

DECISION

At a session held on 5 December 2019 in proceedings to decide upon the constitutional complaint of the company DELO, Časopisno založniško podjetje, d. o. o., Ljubljana, represented by Stojan Zdošek, attorney in Ljubljana, the Constitutional Court

decided as follows:

The constitutional complaint against Point II of the operative provisions of Supreme Court Judgment No. II Ips 304/2013, dated 21 January 2016, is dismissed.

REASONING

A

1. The plaintiff (Slovenska demokratska stranka [the Slovenian Democratic Party] – hereinafter referred to as the SDS) requested from the complainant (i.e. the defendant in the lawsuit) a public apology for publishing an article entitled “The money from Patria did not end up with Janez Janša, but with his SDS party”, which was published in the daily newspaper Delo on 23 November 2009. The plaintiff also claimed restitution for the damage that it sustained as a political party because its reputation and good name were damaged (Article 183 of the Code of Obligations, Official Gazette RS, No. 97/07 – official consolidated text and 20/18 – hereinafter referred to as the CO).^[1] The Constitutional Court has already decided on a court decision by which a claim requesting a public apology was dismissed; namely, by Decision No. Up-530/14, dated 2 March 2017 (Official Gazette RS, No. 17/17, and OdlUS XXII, 18), it abrogated a judgment of a Higher Court concerning a claim requesting a public apology and in this part remanded the case to the Higher Court for new adjudication.^[2] It adopted the position that a court violates the right to the protection of one’s reputation determined by Article 35 of the Constitution if it inappropriately assesses the meaning that a message has for an average reader and thereby conceives the starting point for balancing the rights in collision such that it is detrimental to the right to the protection of one’s reputation. In the case at issue, the Constitutional Court assessed the decision of the Supreme Court that imposed on the complainant (as did the court of first instance) the payment of damages in the amount of

EUR 10,000.00 due to inadmissibly damaging the reputation and good name of the plaintiff.

2. In this part, the court of first instance granted the damage claim of the plaintiff. From the reasoning of the first instance judgment, it follows that the Finnish investigator did not say the exact words that were used in the headline and in the sub-heading of the article in question, hence that the journalist attributed to his source words that he did not say. On the basis of the presented evidence, the court of first instance concluded that the Finnish investigator did not say the words attributed to him in the headline of the article. The court established that “the Finnish investigator denied that the money from Patria certainly ended up with the plaintiff, however he did confirm that that was one of the directions of the investigation.” According to the court of first instance, the replies of the Finnish investigator were “so neutral, non-finite, cautious, and included warnings that the answers would only be clear once the investigation was concluded,” that it is not possible to concur that on the basis of the replies of the Finnish investigator the journalist justifiably formulated the statements that he wrote in the affirmative in the headline and in the text of the article in question. The court of first instance established that the complainant’s journalist attributed to his source different words and wrote different quotes than were said by that person; that the journalist published an untrue and unproven statement that he attributed to the Finnish investigator; that the journalist (together with the editor-in-chief) knowingly decided to publish such and that therefore he failed to absolve himself of liability. Furthermore, in order to substantiate his claim made in the headline of the article in question and also in the article itself, the journalist only provided the alleged quotes and statements made by the Finnish investigator as proof. The court of first instance then concluded that not only the headline but also the text of the article were written in the affirmative and as such included the very serious claim that the plaintiff had violated the electoral legislation and rules on the functioning of political parties in the Republic of Slovenia, which are not allowed to obtain funds from abroad, and in particular not for the purpose of election campaigns. According to the findings of the court of first instance, the article continued to be a subject of public debate for a prolonged period of time and stirred significant agitation and raised questions that required answers. Therefore, the court of first instance concluded that the plaintiff as a political party sustained legally recognised damage to its reputation and good name, and assessed just compensation [i.e. damages] in the amount of EUR 10,000.00.

3. Both parties to proceedings appealed against the decision of the court of first instance. The Higher Court dismissed the appeal of the plaintiff, but granted the appeal of the complainant and modified the first-instance judgment such that it dismissed both claims [of the plaintiff]. It based the decision to dismiss the monetary claim for damages on the position that “the consequences of the inadmissible interference were not so intense as to substantiate the granting of damages.” Nevertheless, the Higher Court concurred with the assessment of the court of first instance as to the unlawfulness of the journalist’s conduct concerning the written statement in the text of the article, but not also as regards the headline of the article, which according to the Higher Court is so open-ended that it does not allow the conclusion to be drawn that it is unlawful. With respect to the statement in the text of the article, the Higher Court explained that the outcome of the procedure for taking

evidence, which was reviewed in the appellate proceedings, demonstrated that the Finnish investigator told the journalist that they [i.e. the investigative team] had a lot of data supporting the likelihood that the money from Patria ended up in Slovenia and that the flow of money from Patria towards the plaintiff was one of the main directions of the investigation, but not also that they had sufficient evidence to confirm such a conclusion with certainty. As stressed by the Higher Court, there is a significant difference between the statement that the Finnish Police had a lot of data supporting the likelihood that the money from Patria ended up in Slovenia and that it was also investigating the hypothesis that the money ended up with the plaintiff, on the one hand, and the statement that the accrued evidence confirms such a hypothesis with certainty, on the other. Also according to the Higher Court, the journalist cannot have a justified interest in falsifying the investigator's statement in the article in question that would exclude the inadmissibility of an interference with the reputation of the plaintiff. The Higher Court referred to its decision No. I Cp 3575/2011, dated 6 July 2012, adopted in the same case, and summarised the essential emphases regarding the specificities of the balancing of journalistic expression and the reputation (*inter alia*) of a political party when reporting on irregularities in the functioning of political parties is at issue.

4. Against the second instance judgment, the plaintiff filed (i) a motion to file an appeal before the Supreme Court as regards the part of the decision that referred to the public apology; and (ii) an appeal before the Supreme Court as regards the part of the decision that referred to the dismissal of the claim for the payment of damages due to its damaged reputation on the basis of Article 183 of the CO. The Supreme Court dismissed the motion to file an appeal before the Supreme Court. In the part that referred to the claim for damages, it granted the appeal and modified the second instance judgment such that it upheld the decision of the court of first instance as regards the just compensation awarded. Taking into account the factual findings of the lower courts, the Supreme Court adopted the position that the disputed quote distorted what the Finnish investigator had told the journalist and that that entailed an inadmissible interference with the reputation of the complainant, as there was no justifiable grounds for falsifying the statement made by the investigator. The Supreme Court concurred with the position that the complainant failed to prove the validity of the statement written in the headline and in the sub-heading of the article, or that its journalist had a justifiable basis for believing in the veracity of the statement he had written. It added that the plaintiff is indeed a political party and that the limits to freedom of expression are broad in such discussions, but then it stressed that the freedom of journalistic expression cannot also protect knowingly untrue statements regarding facts that interfere with the reputation of another entity. Since the complainant's conduct in and of itself entailed an unlawful interference with the personality rights of the plaintiff, according to the Supreme Court that suffices to award just compensation on the basis of Article 183 of the CO.

