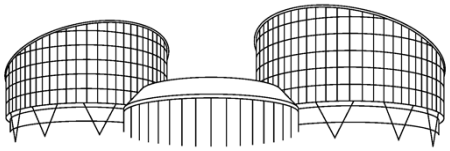

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

FIRST SECTION

CASE OF MATALAS v. GREECE

(Application no. 1864/18)

JUDGMENT

Art 10 • Freedom of expression • Unjustified criminal conviction and prison sentence for slanderous defamation, for statements in private correspondence • Private dispute not reaching the public • *Mutatis mutandis* application of Court case-law on disparaging statements against public officials in written complaints to authorities • Suspension of sentence irrelevant, particularly as criminal conviction itself not expunged

STRASBOURG

25 March 2021

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

In the case of Matalas v. Greece,

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

Ksenija Turković, *President,*
Krzysztof Wojtyczek,
Linos-Alexandre Sicilianos,
Alena Poláčková,
Péter Paczolay,
Raffaele Sabato,
Lorraine Schembri Orland, *judges,*

and Renata Degener, *Section Registrar,*

Having regard to:

the application (no. 1864/18) against the Hellenic Republic lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Greek national, Mr Theodoros Matalas ("the applicant"), on 4 January 2018;

the decision to give notice to the Greek Government ("the Government") of the complaint under Article 10 of the Convention and to declare inadmissible the remainder of the application;

the parties' observations;

Having deliberated in private on 16 February 2021,

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

INTRODUCTION

1. The application concerns the criminal conviction of the applicant, the managing director of a public limited liability company, for slanderous defamation of the former lawyer of the company. The applicant had sent to that lawyer an official document in which he had referred to her behaviour as "unprofessional and contrary to ethics" ("*αντιεπαγγελματική και αντιδεοντολογική*") and had criticised her because, in his view, she had not fully informed him about the court cases against the company.

THE FACTS

2. The applicant was born in 1968 and lives in Kifissia. He was represented by Mr G. Papalambros, a lawyer practising in Athens.

3. The Government were represented by their Agent's delegate, Ms A. Dimitrakopoulou, senior advisor at the State Legal Council.

4. The facts of the case, as submitted by the parties, may be summarised as follows.

5. By a decision of the Minister of Agricultural Development dated 5 November 2007, the applicant was appointed CEO of a limited liability company, AGROGI A.E. ("the company"), for the period between

5 November 2007 and 4 November 2008. On the same day, the applicant requested all the employees and advisors of the company to provide all relevant information regarding matters falling under their respective responsibility, so that he could gain a complete picture of the company and any outstanding issues affecting it. Among the employees invited was Ms L.P., who was at the time the company's legal advisor.

6. Ms L.P. came to the office on 10 November 2007 and informed the applicant orally about pending legal cases involving the company. Subsequently, on 23 November 2007, she handed a report to the applicant, informing him about pending legal cases involving the company. According to the applicant, who questioned the accuracy of the report (arguing that it was incomplete), that note consisted of six lines and mentioned in general terms that there were no pending legal cases in which the company was involved.

7. On 11 December 2007, the applicant, as CEO of the company, sent an official document to Ms L.P. removing her from her position as legal adviser to the company. He additionally served Ms L.P. with another two official documents on 13 and 21 December 2007 informing her that he had deposited to the Deposits and Loans Fund the compensation due to her following the termination of her contract after she had refused to receive a cheque. On 14 January 2008, an additional official document was served on Ms L.P. requesting her to hand in all files relating to the pending legal issues facing the company that she had in her possession and to collect her personal belongings from her office in the company's premises.

8. On 24 January Ms L.P. sent to the applicant an official document informing him that she would call at the company on that day in order to hand over the files and any other items relating to her duties that she had in her possession.

