thereby harmed and there is no predominant public interest in the publication of such details on account of the person's position in society, some other connection with public life, or for other reasons, the victim shall have a claim against the owner of the medium (publisher) for damages for the injury suffered. ....
>
> (2) The legitimate interests of the affected party shall in any event be harmed if the disclosure
>
> 1. in the case of subsection (1)1, is such as to give rise to an interference with the strictly private life of the victim or to his or her identity being disclosed,
>
> 2. in the case of subsection (1)2, relates to a juvenile or merely to a lesser indictable offence or may substantially prejudice the victim's advancement.
>
> ..."

Pursuant to section 41 of the Media Act the provisions of the Code of Criminal Procedure apply to proceedings under the Media Act, unless provided otherwise.

## III. RELEVANT COUNCIL OF EUROPE DOCUMENTS

23. On 10 July 2003 the Committee of Ministers of the Council of Europe adopted Recommendation Rec(2003)13 on the provision of information through the media in relation to criminal proceedings. The relevant principles of the Appendix to that Recommendation are quoted in *Standard Verlags GmbH* (cited above, § 19).

# THE LAW

## I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

24. The applicant company complained that the domestic courts' decisions had violated its right to freedom of expression. It relied on Article 10 of the Convention, which reads as follows:

> "1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...
>
> 2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

### A. Admissibility

25. The Court notes that the application is not manifestly ill-founded within the meaning of Article 35 § 3 (a) of the Convention. It further notes that it is not inadmissible on any other grounds. It must therefore be declared admissible.

### B. Merits

26. The Court notes at the outset that it is not in dispute that the Vienna Court of Appeal's judgment of 20 April 2009, which found a violation of the claimant's rights through the disclosure of his name by the applicant company and awarded damages to the claimant, constituted an interference with the applicant company's right to freedom of expression as guaranteed by Article 10 § 1 of the Convention.

27. As to the fulfilment of the conditions set out in Article 10 § 2, it was common ground between the parties that the interference was "prescribed

by law", namely section 7a of the Media Act and served a legitimate aim, namely the protection of the rights and reputation of others. The Court sees no reason to hold otherwise.

28. The parties' arguments concentrated on the question of whether the interference was "necessary in a democratic society", within the meaning of Article 10 § 2 of the Convention.

*1. The parties' submissions*

29. The applicant company stated that the article at issue had dealt with the question of how losses had been incurred by the bank and what internal measures had been taken as a consequence. It had described the bank's policy of rapid growth from 1992 onwards and the links between the bank and the *Land* of Carinthia. As in the article that was at issue in *Standard Verlags GmbH v. Austria (no. 3)* (no. 34702/07, 10 January 2012), its article had revealed political and personal links and had put the events surrounding the bank, partly owned by the *Land* of Carinthia (*"Landesbank"*) in their proper context. Furthermore, if it had been lawful to publish the position of the person responsible for the losses at the bank, as the Court of Appeal had found, the identity of the claimant would have become known anyway because of the key position he had occupied within the treasury department. Moreover, at the time of the publication of the article at issue the identity of the claimant in the domestic proceedings had already been revealed in other publications. Describing that key position had been the only way to explain to readers how one person had been able to take decisions which had resulted in such large losses. Moreover, the claimant's professional advancement had not been harmed because of the article as his employer had already known about the allegations. The disadvantages he had faced were due to the criminal proceedings and not the article. Furthermore, many other journals and newspapers had disclosed the claimant's name. His name therefore had been known publicly before the release of the article in question. In addition, it had not been correct to speak of the criminal proceedings as being at an early stage as the Financial Market Authority had already carried out an investigation which had led to the institution of criminal proceedings.