5. The complainant alleged a violation of the rights determined by Articles 22, 25, 27, 29, and 39 of the Constitution. It stressed that the challenged decision severely violates its right determined by Article 39 of the Constitution, as the damages awarded have a punitive character and create a chilling effect in the media. The case at issue therefore raises an important constitutional issue, i.e. the nature of awarding damages to a legal entity due to

an interference with its personality rights and the criteria for awarding damages. The complainant faults the Supreme Court for not having taken into account to a sufficient degree the circumstance that the plaintiff is a political party when it was balancing the rights in collision. In its opinion, the interest of society in public debate on political matters must have priority over the interests of political entities in the protection of their reputation and good name. In the case at issue, the journalist working for the complainant allegedly remained within the substantive limits of the topic that he was reporting on and allegedly thereby attributed to an open public debate on a subject that is important for society. In the opinion of the complainant, a journalist is not obliged to verify the veracity of official data if he or she formulates the information in good faith and is also not liable if subsequently it transpires that the information was not true. The complainant alleges that it follows from neither the first instance judgment nor from the Higher Court judgment that the journalist was aware that the article did not contain true information. It was allegedly only the Supreme Court that held thus in its decision and thereby inadmissibly interfered with the state of the facts as established by the lower courts, and thus violated Articles 22 and 25 of the Constitution. The testimonies of the journalist, of the Finnish investigator, and of Darijan Košir allegedly confirm that the journalist formulated in good faith the information that was published. Another element allegedly indicating that the journalist had acted diligently is an article published the day after the article in question was published and in which the journalist specifically underlined that the investigation had not yet concluded.

6. The complainant further alleges that the Supreme Court manifestly erroneously applied Article 183 of the CO. By adopting the position that a mere interference with the personality rights of the plaintiff suffices to award at least some damages, it allegedly arbitrarily and without substantiation departed from the [established] case law. In the opinion of the complainant, the challenged decision is manifestly erroneous, as without a weighty reasoning it allegedly negates the principle of full compensation. The basic purpose of compensation is allegedly to remedy the negative consequences of an unlawful action, which in the case at issue were not demonstrated. The interpretation of Article 183 of the CO as adopted by the Supreme Court allegedly results in a so-called chilling effect and enables serial intimidation of the media. Allegedly, the Supreme Court established a differentiation between the “basic amount of just compensation” (to which a legal entity is allegedly entitled already on the basis of a [court] finding that there was an unlawful interference with the personality rights thereof) and a higher amount (which a legal entity can justify with additional consequences) without a statutory basis. As stressed by the complainant, the CO does not determine which circumstances enable the awarding of damages to a legal entity and which criteria are to be applied to determine the amount thereof. Therefore, the complainant alleges that the statutory conditions for ensuring the proportionality of the damages awarded are not fulfilled, which is allegedly also contrary to the case law of the European Court of Human Rights (hereinafter referred to as the ECtHR). The complainant opines that in view of the fact that the Supreme Court modified the decision of the Higher Court, it should adopt a particularly detailed position as to the allegations of the parties and the reasons provided by the lower instance courts.

7. In the opinion of the complainant, the position of the Supreme Court that the plaintiff does not need to prove the damage it sustained and that the mere deliberate action of the

journalist suffices to award damages indicates the punitive nature of the damages awarded, which was allegedly not the intention of the legislature when drafting Article 183 of the CO. The complainant is convinced that had the legislature decided to introduce punitive damages it would have done so also for natural persons, not just for legal entities. Therefore, the challenged decision allegedly violates the complainant's rights determined by Articles 14 and 22 of the Constitution. In the concrete case, it is allegedly particularly inappropriate to impose punitive damages as the [payment of] damages is imposed on the complainant as an employer, which cannot be faulted for any action worthy of contempt. The complainant also alleges that due to the punitive nature of the damages, it should be ensured the appropriate criminal-law safeguards determined by Articles 27, 28, and 29 of the Constitution. It proposes that the Constitutional Court abrogate the Supreme Court judgment in the challenged part and that the case be remanded to the Supreme Court for new adjudication. It also proposes that on the basis of the second paragraph of Article 59 of the Constitutional Court Act (Official Gazette RS, No. 64/07 – official consolidated text and 109/12 – hereinafter referred to as the CCA) the Constitutional Court initiate proceedings for a review of the constitutionality of Article 183 of the CO.

8. By Order No. Up-366/16, dated 11 December 2018, a panel of the Constitutional Court accepted the constitutional complaint for consideration. In accordance with the first paragraph of Article 56 of the CCA, it informed the Supreme Court of the acceptance of the constitutional complaint. In conformity with the second paragraph of Article 56 of the CCA, it sent the constitutional complaint for a reply to the opposing party in the lawsuit, i.e. the plaintiff SDS.

9. In its reply, the opposing party proposes that the constitutional complaint be dismissed. It stresses that exercise of the right to freedom of expression (Article 39 of the Constitution and Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Official Gazette RS, No. 33/94, MP, No. 7/94 – hereinafter referred to as the ECHR) also includes the obligation and responsibility of journalists to not overstep certain limits concerning respect for the right to privacy and the personality rights of others when performing their work. The opposing party concurs that a journalist is not liable for information that he or she formulates in good faith, even if later it becomes apparent that it was untrue. Nevertheless, it underlines that the case at issue is not such an instance, as the complainant failed to prove that the statement written in the headline of the article is true and that the journalist was able to justifiably believe it. In fact, the exact opposite was found to be true, i.e. the journalist was aware that his statement was untrue. In the procedure for taking evidence it was found that the Finnish investigator did not say to the journalist the exact words that were written in the headline of the disputed article. The complainant's journalist was allegedly well aware that the headline of the article did not contain true information and that the publication thereof would surely capture significant attention and have a significant impact in the Slovene media and in the public, and yet he insisted on keeping the headline in the affirmative. The opposing party opines that the different allegations of the complainant, namely that the disputed information was formulated in good faith and that the journalist justifiably believed that it was true, are unfounded. Likewise, also the complainant's allegation in the part concerning the assessment of the Higher Court that the complainant's journalist falsified the statement of