9. Ms L.P. visited the company's premises and handed over the files at a time when the applicant was absent; however, the applicant continued to assert that Ms L.P. had not surrendered all the information relating to the company's pending legal cases. Accordingly, on 4 February 2008 the applicant sent to Mrs L.P. an official document that was served on her on 6 February 2008. In it, he mentioned, *inter alia*, the following:

> "... we condemn the unprofessional and contrary to ethics behaviour that you have shown towards our company, which has shown so far great tolerance towards you. ... Until today, despite the numerous official documents that we have addressed to you, you still have not informed us of the progress of the legal cases that you have handled – in particular legal cases involving our company that are still pending – with a persistence that can only be explained by a malicious intention on your part to harm the company's interests, in revenge for the fact that we removed you from the duties that had been assigned to you. Additionally, not only have you failed to deliver to us a complete and clear table detailing the progress and handling of judicial cases, but the information that you have so far provided to us is incomplete and erroneous ..."

10. On 22 April 2008 Ms L.P. lodged a criminal complaint against the applicant, alleging slanderous defamation resulting from the document of 4 February 2008.

11. On 26 November 2014 the one-member first-instance Misdemeanour Court of Athens held a hearing in the case. The applicant argued that he had not had any intention of harming L.P.'s reputation. The court found the applicant guilty of slanderous defamation and imposed on him a suspended sentence of ten months' imprisonment (decision no. 97314/2014). The applicant appealed against that decision.

12. On 7 October 2015 the three-member Misdemeanour Court of Athens heard the applicant's appeal. The applicant once again stated that the information contained in the official document dated 4 February 2008 had been based on facts, as L.P. had refused to fully inform him regarding the company's pending legal cases. He mentioned as an example that on 14 January 2008 he had accidentally been informed by the opposite party's lawyer that a trial was scheduled for the following day, whereas L.P. had noted down as the trial date 15 February 2008. He cited a full history of the dispute between him (in his capacity as managing director) and L.P. (as the former legal advisor to the company). He stated that only after he had served on her many official documents had she responded on 24 January 2008, sending him an official document in which she had informed him that she would call in at the company on that same day in order to hand over all outstanding files. He also cited Article 367 of the Criminal Code, arguing that he had made the impugned statements in his capacity as managing director of the company in an effort to protect its interests.

13. The appellate court, in its decision no. 34042/2015, held that the applicant had used expressions that had not been necessary for the protection of the company's interests. Those unnecessary expressions had included lies (which had been contained in the above-mentioned official document dated 4 February 2008), as he had known when he had sent it that L.P. had fully informed him of the legal cases involving the company. None of the evidence adduced proved the applicant's allegation that he had not been fully informed of all pending legal issues and cases involving the company: the deposition made under oath by the new legal advisor to the appellate court (that is to say, L.P.'s replacement) could not prove his assertion in that regard, as she had not been present at any meeting with L.P. Nor had L.P. contacted her in connection with her new responsibilities. In addition, when L.P. had handed over the files on 24 January 2008, the company employee receiving them had signed the handover record without writing any remarks on it. The appellate court concluded that the applicant's allegations contained in the above-mentioned official document amounted to "facts" (*γεγονότα*) and were false. Those allegations had come to be known by numerous people, including the lawyer who had drafted the official document, the person who had served it on L.P., and the people in

the building in which had her office (given the fact that the document had been attached to and left on her door, as she had been absent when the attempt had been made to serve it on her). The appellate court thus found the applicant guilty of slanderous defamation and sentenced him to a suspended prison sentence of eight months (decision no. 34042/2015). It additionally rejected the applicant's argument to that he had lived an honest life until that point and that a more lenient sentence should be imposed on him.

14. The applicant appealed on points of law, on the grounds that included the erroneous application of Articles 362 and 367 of the Criminal Code, which had resulted in the rejection of the arguments that he had made thereunder. In particular, he argued that the appellate court had acted erroneously in finding his allegations to be false, as proved by the multiple official documents that he had been forced to serve on the complainant owing to her failure to provide accurate information regarding the pending legal cases in which the company was involved. The applicant had adduced evidence proving that what he had stated had been true, and the domestic court had failed to provide reasoning for its conclusion that the applicant had known that his statements had been false. In addition, the first-instance court had erroneously deemed that he had disseminated the contents of the document beyond its intended recipient. He had made his statements in a document addressed solely to L.P. Neither the bailiff who had served the document on her nor the residents of the building had had any interest in reading the document. This document had been posted on her door because of her absence (despite the fact that the applicant had not instructed the bailiff to do so). Lastly, the appellate court should have accepted the extenuating circumstances he had invoked, namely that he had lived an honest life.