30. The Government, while acknowledging the essential role played by the press as a "public watchdog", referred to the Court's case-law that when assessing whether and to what extent any interference was necessary in a democratic society, the national authorities enjoyed a certain margin of appreciation. The national courts had applied standards that were in accordance with the principles enshrined in Article 10 and they had based their decisions on an acceptable assessment of the facts. In contrast with the article examined by the Court in *Standard Verlags GmbH* (cited above), the material at issue could not be qualified as a contribution to a current debate of public interest. It had essentially confined itself to describing the bank's

speculative losses and to related suspicions of criminal acts. The theme of the intertwining of politics and the speculative losses had only been discussed as a side issue. Even if it had been in the public interest to be informed about the events connected to the speculative losses, that had not justified disclosing the claimant's name. Moreover, the claimant had to be protected against a "trial by the media" as the report had been published at a very early stage in the criminal proceedings, namely only five days after the information gathered by the Financial Market Authority had arrived at the public prosecutor's office, which had been around six weeks prior to the institution of judicial investigation proceedings. The sanction imposed on the applicant company, compensation of EUR 3,000, was extremely moderate, taking into account the legal upper limit of EUR 20,000 and the magazine's high circulation.

*2. The Court's assessment*

**(a) General principles**

31. The general principles concerning the necessity of an interference with the freedom of expression have been summarised as follows (see, among other authorities, *Stoll v. Switzerland* [GC] no. 69698/01, § 101, ECHR 2007-V; *Animal Defenders International v. the United Kingdom* [GC], no. 48876/08, § 100, ECHR 2013 (extracts)):

> "(i) Freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfillment. Subject to paragraph 2 of Article 10, it is applicable not only to 'information' or 'ideas' that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no 'democratic society'. As set forth in Article 10, this freedom is subject to exceptions, which ... must, however, be construed strictly, and the need for any restrictions must be established convincingly ...
>
> (ii) The adjective 'necessary', within the meaning of Article 10 § 2, implies the existence of a 'pressing social need'. The Contracting States have a certain margin of appreciation in assessing whether such a need exists, but it goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by an independent court. The Court is therefore empowered to give the final ruling on whether a 'restriction' is reconcilable with freedom of expression as protected by Article 10.
>
> (iii) The Court's task, in exercising its supervisory jurisdiction, is not to take the place of the competent national authorities but rather to review under Article 10 the decisions they delivered pursuant to their power of appreciation. This does not mean that the supervision is limited to ascertaining whether the respondent State exercised its discretion reasonably, carefully and in good faith; what the Court has to do is to look at the interference complained of in the light of the case as a whole and determine whether it was 'proportionate to the legitimate aim pursued' and whether the reasons adduced by the national authorities to justify it are 'relevant and sufficient'.... In doing so, the Court has to satisfy itself that the national authorities

> applied standards which were in conformity with the principles embodied in Article 10 and, moreover, that they relied on an acceptable assessment of the relevant facts ....”

32. The Court further reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI; *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). In order for Article 8 to come into play, however, an attack on a person’s reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, no. 2807006, § 64, 9 April 2009, and *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012).

33. When examining whether there is a need for an interference with freedom of expression in a democratic society in the interests of the “protection of the reputation or rights of others”, the Court may be required to ascertain whether the domestic authorities have struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely on the one hand freedom of expression protected by Article 10, and on the other the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007; *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011; *Axel Springer AG*, cited above, § 84; and *Bédat v. Switzerland* [GC], no. 56925/08, §§ 50-53, ECHR 2016).

34. According to the Court’s well-established case-law, a number of criteria have been found to be relevant where the right of freedom of expression is being balanced against the right to respect for private life (see *Axel Springer AG*, cited above, § 89-95, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, 10 November 2015 and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, §§ 109-112, ECHR 2012). Those are:

(a) a contribution to a debate of general interest;

(b) how well known is the person concerned and what is the subject of the report?

(c) the prior conduct of the person concerned;

(d) the method of obtaining the information and its veracity;

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

(f) the severity of the sanction imposed.

Having regard to the particular circumstances of the case the Court would further have regard to the following elements, namely whether the the author of the publication could reasonably rely on an official report (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, § 72,

ECHR 1999-III) and whether certain information contained in the publication had already been made public or had ceased to be confidential (see *Vereniging Weekblad* Bluf! *v. the Netherlands*, 9 February 1995, § 44, Series A no. 306-A; The Sunday Times *v. the United Kingdom (no. 2)*, 26 November 1991, § 54, Series A no. 217; and Observer *and* Guardian *v. the United Kingdom*, 26 November 1991, § 68, Series A no. 216).