the investigator, with regard to which the standard regarding the falsification of a statement is essentially similar to the standard regarding the use of exaggerated statements or a provocation. The opposing party opines that this cannot hold true already on the basis of the linguistic meaning of the mentioned expressions. In view of the positions adopted in Decision of the Constitutional Court No. Up-530/14, the opposing party opines that the different allegations of the complainant are unfounded, and that the case law of the Constitutional Court and of the ECtHR to which it refers with a view to substantiating the alleged violation is irrelevant. Furthermore, the allegation of the complainant that the Supreme Court established the state of the facts by itself, by which it allegedly violated the rights determined by Articles 22 and 25 of the Constitution, is unfounded. In the reasoning of the first instance judgment, the findings of the court regarding the fact that the journalist was aware that the information he had provided was untrue were allegedly explained in detail. As regards the assessment of damages in conformity with Article 183 of the CO, the opposing party opines that the Supreme Court did not depart from the case law with respect to this question. Allegedly, already in Order No. II Ips 238/2015, dated 8 January 2015, the Supreme Court adopted the position that in order for legally recognised non-material damage in accordance with Article 183 of the CO to exist, the mere violation of that personality right suffices, i.e. a violation of the right to the protection of one's reputation and good name. The Supreme Court allegedly also adopted an equivalent position in Judgment No. II Ips 274/2013, dated 4 June 2015. The opposing party also refers to the position of the Supreme Court in Judgment No. III Ips 71/2016, dated 24 July 2018, namely that Article 183 of the CO should be interpreted restrictively so that no inequalities between natural persons and legal entities enter the legal order, as the damage that natural persons sustain must be psychological damage, which legal entities inherently cannot sustain. This is a special category of non-material damage that follows directly from the perpetrator's action. In the opinion of the opposing party, the Supreme Court appropriately reasoned its decision and explained the special circumstances that justify it; therefore, the complainant's allegation that the judgment cannot be reviewed is unfounded. As regards the amount of damages awarded, the opposing party underlines that this is only a question of substantive law. Whether the amount of the damages awarded is appropriate can be verified by reviewing comparable case law. The opposing party is also opposed to the proposal of the complainant that the Constitutional Court initiate proceedings for a review of the constitutionality of Article 183 of the CO. In its opinion, what is at issue is a legal standard that in each individual case is concretised by a court, taking into account the circumstances of the individual case.

10. The reply of the opposing party was sent to the complainant, who did not respond thereto.

11. In the proceedings to decide on the constitutional complaint, on the basis of a request dated 12 December 2018, the Constitutional Court obtained file No. P 1655/2012-III of the Ljubljana District Court and then reviewed it.

As to the alleged violation of Article 22 of the Constitution when assessing whether the journalist acted in good faith

12. The complainant substantiates a violation of the right determined by Article 22 of the Constitution by claiming that the Supreme Court inadmissibly interfered with the state of the facts as established in the judgments of the lower courts by proceeding from the circumstance that “the journalist was aware that the headline of the article does not contain true information.” With that allegation, the complainant challenges the position of the Supreme Court that good will – i.e. that the journalist had a justifiable basis for believing in the veracity of what he wrote in the headline and in the text of the disputed article – was not demonstrated.

13. Already from the reasoning of the first instance judgment there follows the finding that the Finnish investigator did not say the exact words that were used in the headline and in the sub-heading of the article, hence that the journalist attributed to his source words that he did not say. The court of first instance reached such a conclusion by comparing the testimonies of the journalist and the Finnish investigator with the headline and text of the article.^[3] When comparing these testimonies, the court of first instance ascertained that the Finnish investigator did not say to the journalist that the money ended up with the plaintiff; the Finnish investigator stated that one of the main directions of the investigation was examining whether and how the money from Patria, a Finnish company, ended up in Slovenia, and in this context he left unanswered the question of exactly who allegedly ended up with the money.^[4] According to the court of first instance, the Finnish investigator denied that the money from Patria certainly ended up with the plaintiff, however, he did confirm that that was one of the directions of the investigation.^[5] On the basis of the presented evidence, the court of first instance concluded that the Finnish investigator did not say the words attributed to him in the headline of the article, namely that “he did not say that the plaintiff received the money in question as a bribe; he stated that they were investigating where in Slovenia the money ended up.”^[6] The conversation itself between the journalist and the Finnish investigator and also the conversation between the then editor-in-chief and the Finnish investigator convinced the court that the replies of the Finnish investigator were “so neutral, non-finite, cautious, and included warnings that the answers would only be clear once the investigation was concluded” that it is not possible to concur that on the basis of the replies of the Finnish investigator the journalist justifiably formulated the statement that he wrote in the affirmative in the headline of the article.^[7] Hence, in the assessment of the court of first instance, the complainant did not prove that the journalist justifiably believed and [correctly] quoted the Finnish investigator when making the statement that he wrote in the headline of the article; [the court established] that the journalist attributed to his source different words and wrote different quotes than were said by that person.^[8] The court of first instance then concluded that not only the headline but also the text of the article were written in the affirmative and as such included the very serious claim that there had been a violation of the electoral legislation and of the [lawful] functioning of political parties in the Republic of Slovenia, which are not allowed to obtain funds from abroad, and in particular not for the purpose of election campaigns.^[9] In this respect, in order to substantiate his statements in the headline of the disputed article and also in the article itself the journalist only offered

the alleged quotes and statements of the Finnish investigator as proof.^[10] As stressed by the court of first instance, the headline and the text of the article in the affirmative are statements [that entail] a serious violation of statutory norms and an unlawful act. The complainant did not prove that these words were said by his source, who is referred to as such in the article, and also did not prove that this same source spoke in such a manner that the journalist would justifiably believe that he confirmed the veracity of the statement made by the journalist himself.^[11] The court of first instance also established that the journalist wrote the disputed text and statement by himself, which was his own decision, and that he was aware that the information was not true, and also that the published information would surely capture significant attention and have a significant impact in the Slovene media and in the public, and yet he insisted on keeping the headline in the affirmative.^[12]

14. The Higher Court concurred with the assessment of the court of first instance as to the unlawfulness of the journalist's conduct concerning the written statement in the text of the article (but not also as regards the headline of the article, which according to the Higher Court is so open-ended that it does not allow the conclusion to be drawn that the statement written therein is unlawful). It is also the assessment of the Higher Court that the article attributes to the Finnish investigator the statement that the Finnish Police in the phase of the investigation up to that point had gathered enough material in order for the investigator to be able to say that the money from the Patria company had ended up with the plaintiff when its 8x8 AMVs were purchased. As stressed by the Higher Court, there is a significant difference between the statement that the Finnish Police have a lot of data supporting the likelihood that the money from Patria ended up in Slovenia and that it was also investigating the hypothesis that the money ended up with the plaintiff, on the one hand, and the statement that the accrued evidence confirms such a hypothesis with certainty, on the other.^[13] Also according to the Higher Court, the journalist cannot have a justified interest in falsifying the investigator's statement in the article in question that would exclude the inadmissibility of an interference with the reputation of the plaintiff.^[14]

15. On the basis of the findings of the lower courts, the Supreme Court adopted the position that the disputed quote distorted what the Finnish investigator told the journalist and that that entails an inadmissible interference with the reputation of the complainant, as there was no justifiable grounds for falsifying the statement made by the investigator. In this respect, it stressed that the plaintiff is a political party and that the limits to freedom of expression are broad in such discussions, but then it adopted the position that the freedom of journalistic expression cannot also protect knowingly untrue statements regarding facts that interfere with the reputation of another entity. Hence, the allegation of the complainant that the Supreme Court established by itself that the journalist had failed to prove that he justifiably believed that the written statements in the headline and the text of the article were true is not correct.