15. On 25 May 2017 the Court of Cassation quashed the appellate court judgment in part rejecting the applicant's argument that he had lived an honest life before the events in question. However, the Court of Cassation dismissed the applicant's appeal on points of law in respect of the remainder of the appellate court's judgment (decision no. 1182/2017). The Court of Cassation held that the judgment of the Court of Appeal had included sufficient reasoning as regards the other parts of its decision. In addition, it had acted correctly in dismissing the applicant's argument that he had had a legitimate interest in sending the impugned document to L.P., as Article 367 did not apply when the allegations in question were false, as they had been in the present case. The decision was finalised (*καθαρογραφή*) on 6 July 2017.

16. The case was remitted to the three-member Misdemeanour Court of Athens for it to rule again on the extenuating circumstances. It held a hearing on 4 October 2017 and after accepting that the applicant had

previously lived an honest life, sentenced the applicant to a suspended prison sentence of five months.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW

A. Criminal Code

17. The relevant provisions of the Criminal Code read:

Article 361
Insult

"1. Except in cases that amount to defamation (Articles 362 and 363), anyone who by words or by deeds or by any other means injures another's reputation shall be punished with up to one year's imprisonment, or with a pecuniary penalty. The pecuniary penalty may be imposed in addition to imprisonment.

2. If the injury to reputation is not severe, considering the circumstances and the person injured, the offender shall be punished by imprisonment or a fine.

3. The provision of paragraph 3 of Article 308 shall apply in this case."

Article 362
Defamation

"Anyone who by any means disseminates information to a third party concerning another person that may harm the latter's honour or reputation shall be punished with up to two years' imprisonment or a pecuniary penalty. A pecuniary penalty may be imposed in addition to imprisonment."

Article 363
Slanderous defamation

"If, in a case [tried] under Article 362, the information [disseminated] is false and the offender was aware of its falsity, he shall be punished with at least three months' imprisonment, and, in addition, a pecuniary penalty may be imposed and deprivation of civil rights under Article 63 may be ordered."

Article 366

"1. If the information [disseminated as referred to in] Article 362 is true, then the act shall remain unpunished ..."

Article 367

"1. The following cannot be considered wrongful acts: ... c) [statements or actions undertaken in the course of] performing one's legal duty, exercising a legal power, or preserving (protecting) a right, or in pursuit of another legitimate interest or d) similar cases.

2. The preceding provision does not apply: a) when the above-mentioned adverse judgments and [statements or actions] have the elements [listed in] Article 363, and b)

when, from the manner ... or the circumstances in which the statement or action was undertaken, it follows that there was an intention to insult."

B. Code of Civil Procedure

18. Article 128 of the Code of Civil Procedure provides as follows:

"1. If the recipient is not at home, then the document shall be served on one of his adult relatives or any servants who live with him/her. If they are absent or [no such relatives or servants] exist, then the document shall be served on any other adult co-residents who are aware of their actions and are not participating in the trial as opponents of the interested party.

...

4. If none of those referred to in paragraph 1 is at home, then a) the document must be affixed to the door of the residence in a sealed envelope, on which there will be [written] only the names of the bailiff and the person to whom the document is addressed, in the presence of a witness. In the case of [apartment] buildings whose entrance doors are closed and it is not possible to affix the document to the door of the [apartment of the person in question], it can be affixed to the entrance to the building in question; b) at the latest on the next working day following the affixing of the document to the door, a copy of the document ... must be delivered into the hands of the head of the police station or police office for the region in which the residence is located; ... c) at the latest on the next working day after the delivery, pursuant to point b) above, the person who served the document must send by post, to the person to whom the document is addressed, a written notification in which he specifies the kind of document that was served, the residential address at which it was posted, the date on which it was posted, the authority to which the document was delivered, and the date of delivery ..."