**(b) Application of the principals in the present case**

35. The Court observes at the outside that the facts of the present case are somewhat similar to the case of *Standard Verlags GmbH* (cited above), which also concerned a press article on Hypo Alpe-Adria's huge speculative losses. That article, which appeared in the newspaper *Der Standard*, dealt with the fact that politics and banking were intertwined and reported on the opening of an investigation by the public prosecutor. Mr. Rauscher brought proceedings against the owner of the newspaper for disclosure of his identity under section 7a of the Media Act. The Vienna Regional Court dismissed the claim after weighing the interests in question, but the Vienna Court of Appeal granted Mr. Rauscher's action as it found that the newspaper could have given enough information to the public without disclosing the claimant's name.

36. In its judgment of 10 January 2012 (see paragraph 8 above), the Court found a violation of the newspaper company's rights under Article 10. As regards the necessity test to be carried out under Article 10 § 2, it agreed with the assessment of the Austrian courts that the claimant was not a "public figure" and that he had not been in the public eye. However, the Court observed that the question of whether or not a person whose interests had been harmed by reporting in the media was a public figure was only one element among others to be taken into account. Another important factor, when it came to weighing conflicting interests under Article 10 and Article 8 was the contribution made by articles or photographs in the press to a debate of general interest. The Court observed that it was not in dispute that the article had reported on an issue of public interest as it had dealt with the issue of politics and banking being intertwined and on the opening of an investigation by the public prosecutor. Considering that the disclosure of a suspect's identity may be particularly problematic at the early stage of criminal proceedings, the Court observed that the article as a whole had focused mainly on the political dimension of the banking scandal and had not dealt with the conduct or contents of the criminal investigation as such. Instead, it had focused on the extent to which politics and banking were intertwined and on the political and economic responsibility for the bank's enormous losses, giving names. As names, persons and personal relationships were clearly of considerable importance in that sphere, the Court considered it difficult to see how the applicant company could have reported on those issues in a meaningful manner

without mentioning the names of all those involved, including Mr. Rauscher. Moreover, it dismissed the argument that the disclosure of Mr. Rauscher's identity had been detrimental to him, namely to his professional advancement, and affirmed the Regional Court's argument that his name and position at Hypo Alpe-Adria must have been well known in business circles before the publication of the article at issue.

37. The Court notes that the circumstances of the present case are similar to the one described above. Even so, the Court emphasises that an examination of the case may lead to different conclusions as certain of the criteria of assessment defined by the Court's case-law depend heavily on an assessment of the specific publication and the conduct of its author.

38. Concerning the subject of the report, the Court notes that the publication aimed at describing events which led to massive speculative losses in November 2004 at a bank which was nearly 50% owned by the *Land* of Carinthia, and the conduct of the executive board in that and previous management crises. The report also looked at the major losses from previous business transactions and at the possible intent of the executive board's members because the losses were not booked in the annual accounts for 2004 and notice was only given to the supervisory board in May 2005.

39. As regards the criterion of a "contribution to a debate of general interest", the Court reiterates that the margin of appreciation of States, granted when deciding upon the necessity of an interference under Article 10 § 2 of the Convention, is reduced where a debate on a matter of public interest is concerned (see *Editions Plon v. France*, no. 58148/00, § 44, ECHR 2004-IV). The definition of what constitutes a subject of general interest will depend on the circumstances of the case (*Axel Springer AG*, cited above, § 90).

40. The Court elaborated on the criterion of a debate on a matter of public interest in *Couderc and Hachette Filipacchi Associés* (cited above, § 103) and found:

> "... the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree ..., especially in that they affect the well-being of citizens or the life of the community .... This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue ..., or which involve a problem that the public would have an interest in being informed about. ..."