16. In view of the above, the complainant's allegation that the Supreme Court established by itself that the journalist had not succeeded in proving that he had a justifiable basis for believing in the veracity of what he had written in the headline and in the sub-heading of the article without having a basis for such in the judgments of the lower courts, is not well

founded. In its constitutional complaint, the complainant maintained that the assessment that the journalist had acted in good faith follows from the testimonies of the journalist, the Finnish investigator, and the then editor-in-chief, which in fact requires that the Constitutional Court ascertain that the assessment of the evidence by the courts deciding in the lawsuit was correct. However, in the proceedings to decide on the constitutional complaint the Constitutional Court cannot address the correctness of the assessment of the evidence by the courts. The assessment of the evidence by the courts is extensively substantiated. It includes (*inter alia*) a critical comparison of all testimonies of the witnesses, in particular in the parts in which they contradicted each other, and stresses that already the next day the journalist, when he quoted the Finnish investigator anew, attributed to him a statement that was different from the disputed statement, but identical to the one that was established in the procedure for taking evidence, and that the publications of the statements of the Finnish investigator in other media in the days following the disputed publication were consistent with his testimony in the procedure for taking evidence. Also the reasoning of the Supreme Court in the part in which it summarises the assessment of the lower courts that it was not demonstrated that the journalist had acted in good faith is sufficient in a constitutional sense and does not violate the complainant's right determined by Article 22 of the Constitution.

B – II

As to the alleged violation of Article 39 of the Constitution

17. The complainant faults the Supreme Court for not sufficiently taking into account, when balancing the rights in collision, the circumstance that the plaintiff is a political party, and also for not taking into account that the journalist formulated the disputed article in good faith, regarding which the Supreme Court allegedly violated its right determined by the first paragraph of Article 39 of the Constitution. In the opinion of the complainant, a journalist is not obliged to verify the veracity of official data if he or she formulates the information in good faith and is also not liable if subsequently it transpires that the information was not true. The complainant is thereby *mutatis mutandis* opposed to the position of the Supreme Court, in accordance with which the freedom of journalistic expression (the first paragraph of Article 39 of the Constitution) cannot protect knowingly untrue statements regarding facts that interfere with the reputation of another entity (Article 35 of the Constitution), even if it is the reputation of a political party that is damaged, while the limits to freedom of expression in discussions concerning the possible corruption of political parties are broad. In view of these allegations of the complainant, the Constitutional Court must assess the admissibility of the positions on which the challenged Judgment of the Supreme Court is based, taking into account the complainant's right determined by the first paragraph of Article 39 of the Constitution.

The General Starting Points of the Constitutional Review

18. The first paragraph of Article 39 of the Constitution guarantees the freedom of expression of thought, freedom of speech and public appearance, and freedom of the press and other forms of public communication and expression. Everyone may freely

collect, receive, and disseminate information and opinions. In addition to the fact that freedom of expression is a direct manifestation of one's personality in society, it is also a fundamental constitutive element of a free democratic society. Within the framework of freedom of expression, freedom of the press plays a particularly important role. The Constitutional Court already stressed in Decision No. U-I-172/94, dated 9 November 1994 (Official Gazette RS, No. 73/94, and OdlUS III, 123), that freedom of the press and of the expression of opinions helps establish and form an unbiased and informed public. The importance and role of freedom of journalistic expression are multi-layered. Its function is to protect the freedom to impart information and opinions (the active aspect), as well as the freedom to receive them, i.e. the right to be informed (the passive aspect). The first paragraph of Article 39 of the Constitution, which protects freedom of journalistic expression as a special aspect of this freedom, guarantees not only the rights of individuals (individual journalists), but through the press and other public media outlets also enables exercise of the democratic right of the public to be informed of matters of public concern.[\[15\]](#)

19. In accordance with the third paragraph of Article 15 of the Constitution, the right to freedom of expression (Article 39 of the Constitution) is limited by the rights and freedoms of others. It often comes into conflict precisely with the right to the protection of personal dignity (Article 34 of the Constitution) and the protection of personality rights (Article 35 of the Constitution), which also include the right to the protection of one's honour and reputation. The basis and limits of the constitutional protection of personality rights are hence determined by Articles 34 and 35 of the Constitution. In Decision No. Up-530/14 (which was adopted with regard to the decision of the courts to dismiss a claim requesting a public apology for the same newspaper article), the Constitutional Court adopted the position that a legal entity, hence also a political party, cannot be a holder of the right to human dignity and consequently also not of the constitutional right to the protection of (subjective, intrinsic) honour – i.e. to protection of its perception or awareness of itself as a worthy being.[\[16\]](#) Political parties do, however, enjoy the right to the protection of their reputation, which follows from Article 35 of the Constitution. Unless they are protected from false (unsubstantiated) statements and statements made in bad faith that inadmissibly harm their reputation in public, their activities could namely be significantly impaired.[\[17\]](#)

20. In Decision No. Up-530/14, the Constitutional Court stressed that as a structure intended for the attainment and exercise of power, a political party must be subjected to constant critical scrutiny by the democratic public, therefore its public nature and the requirement of transparency are integrated into its very essence. As a result, when balancing constitutional values, the weight of the reputation of a political party is correspondingly small, in particular in a conflict with freedom of expression. Furthermore, in accordance with the case law of the ECtHR, the limits of acceptable criticism are broader with respect to politicians or political parties than with respect to private entities [or individuals]. In contrast with the latter, politicians and political parties unavoidably and consciously submit themselves to monitoring of their every word and action, which is exercised by journalists and the general public; as a result, they must demonstrate greater tolerance of criticism.[\[18\]](#)

21. The ECtHR qualifies the freedom of journalistic expression as one of the foundations of a democratic society. When balancing the right to freedom of expression, as determined by Article 10 of the ECHR, and the right to the protection of one's honour and reputation, as protected by Article 8 of the ECHR, the ECtHR takes into account multiple criteria. The fundamental criterion is whether the disputed publications represent a contribution to a discussion in the public interest.^[19] The drawing of attention to irregular or corrupt functioning (of public authorities, political parties, etc.) is undoubtedly a topic that concerns a discussion in the public interest.^[20] Furthermore, when assessing disputed publications, it is necessary to distinguish whether they concern statements of facts or value judgments.^[21] Statements of fact can namely be subject to proving whether they are true.^[22] In the event written information is based on the statements of other persons (e.g. an interview), it is necessary to clearly distinguish which information stems from the journalist and when only the statements of other persons are cited.^[23]