II. INTERNATIONAL LAW

19. On 4 October 2007 the Parliamentary Assembly of the Council of Europe adopted Resolution 1577 (2007), entitled "Towards decriminalisation of defamation". Its relevant passages read as follows:

"...

6. Anti-defamation laws pursue the legitimate aim of protecting the reputation and rights of others. The Assembly nonetheless urges member states to apply these laws with the utmost restraint since they can seriously infringe freedom of expression. For this reason, the Assembly insists that there be procedural safeguards enabling anyone charged with defamation to substantiate their statements in order to absolve themselves of possible criminal responsibility.

7. In addition, statements or allegations which are made in the public interest, even if they prove to be inaccurate, should not be punishable provided that they were made without knowledge of their inaccuracy, without intention to cause harm, and their truthfulness was checked with proper diligence.

...

12. Every case of imprisonment of a media professional is an unacceptable hindrance to freedom of expression and entails that, despite the fact that their work is

in the public interest, journalists have a sword of Damocles hanging over them. The whole of society suffers the consequences when journalists are gagged by pressure of this kind.

13. The Assembly consequently takes the view that prison sentences for defamation should be abolished without further delay. In particular it exhorts states whose laws still provide for prison sentences – although prison sentences are not actually imposed – to abolish them without delay so as not to give any excuse, however unjustified, to those countries which continue to impose them, thus provoking a corrosion of fundamental freedoms.

14. The Assembly likewise condemns abusive recourse to unreasonably large awards for damages and interest in defamation cases and points out that a compensation award of a disproportionate amount may also contravene Article 10 of the European Convention on Human Rights.

...

17. The Assembly accordingly calls on the member states to:

17.1. abolish prison sentences for defamation without delay;

17.2. guarantee that there is no misuse of criminal prosecutions for defamation and safeguard the independence of prosecutors in these cases;

17.3. define the concept of defamation more precisely in their legislation so as to avoid an arbitrary application of the law and to ensure that civil law provides effective protection of the dignity of persons affected by defamation;

...

17.5. make only incitement to violence, hate speech and promotion of negationism punishable by imprisonment;

17.6. remove from their defamation legislation any increased protection for public figures, in accordance with the Court's case law, and in particular calls on:

...

17.7. ensure that under their legislation persons pursued for defamation have appropriate means of defending themselves, in particular means based on establishing the truth of their assertions and on the general interest, and calls in particular on France to amend or repeal Article 35 of its law of 29 July 1881 which provides for unjustified exceptions preventing the defendant from establishing the truth of the alleged defamation;

17.8. set reasonable and proportionate maxima for awards for damages and interest in defamation cases so that the viability of a defendant media organ is not placed at risk;

17.9. provide appropriate legal guarantees against awards for damages and interest that are disproportionate to the actual injury;"

THE LAW

I. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

20. The applicant complained that his criminal conviction for slanderous defamation had violated his right to freedom of expression, as provided in 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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
>
> 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

1. The parties' arguments

21. The Government argued that the applicant had not exhausted the available domestic remedies. In particular, in his appeal on points of law to the Court of Cassation, the applicant had failed to invoke his rights under Article 10 of the Convention or complain of being given a disproportionate sentence. Therefore, he had not given the Court of Cassation the opportunity to examine a possible violation of the Convention.

22. The applicant contested that argument. He argued that he had brought to the attention of the domestic authorities, facts that had constituted a violation of his rights under Article 10. He had advanced the argument that his statements had constituted value judgments, not facts. Even though he had not explicitly referred to Article 10 of the Convention, he had in substance raised such a complaint before the Court of Cassation. In particular, he had included in his appeal on points of law the argument that what he had written had been based on his legitimate interest as managing director of the company. To that effect he had cited Article 367 of the Criminal Code, under which his actions should have remain unpunished, given that his actions and been undertaken in pursuit of a matter of legitimate interest.