41. In the present case, the Court agrees with the Government that the article at issue did not deal with the issue of the links between politics and the events which led to the losses to the same extent as the one in *Standard Verlags GmbH* (cited above). The applicant company therefore cannot argue that the article at issue contributed to a debate on a matter of public interest because it dealt with the intertwining of politics and the bank's losses.

Consequently, the Court has to examine if there are other reasons why the article in question contributed to a debate on a matter of public interest.

42. In previous cases the Court has found that the public do, in principle, have an interest in being informed, and being able to inform themselves, about criminal proceedings, whilst strictly observing the presumption of innocence. That interest will vary in degree, however, as it may evolve during the course of the proceedings according to various factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings (see *Axel Springer AG*, cited above, §§ 90 and 96, and *Bédat*, cited above, § 68). In that connection, the Court has stated that especially at the early stage of criminal proceedings the disclosure of a suspect's identity may be particularly problematic (*Standard Verlags GmbH*, cited above, § 42) and that national courts may take measures to protect him or her against a "trial by the media" and to give effect to the presumption of innocence under Article 6 § 2 of the Convention (see *"Wirtschafts-Trend" Zeitschriftenverlagsgesellschaft mbH*, cited above).

43. The Court acknowledges that the Court of Appeal applied that flexible approach in its judgment of 20 April 2009. Nonetheless, the Court is not persuaded by the findings of the Court of Appeal and the Supreme Court that the claimant was only in a subordinate management position when in charge of the bank's treasury department. It is clear that the claimant had the ability to authorise contracts which resulted in transactions worth many millions of euros. Even if not a member of the executive board, the claimant held one of the leading management positions in the bank. As nearly 50% of the bank was owned by the *Land* of Carinthia, it was ultimately the taxpayer who bore a large share of the losses. In addition, even if the Financial Market Authority was not a body which investigated criminal conduct, it was the main authority which supervised the banking sector in Austria (Bladet Tromsø *and Stensaas*, cited above, § 72). That body found sufficient grounds to file criminal information. The public therefore had a right to be informed about the bank's losses and the people who were in charge. Even if the ordinary courts had not yet formally instituted a preliminary investigation, criminal enquiries had already started. The Court therefore finds that the article at issue contributed to a debate of general interest where the issue of what stage the criminal proceedings were at is one, but not the sole criterion of evaluation. Therefore, as the publication at issue contributed to a debate of general interest, there is little scope under Article 10 § 2 of the Convention for restrictions (see the principles exposed in paragraph 34 above; see also, *inter alia*, *Sürek v. Turkey (no. 1)* [GC], no. 26682/95, § 61, ECHR 1999-IV, and *Bestry v. Poland*, no. 57675/10, § 60, 3 November 2015).

44. The Court observes that there is agreement between the parties that the claimant was neither a public figure nor someone who had previously

been in the public eye. However, the Court observes that the question whether or not a person, whose interests have been violated by reporting in the media, is a public figure is only one element among others to be taken into account (see the case of *Eerikäinen and Others v. Finland*, no. 3514/02, §§ 66-72, 10 February 2009, in which the publication concerned an ordinary individual but where the court nevertheless found that the order to pay damages for publishing her name and picture in the context of a report on an issue of general interest had not been "necessary" within the meaning of Article 10 § 2 of the Convention).

45. As regards the contents of the article, the Court observes that the veracity of the information contained in the article was not questioned. Also the methods of obtaining the information were not in dispute between the parties. As has been pointed out by the applicant company and not disputed by the Government, the identity of the claimant in the domestic proceedings had already been revealed by other publications at the time of the publication of the article in question (see *mutatis mutandis Vereniging Weekblad* Bluf!, cited above, § 44).

46. As regards the form of the article at issue, the Court notes that the language used was neither offensive nor provocative. The author did not judge the claimant's conduct; rather the report clearly portrayed the statements as those of Mr. Kulterer and others. Also, the claimant was not the focus of the article but the executive board, in particular, the chief executive. The Court cannot find therefore that the disclosure of the claimant's identity amounted to a "trial by the media" which justified the measure that was taken.