22. However, there also follows from the case law of the ECtHR the position that protection under the ECHR does not ensure completely unlimited freedom of expression, even if what is at issue is journalistic reporting on matters with respect to which there exists an important (serious) public interest in being informed.^[24] In conformity with the second paragraph of Article 10 of the ECHR, the exercise of this freedom is connected with "duties and responsibilities," which also apply to the press. These duties and responsibilities gain importance when the question of an interference with the honour and reputation of others or of jeopardising the rights of others is raised. Due to the duties and responsibilities that are inherently connected with the exercise of freedom of expression, the protection that Article 10 of the ECHR ensures journalists with respect to questions concerning a discussion in the public interest is conditional upon acting in good faith with the intention of providing accurate and reliable information in conformity with the ethics of journalistic reporting.^[25] In the event there is on one side an allegation concerning facts regarding which there is no sufficient evidence to confirm such allegation, while on the other side a journalist discusses a question that is an issue of genuine public interest, it becomes crucial to ascertain whether the journalist acted professionally and in good faith.^[26] The more the allegation is damaging to a person's reputation, the more thoroughly the journalist must research the facts that support it.^[27] If the written information entails a serious accusation, particular diligence is required of the journalist before he or she communicates that information to the public.^[28] In fact, when reporting on a topic that concerns a discussion in the public interest, the media and journalists must not bear an unreasonable burden of proof [regarding their statements], as otherwise that could discourage them from informing the public of topics regarding which there exists an interest in an open public discussion. Therefore, the courts must take into consideration the probable effect their decisions have not only on the concrete cases they deliberate on, but also on the media in general. Their margin of discretion is limited by the interest of a democratic society in enabling journalists to play their crucial role in communicating information that concerns a discussion in the public interest.^[29]

Application of the mentioned starting points in the case at issue

23. When a question of the content and scope of the right to freedom of expression is concerned, the Constitutional Court is competent to ascertain whether the positions on which the decision of a court is based are acceptable from the viewpoint of the right determined by the first paragraph of Article 39 of the Constitution. In the case at issue, it must in particular assess whether the position of the Supreme Court in accordance with which the freedom of journalistic expression cannot also protect knowingly untrue statements on facts that interfere with the reputation of a person is acceptable from the viewpoint of the right determined by the first paragraph of Article 39 of the Constitution, even if it is the reputation of a political party that is damaged, while the limits to freedom of expression are broad in discussions concerning the possible corruption of political parties.

24. The disputed article was published in the context of a discussion on a corruption scandal which was going on in public during that time. Therefore, there is no doubt that the reporting concerned a topic important for a discussion in the public interest. The Supreme Court qualified the disputed writings as statements of fact, with respect to which the journalist was tasked with proving their veracity i.e. that he had acted in good faith and had a justifiable basis for believing in the veracity of what he had written. By taking into consideration the findings of the lower courts regarding the facts (which it was bound to observe), the Supreme Court concluded that the journalist falsified the Finnish investigator's statement and misleadingly presented what the investigator had told him.^[30] The investigator namely did not say to the journalist the exact words that were written in the headline and in the text of the article. The Supreme Court concurred with the assessment of the court of first instance that, for an average reader, the headline of the article "The money from Patria did not end up with Janez Janša, but with his SDS party" entails a clear message that the plaintiff had acted in a corrupt manner.^[31] In the assessment of the Supreme Court, for an average reader, the article at issue with a headline in the affirmative, the whole text, the picture, and the quote of the Finnish investigator represent a clear message that the plaintiff had acted in a corrupt manner and raises no doubt as to the truth of the written accusation that the plaintiff had performed an unlawful act;^[32] it includes the very serious claim that there had been a violation of the electoral legislation and of the [lawful] functioning of political parties in the Republic of Slovenia, which are not allowed to obtain funds from abroad, and in particular not for the purpose of election campaigns.^[33] This is precisely why in the assessment of the Supreme Court the writings in the disputed article together with the headline entail an inadmissible act by the complainant.^[34]

25. In the event it is established that on the one side there is a journalist's allegation concerning facts regarding which there is not sufficient evidence to confirm the allegation, and on the other side the journalist discusses a question that is an issue of genuine public interest, it becomes crucial to ascertain whether the journalist acted professionally and in good faith.^[35] Journalists and the media must namely strive to ensure the veracity, clarity, and unambiguity of information, and they must not and cannot make excuses claiming that they are giving the public what it wants.^[36] In principle, the hypothesis of the complainant that a journalist is not obliged to verify the veracity of official information and that in such an instance he or she is not liable even if subsequently it transpires that the published information was not true, is correct. However, that is only so provided that he or she acted

in good faith. In view of the reasoning above (see paragraphs 13 and 14 of the reasoning of this Decision), this was not established in the case at issue. The finding that the journalist knowingly wrote and published untrue, i.e. falsified, information that is seriously damaging to the reputation of the plaintiff logically excludes the hypothesis of the complainant that the journalist had acted in good faith.^[37] With respect to the position of the courts that the journalist falsified the statements of the Finnish investigator without a justifiable reason, the Constitutional Court adds that the duty to accurately quote the source to which the journalist refers, does not in any way reduce the freedom of journalistic expression. The duty to accurately quote a source does not impose on a journalist who imparts information on facts by referring to such source a burden that could in any way hinder his or her freedom of expression.

26. The Constitutional Court has already adopted the position that the finding that a disputed text includes untrue statements does not suffice to exclude the individual from protection of the right to freedom of expression.^[38] However, if a court establishes that an individual knowingly and intentionally wrote untrue defamatory statements about another entity or that in doing so he or she acted with gross negligence (i.e. carelessness), he or she may even be reproached for having abused the freedom of expression.^[39] There is no doubt that the media and journalists play a key and indispensable role in informing the public of topics in the public interest, but in doing so their duty and responsibility to act in good faith in informing the public with credible and verified information and facts are tightly intertwined. Namely, the interest of the public in being informed of topics important for a discussion in the public interest is thereby implemented. Journalistic freedom entails the freedom to responsibly search for the truth.