2. The Court's assessment

23. The Court reiterates that the purpose of the rule on the exhaustion of domestic remedies is to afford Contracting States the opportunity of preventing or putting right violations that they are alleged to have committed before those allegations are submitted to it (see, among many other authorities, *Selmouni v. France* [GC], no. 25803/94, § 74, ECHR 1999-V, and *Remli v. France*, 23 April 1996, § 33, *Reports of Judgments and Decisions* 1996-II).

24. The rule on exhaustion of domestic remedies must be applied with some degree of flexibility and without excessive formalism. At the same time, it requires, in principle, that the complaints intended to be made subsequently at international level should have been aired before those same courts – at least in substance, and in compliance with the formal requirements and time-limits laid down in domestic law (see, among many other authorities, *Vučković and Others v. Serbia* (preliminary objection) [GC], nos. 17153/11 and 29 others, § 72, 25 March 2014, and *Gherghina v. Romania* (dec.) [GC], no. 42219/07, §§ 84-87, 9 July 2015).

25. It is not necessary for a Convention right to be explicitly raised in domestic proceedings, provided that the complaint is raised "at least in substance" (see *Fressoz and Roire v. France* [GC], no. 29183/95, § 39, ECHR 1999-I, and *Azinas v. Cyprus* [GC], no. 56679/00, § 38, ECHR 2004-III). If the applicant has not relied on the provisions of the Convention, he or she must have raised arguments to the same or like effect on the basis of domestic law, in order to have given the national courts the opportunity to redress the alleged breach in the first place (see *Gäfgen v. Germany* [GC], no. 22978/05, § 142, ECHR 2010, and *Karapanagiotou and Others v. Greece*, no. 1571/08, § 29, 28 October 2010).

26. In the present case, the Court notes that the applicant did provide the Court of Cassation with a complete account of the proceedings before the Court of Appeal and presented arguments that were in substance relevant to Article 10 of the Convention. In particular, he argued that what he had written in his official document had constituted value judgments and that they had not been written with any intention to insult, but rather on the basis of his legitimate interest, as managing director of the company, in protecting its interests (see paragraph 14 above). The Court of Cassation, for its part, examined (to the extent of its powers) the applicant's arguments and dismissed them (see paragraph 15 above).

27. In view of the foregoing, the Court is satisfied that through the arguments that he raised before the Court of Cassation, the applicant did complain, albeit implicitly, that his right to freedom of expression had been breached. In doing so, he raised, at least in substance, a complaint under Article 10 of the Convention before the Court of Cassation, and the court examined that complaint. It follows that he provided the national authorities with the opportunity that is in principle intended to be afforded to

Contracting States by Article 35 § 1 of the Convention – namely, the opportunity to put right the violations alleged against them (see *Muršić v. Croatia* [GC], no. 7334/13, § 72, ECHR 2016). The Government's objection concerning the alleged failure to exhaust the domestic remedies must therefore be dismissed.

28. The Court notes that the application is neither manifestly ill-founded nor inadmissible on any other grounds listed in Article 35 of the Convention. It must therefore be declared admissible.

B. Merits

1. The parties' arguments

29. The applicant argued that the sentence imposed on him had not been fair, given the fact that his value judgments had had a sufficiently factual basis. In particular, the applicant had put forward arguments before the domestic courts to the effect that L.P. had failed to adequately inform him of the dates of trial hearings scheduled for January 2008 and that it had been only by chance that he had learned of them from the lawyer of the other party.

30. The applicant had acted in his capacity as managing director and had listed the impugned characterisations – that is to say that L.P.'s conduct had been unprofessional and contrary to ethics – in an official document addressed solely to L.P. That document had not been designed to offend her, but rather simply to protect the company's interests and had not been intended for sharing with the general public. The applicant argued that according to domestic case-law (decision no. 487/2019 of the Court of Cassation), a bailiff who served official documents could not be considered to be a third person, and his knowledge of the document did not constitute the dissemination of allegations.