47. In the proceedings at issue the claimant argued that the impugned article had had serious repercussions on his private and professional life because it had portrayed him as someone acting alone when performing high risk, speculative transactions for the bank. The Regional Court acknowledged that the publication of the article had indeed had, in general, some consequences for the claimant's private and business life, without going into detail. Even though the parties have not commented on this issue, the Court assumes that the article must have had some kind of significant effect on the claimant's life and his professional standing.

48. As regards the severity of the sanction imposed, the Court observes that the applicant company had been ordered in criminal proceedings to pay compensation to the injured party in the amount of EUR 3,000 and to reimburse the costs of the proceedings. The resulting amount is thus neither symbolical nor negligible.

49. In sum, the Court finds that the reasons given by the domestic courts were "relevant" but not "sufficient". The Court therefore considers that the domestic courts have exceeded the narrow margin of appreciation afforded to them regarding restrictions on debates of public interest. It follows that

the interference with the applicant company's right to freedom of expression was not "necessary in a democratic society".

50. Consequently, there has been a violation of Article 10 of the Convention.

## II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

51. Article 41 of the Convention provides:

> "If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the High Contracting Party concerned allows only partial reparation to be made, the Court shall, if necessary, afford just satisfaction to the injured party."

### A. Damage

52. The applicant company claimed 7,873.22 euros (EUR) in respect of pecuniary damages. That sum was composed of EUR 3,000 which it had to pay to the claimant in compensation, plus EUR 500 and EUR 3,675.52 which it had to pay him for court fees and legal representation respectively. The latter amount does not include value-added tax (VAT).

53. The applicant company did not request an award in respect of non-pecuniary damage.

54. The Government did not comment on this point.

55. The Court finds that there is a causal link between the violation found and the pecuniary damage alleged. It therefore awards EUR 7,873.22 plus any tax that the applicant company may be charged under the head of pecuniary damage.

### B. Costs and expenses

56. The applicant company also claimed EUR 4,603.34 (including VAT) for the costs and expenses incurred before the domestic courts and EUR 3,364.94 (including VAT) for those incurred before the Court.

57. The Government asserted that the claim was excessive and, in respect of the domestic proceedings, no documents were submitted to clarify the calculation of costs.

58. According to the Court's case-law, an applicant is entitled to the reimbursement of costs and expenses only in so far as it has been shown that these have been actually and necessarily incurred and are reasonable as to quantum. That is to say, the applicant must have paid them, or be bound to pay them, pursuant to a legal or contractual obligation, and they must have been unavoidable in order to prevent the violation found or to obtain redress (see, with further references, *Klein v. Austria* (just satisfaction), no. 57028/00, § 19, 25 September 2014). Since the applicant company has

failed to specify its claim for costs incurred before the domestic courts by submitting a bill of fees, no award can be made for those costs (see *Efstathiou and Michailidis & Co. Motel Amerika v. Greece*, no. 55794/00, § 40, ECHR 2003-IX, and *Goriany v. Austria*, no. 31356/04, § 39, 10 December 2009). As regards the costs and expenses incurred before the Court, it considers it reasonable to award the sum of EUR 2,750 (excluding VAT), covering costs and expenses plus any tax that may be chargeable to the applicant company.

### C. Default interest

59. The Court considers it appropriate that the default interest rate should be based on the marginal lending rate of the European Central Bank, to which should be added three percentage points.

## FOR THESE REASONS, THE COURT, UNANIMOUSLY,

1. *Declares* the application admissible;

2. *Holds* that there has been a violation of Article 10 of the Convention;

3. *Holds*
   (a) that the respondent State is to pay the applicant, within three months from the date on which the judgment becomes final in accordance with Article 44 § 2 of the Convention, the following amounts:
      (i) EUR 7,873.22 (seven thousand eight hundred and seventy three euros and twenty two cents), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 2,750 (two thousand seven hundred and fifty euros), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

4. *Dismisses* the remainder of the applicant's claim for just satisfaction.

Done in English, and notified in writing on 25 October 2016, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

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| Andrea Tamietti | András Sajó |
| Deputy Registrar | President |