27. The conduct of the complainant's journalist, which in the assessment of the courts seriously damaged the reputation of the plaintiff, cannot be offered constitutional protection in a collision with the right to the protection of one's reputation, irrespective of the importance of the topic for a discussion in the public interest and reference to the role of journalists in informing the public of such topics. It must namely be taken into consideration that the special protection that journalists are guaranteed by the first paragraph of Article 39 of the Constitution and the first paragraph of Article 10 of the ECHR is subject to the condition that they act in good faith and with the intention to provide accurate and reliable information in conformity with the principles of responsible journalism.^[40] According to all three courts, the journalist cannot have a justified interest in falsifying the investigator's statement in the article in question that would exclude the inadmissibility of an interference with the reputation of the plaintiff (see paragraphs 13 through 15 of the reasoning of this Decision). The fact that in the circumstances of the case at issue there is no justified interest in falsifying the investigator's statement must also be taken into account to understand the position of the Supreme Court. The position in accordance with which the freedom of journalistic expression cannot also protect knowingly untrue statements on facts that interfere with the reputation of a person, even if it is the reputation of a political party that is damaged, while the limits to freedom of expression are broad in discussions concerning the possible corruption of political parties, is the *conclusio* that the Supreme Court adopted in the context of the review and assessment by the lower courts. By referring to its decision No. I Cp 3575/2011, which it

adopted in the same case, the Higher Court stressed the importance of the freedom of journalistic expression when reporting on irregularities in political parties is concerned, and also the responsibility of journalists to impart true information in discussions concerning issues in the interest of the public. Therefore, the Supreme Court cannot be reproached for disregarding the aspect of balancing the rights in collision (not even the complainant faults the Supreme Court for that) or for not sufficiently taking into account in this respect that the plaintiff is a political party. The mentioned position of the Supreme Court also does not entail that the Supreme Court overlooked the importance of any of the rights in collision. It only entails that courts must, in view of the concretely established circumstances of a case (in particular taking into account the finding that the statements of fact of the journalist were knowingly untrue), safeguard the right of the plaintiff to protection of its reputation. In such a case, limitation of freedom of expression due to protection of the reputation of another transpires to be necessary.

The proportionality of the imposed sanction

28. The complainant alleges that the damages awarded by the challenged judgment due to the damaged reputation and good name of the plaintiff have a punitive nature and create a chilling effect in the media space, which is allegedly unacceptable from the perspective of the right to freedom of expression determined by the first paragraph of Article 39 of the Constitution.

29. In order to assess the mentioned allegation of the complainant, two elements have to be taken into consideration. Firstly, what is at issue are knowingly untrue statements of fact made by a journalist and that they are seriously damaging to the reputation of another. Secondly, the assessment of the Supreme Court is based on the position that the violation of the right of the plaintiff to protection of one's reputation alone entails a sufficient basis for awarding at least some just compensation, whereas the possible additional consequences that arose due to the publication of the article can merely serve as a basis for awarding higher damages.^[41] The complainant advocates a different interpretation of Article 183 of the CO, namely such as the Higher Court adopted. However, these allegations of the complainant substantively entail a claim that substantive law was erroneously applied, which does pertain to the constitutional level [of decision-making]. From the amount of the awarded just monetary compensation itself it is not possible to infer that when deciding in the case at issue the court was perhaps also led by a punitive intention that would not be compatible with the nature of the sanction in the form of damages determined by Article 183 of the CO. The damages awarded are namely not disproportionally high.^[42] In the circumstances of the concrete case, in addition to the compensatory purpose, they certainly also express a preventive purpose, i.e. to deter the complainant (and any other potential entity that could cause damage) from imparting untrue statements on facts that are harmful to another's reputation. However, the damages awarded manifestly cannot be considered punitive. Therefore, the complainant's allegations that in the civil procedure it was deprived of the criminal law guarantees determined by Articles 27, 28, and 29 of the Constitution are irrelevant.

30. The damages awarded as a sanction for violating the right to the protection of one's

reputation limit the exercise of the right to freedom of expression. However, the Supreme Court provided relevant and sufficient reasons therefor. It took into consideration that what was at issue were knowingly untrue statements of fact that seriously damaged the reputation of the plaintiff, that the journalist inadmissibly interfered with the personality rights of the plaintiff, that the interference with the plaintiff's rights was grave and intentional, that the article was published on the front page of the main daily newspaper in Slovenia, that it targeted the broadest circle of readers, that it was quoted by all central media in Slovenia, and that it persisted for a long period of time as a subject of public discussion. These are circumstances that justify that the imposed sanction in the circumstances of the concrete case is necessary in a democratic society and that it is proportionate to the objective – to protect another's reputation from knowingly untrue statements of fact made by a journalist in a newspaper that seriously harm the reputation of another entity. The claim that by awarding damages in the amount of EUR 10,000.00 the Supreme Court violated the right determined by the first paragraph of Article 39 of the Constitution is therefore unfounded. The Constitutional Court adds that when assessing the challenged decision of the Supreme Court from the viewpoint of the proportionality of the imposed sanction it could not take into consideration Ljubljana Higher Court Judgment No. I Cp 918/2017, dated 31 May 2017, which upheld the Judgment of the court of first instance also in the part in which the claim requesting a public apology was granted. In fact, that Judgment was issued more than one year after the challenged Judgment. At the time when the Supreme Court decided, the claim requesting a public apology had been dismissed with finality.

B – III

As to the alleged violation of Articles 14 and 22 of the Constitution when applying Article 183 of the CO

31. The complainant also faults the Supreme Court for having arbitrarily departed from the hitherto case law as regards the application of Article 183 of the CO, and consequently for having violated the right determined by Article 22 of the Constitution. However, this allegation as well proves to be unfounded. As early as in Decision No. II Ips 274/2013, dated 4 June 2015 (in which it was faced for the first time with an interpretation of Article 183 of the CO), the Supreme Court formulated a fundamental starting point in conformity with which a legal entity is entitled to receive at least some damages on the sole basis of a "mere" interference with its reputation and good name.^[43] It thus enforced the so-called objective conception as an interpretative argument in the application of Article 183 of the CO.^[44] It repeated such position in Judgment No. II Ips 304/2013 (which is challenged by the constitutional complaint at issue) and in Order No. IV Kpd 238/2015, dated 15 June 2017. In the latter it stressed that by alleging harmful conduct that entailed a violation of a personality right (to protection of one's reputation and good name), the party also alleges the existence of damage and that when assessing whether a certain action constitutes an unlawful violation of a personality right, a court should concurrently also ascertain whether legally recognised non-material damage exists.^[45] The mentioned development of the case law thus indicates that the challenged assessment of the Supreme Court cannot be

labelled as arbitrary. The Supreme Court also cannot be reproached for having arbitrarily departed from the [established] case law. The challenged decision only entails an element in the formation of the case law relating to the application of Article 183 of the CO.

32. The complainant then problematises the issue of the criteria on the basis of which in such cases a legal entity is awarded just monetary compensation. In this respect, the complainant faults the Supreme Court for having insufficiently reasoned the challenged decision (Article 22 of the Constitution). In the case at issue, the Supreme Court had an opportunity for the first time to adopt a position as to the issue of the criteria for determining the amount of damages on the basis of Article 183 of the CO.^[46] In doing so, it adopted the position that the mere violation of the right to the protection of one's reputation and good name of a legal entity suffices to award at least some damages, while the possible further damaging consequences can only serve as a basis for increasing the amount of damages. Taking the above into account, the Supreme Court awarded the plaintiff damages in the amount of EUR 10,000.00 (out of the EUR 300,000.00 that it had claimed), and in so doing it took into consideration the following circumstances: (i) that the journalist inadmissibly interfered with the personality rights of the plaintiff, (ii) that the interference by the journalist was grave and intentional, and that (iii) the article had a strong impact in the Slovene public space; it was quoted by all the main media outlets, and the article also remained a subject of public discussion for a long time. In such manner, the Supreme Court fulfilled the standard of a reasoned judicial decision determined by Article 22 of the Constitution. It also must be taken into consideration that while the Supreme Court did modify the Higher Court Judgment, it modified it such that it upheld the Judgment of the court of first instance and explained that it awarded an amount equal to that awarded by the court of first instance. The fact that the complainant does not concur with the positions of the Supreme Court, however, is not sufficient to conclude that the right determined by Article 22 of the Constitution was violated.

33. The complainant's allegation that the right determined by Article 14 and Article 22 of the Constitution was violated is also unfounded, as there is no basis in the law to differentiate between the basic amount of damages that a legal entity is entitled to on the basis of a "mere" interference with its personality rights, and the higher amount to which it is entitled if it demonstrates additional damaging consequences. Since in this respect the complainant refers to a comparison with Article 179 of the CO (which regulates the payment of damages for non-material damage sustained by natural persons), it should be stressed that the elements for awarding just monetary compensation on the basis of Articles 179 and 183 of the CO cannot be considered identical, and the reason for that is the conceptual difference itself of the subjects who are the injured party. In fact, it is conceptually impossible for legal entities to sustain psychological damage within the meaning of Article 179 of the CO as applicable to natural persons. Even if the secondary damaging consequence (i.e. psychological damage) therefore cannot entail the starting point for an assessment of the issue of the amount of just monetary compensation due to a damaged reputation or good name, such does not entail that it is not possible to form different criteria that are decisive for determining the indefinite legal term "just monetary compensation". This definition falls in the field of the interpretation of ordinary (i.e. statutory) law, which, in accordance with the Constitution, is entrusted to the courts, and in

particular the Supreme Court, which as the highest court in the state (the first paragraph of Article 127 of the Constitution) is entrusted with developing legal positions relating to the interpretation of statutory law. The Constitutional Court cannot delve into the assessment of a court's interpretation if only a question of the correct application of substantive law is at issue.

B – IV

34. If the Constitutional Court assesses that the law on which a challenged individual act is based is potentially unconstitutional, it initiates, by itself, proceedings for a review of the constitutionality of that law (the second paragraph of Article 161 of the Constitution and the second paragraph of Article 59 of the CCA). Hence, the second paragraph of Article 59 of the CCA does not enable a complainant to propose, in a constitutional complaint, the initiation of proceedings for a review of the constitutionality of the law on which the challenged individual act is based. The proposal of the complainant [in the case at issue] that on the basis of the second paragraph of Article 59 of the CCA the Constitutional Court should initiate proceedings for a review of the constitutionality of Article 183 of the CO (because that Article does not determine either the circumstances that justify the awarding of just monetary compensation to a legal entity because the reputation thereof was damaged or the criteria for determining the amount thereof) must thus be disregarded as irrelevant.

C

35. The Constitutional Court adopted this Decision on the basis of the first paragraph of Article 59 of the CCA, composed of: Dr Rajko Knez, President, and Judges Dr Matej Accetto, Dr Rok Čeferin, Dr Dunja Jadek Pensa, Dr. Dr. Klemen Jaklič (Oxford, UK; Harvard, USA), Dr Špelca Mežnar, Marko Šorli, and Dr Katja Šugman Stubbs. Judge Dr Marijan Pavčnik was disqualified from deciding on the case. The Constitutional Court adopted the Decision by six votes against two. Judges Mežnar and Šugman Stubbs voted against. Judge Čeferin submitted a concurring opinion.

Dr Rajko Knez
President

[\[1\]](#) The subject of assessment is the content of the journalist's article published in the daily newspaper Delo on 23 November 2009, namely:

- the statement in the headline: "The money from Patria did not end up with Janez Janša, but with his SDS party";
- the allegations in the sub-heading of the article: "We have plenty of information on that,"

the Finnish investigator Erik Björqvist decisively replied in response to our question of whether at this time and in this part of the investigation he possessed enough material to be able to state with certainty that the money from the Finnish state company Patria in the purchase of their 8x8 AMVs ended up with SDS, previously the biggest coalition party [in the Slovene Government]. On a serious note, he expressly replied: ‘Yes.’”;

– the allegation in the article: “(for instance, how much money Patria ‘sent’ to SDS)”.

[2] By Judgment No. I Cp 918/2017, dated 31 May 2017, the Ljubljana Higher Court dismissed the complainant’s appeal and in the part in which the complainant was ordered to publicly apologise, upheld the judgment of the court of first instance.

[3] See Para. 23 of the reasoning of the judgment of the court of first instance.

[4] *Ibidem*.

[5] *Ibidem*.

[6] See Para. 27 of the reasoning of the judgment of the court of first instance.

[7] *Ibidem*.

[8] *Ibidem*.

[9] See Para. 28 of the reasoning of the judgment of the court of first instance.

[10] *Ibidem*.

[11] *Ibidem*.

[12] See Para. 29 of the reasoning of the judgment of the court of first instance.

[13] See Para. 23 of the reasoning of the judgment of the court of second instance.

[14] *Ibidem*.

[15] Such is stated in Decision of the Constitutional Court No. Up-2940/07, dated 5 February 2009 (Official Gazette RS, No. 17/09, and OdlUS XVIII, 62).

[16] Decision of the Constitutional Court No. Up-530/14, Paras. 10–12 of the reasoning.

[17] *Ibidem*.

[18] See the ECtHR Judgment in *Magyar Jeti Zrt v. Hungary*, dated 4 December 2018, Para. 81 of the reasoning.

[19] See the Judgment of the Grand Chamber of the ECtHR in *Axel Springer AG v. Germany*, dated 7 February 2012.

[20] See the ECtHR Judgment in *Kasabova v. Bulgaria*, dated 19 April 2011, Para. 56 of the reasoning.

[21] Cf. C. Grabenwarter, *European Convention on Human Rights, Commentary*, Verlag C. H. Beck, Munich 2014, p. 267. See also the ECtHR Judgments in *Jerusalem v. Austria*, dated 27 February 2001, Paras. 43–45 of the reasoning, and *Unabhängige Initiative Informationsvielfalt v. Austria*, dated 26 February 2002, Paras. 46–48 of the reasoning.

[22] See, e.g., the ECtHR Judgments in *Jerusalem v. Austria*, Para. 42 of the reasoning, and *Steel and Morris v. the United Kingdom*, dated 15 February 2005, Para. 87 of the reasoning. See also Decision of the Constitutional Court No. Up-462/02, dated 13 October 2004 (Official Gazette RS, No. 120/04, and OdlUS XIII, 86), Para. 9 of the reasoning.

[23] The ECtHR, for instance, stated such in *Dyundin v. Russia*, dated 14 October 2008, Para. 29 of the reasoning.

[24] Such is stated by the ECtHR in *Bladet Tromsø and Stensaas v. Norway*, dated 20 May 1999 (Grand Chamber), Para. 65 of the reasoning; *Kasabova v. Bulgaria*, Para. 63 of the reasoning; and *Yordanova and Toshev v. Bulgaria*, dated 2 October 2012, Para. 48 of the reasoning.

[25] *Ibidem*.

[26] The ECtHR stated such in *Flux v. Moldova* (No. 7), dated 24 November 2009, Para. 41 of the reasoning.

[27] The ECtHR stated such in *Rumyana Ivanova v. Bulgaria*, dated 14 February 2008, Para. 64 of the reasoning.

[28] The ECtHR stated such in *Koprivica v. Montenegro*, dated 22 November 2011, Para. 67 of the reasoning. In that instance, prior to publishing an article, the journalist did not thoroughly enough investigate the factual basis of the article. Considering that information had been published that entailed a serious accusation against the opposing party, also in the assessment of the ECtHR that sufficed for the conclusion that he had not acted as a responsible journalist, and that his conviction must be deemed necessary in order to protect the reputation of the affected persons.

[29] This was stated by the ECtHR in *Kasabova v. Bulgaria*, Para. 55 of the reasoning.

[30] See Para. 13 of the reasoning of the Supreme Court Judgment.

[31] See Para. 15 of the reasoning of the Supreme Court Judgment.

[32] *Ibidem*.

[33] See Para. 16 of the reasoning of the Supreme Court Judgment.

[34] *Ibidem*.

[35] This was stated by the ECtHR in *Flux v. Moldova* (No. 7), Para. 41 of the reasoning.

[36] See Decisions of the Constitutional Court No. Up-2940/07, Para. 8 of the reasoning, and No. Up-570/09, dated 2 February 2012 (Official Gazette RS, No. 18/12, and OdlUS XIX, 40), Para. 6 of the reasoning.

[37] "A person acting in good faith is someone who can be convinced that his or her actions do not interfere with the rights of others." Such is stated in J. Štempihar, *Zasebno pravo, Splošni del* [Private Law, General Part], Pravna fakulteta and Cankarjeva založba, Ljubljana 2003, p. 141.

[38] This was stated in Decision of the Constitutional Court No. Up-1019/12, dated 26 March 2015 (Official Gazette RS, No. 30/15, and OdlUS XXI, 12), Para. 18 of the reasoning.

[39] *Ibidem*. In this respect, the Constitutional Court referred to the position of the US Supreme Court that the plaintiff must prove that the defendant made his or her statements with actual malice, i.e. that he or she made such statements indifferently, with reckless disregard for the truth – the Supreme Court stated such in *Gertz v. Robert Welch, Inc.*, 418 U. S. 323 (1974). See also E. Barendt, *Freedom of Speech*, Oxford University Press, Oxford, New York 2005, p. 206.

[40] This was stated by the ECtHR in *Bladet Tromsø and Stensaas v. Norway*, Para. 65. of the reasoning; *Kasabova v. Bulgaria*, para. 63 of the reasoning; and *Yordanova and Toshev v. Bulgaria*, Para. 48 of the reasoning.

[41] In legal theory, this is the so-called objective conception. This is explained in more detail in D. Jadek Pensa, *Objektivna koncepcija nepremoženjske škode* [The Objective Conception of Non-material Damage], Collection of Papers of the Inštitut za primerjalno pravo [Institute for Comparative Law] at the Faculty of Law of the University of Ljubljana: *Izbrane teme civilnega prava* [Selected Civil Law Topics], Ljubljana 2006, pp. 50 *et seq.*

[42] Cf. the ECtHR Judgment in *Steel and Morris v. the United Kingdom*, in which the ECtHR considered the damages awarded (in the amount of GBP 40,000.00) very *substantial* in view of the low income of the complainants, and established that there was a violation of the right determined by Article 10 of the ECHR. In *Krone Verlag GmbH v.*

Austria (judgment dated 19 June 2012), the ECtHR decided differently, and did not establish a violation of Article 10 of the ECHR in spite of substantial damages (EUR 130,000.00). It assessed that in view of the circumstances of the case, the damages awarded were not disproportionate. Also, in *Independent News and Media and Independent Newspapers Ireland Limited v. Ireland* (judgment dated 16 June 2005), in which the national court awarded the complainant damages in the amount of EUR 381,000.00, the ECtHR did not establish a violation of the right determined by Article 10 of the ECHR. It stressed, on the one hand, that unpredictably large damages awarded in libel cases may have a chilling effect on the [press] and thus require a particularly diligent assessment. On the other hand, it stressed that in the case at issue the interference with one's reputation and good name was particularly serious and grave, therefore the damages awarded did not entail a violation of the right determined by Article 10 of the ECHR. See also the ECtHR Judgment in *Independent Newspapers (Ireland) Limited v. Ireland*, dated 15 June 2017, in which the Irish Supreme Court applied its exceptional power to determine the amount of damages by itself, and the new amount so determined (EUR 1,250,000.00) was higher than any damages awarded by a jury or an appellate court ever before, and also higher than any of the damages determined or annulled by the Supreme Court before that case. In the assessment of the ECtHR, in a case where the Supreme Court exercises the lawful, but exceptional, power to determine the amount of damages (in lieu of the jury in a retrial), it should provide more extensive reasons for its decision, considering the finality of such determination of the amount [of damages] in national proceedings. Although in the mentioned case the determination of the amount [of damages] was not entirely devoid of arguments, the Supreme Court did not provide reasons as to how the awarded total of EUR 1,250,000.00 was arrived at.

[43] Cf. Supreme Court Judgment No. II Ips 274/2013, Para. 14 of the reasoning.

[44] The objective conception takes into account the primary damaging consequence affecting non-material values (i.e. the specific damaged reputation), but does not require secondary consequences – i.e. psychological damage – to exist. See D. Jadek Pensa, *op. cit.*, p. 54.

[45] Cf. Supreme Court Judgment No. II Ips 238/2015, Para. 10 of the reasoning.

[46] In Judgment II Ips 274/2013, the Supreme Court explained that the criteria in this field are yet to be developed, with the internal coherency and wholeness of the legal order as a starting point. It did not address the issue of the amount of potential damages, as in the case it decided on the claim was dismissed. The same was stated in Supreme Court Judgment No. II Ips 238/2015.

⇒