31. In that official document, the applicant had requested that L.P. inform the company of any legal cases pending, pursuant to her legal obligation. The comments contained in the official document had not targeted her personally but rather in her capacity as a lawyer. The applicant had repeatedly called on L.P., as the company's legal advisor, to inform the company of any pending legal issues, but to no avail; he had thus been under considerable psychological strain and had had an obligation as managing director towards the company to protect its interests.

32. The Government argued that freedom of expression did not include the right to disseminate facts that could injure the reputation of another person – especially if those facts were false. The domestic courts, following an evidentiary procedure, had concluded that the applicant had disseminated to an indefinite number of people false information that could have harmed the reputation of L.P. The applicant had known that what he had stated was untrue. Therefore, the applicant's statements had exceeded the permissible

limits of the right to freedom of expression, as he had disproportionately injured L.P.'s reputation.

33. In any event, assuming that there had indeed been an interference with the applicant's right to freedom of expression, that interference had been prescribed by law – namely, Articles 362 and 363 of the Criminal Code, which had been well known and of a clearly defined scope, and had served a legitimate aim (that is to say the protection of L.P.'s reputation). L.P. was not a political figure, and the wider limits of criticism did not therefore apply to her. Nor had the applicant's statements contributed to a debate of general interest that could have justified a degree of exaggeration or even provocation.

34. Lastly, the interference had been necessary in a democratic society. The domestic courts – after taking into account all the elements of the dispute and after conducting a fair trial, in conformity with Article 6 of the Convention – had struck a fair balance between the competing interests. The sentence imposed on the applicant had been proportionate and could not be considered excessive. Indeed. the applicant had not argued that the sentence had been too severe.

2. The Court's assessment

35. The Court considers that the applicant's conviction amounted to "interference by public authority" with his right to freedom of expression and that the Government's arguments should be examined in relation to the restrictions on freedom of expression provided in paragraph 2 of Article 10. Such interference will infringe the Convention if it does not meet the requirements of that paragraph. It must therefore be determined whether it was "prescribed by law", pursued one or more of the legitimate aims set out in paragraph 2, and was "necessary in a democratic society" in order to achieve them.

(a) Prescribed by law and "legitimate aim"

36. The Court finds that the interference in question was prescribed by law (namely, Articles 363 and 367 of the Criminal Code), and that it pursued the legitimate aim of protecting the reputation or rights of others, within the meaning of Article 10 § 2.

(b) Necessary in a democratic society

37. In the present case, what is at issue is whether the interference was "necessary in a democratic society".

(i) General principles

38. The general principles for assessing the necessity of an interference with the exercise of freedom of expression have been frequently reaffirmed

by the Court since the judgment in *Handyside v. the United Kingdom* (7 December 1976, Series A no. 24), were summarised in *Stoll v. Switzerland* ([GC], no. 69698/01, § 101, ECHR 2007-V) and were restated more recently in *Pentikäinen v. Finland* ([GC], no. 11882/10, § 87, ECHR 2015), *Bédat v. Switzerland* ([GC], no. 56925/08, § 48, 29 March 2016), and *Medžlis Islamske Zajednice Brčko and Others v. Bosnia and Herzegovina* ([GC], no. 17224/11, § 75, 27 June 2017):

> "(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-fulfilment. 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 ..."

39. When called upon to examine the necessity of an interference 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 struck a fair balance in seeking to protect two values guaranteed by the Convention that may have 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, as enshrined in Article 8 (see *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011). 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 carried out in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *Bédat*, cited above,

§ 72; *Axel Springer AG v. Germany* [GC], no. 39954/08, § 83, 7 February 2012; and *A. v. Norway*, no. 28070/06, § 64, 9 April 2009). On the other hand, Article 8 cannot be relied on in order to complain of a loss of reputation that is the foreseeable consequence of one's own actions, such as, for example, the commission of a criminal offence (see *Axel Springer AG*, cited above, § 83, and *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII).

40. In instances where, in accordance with the criteria set out above, the interests of the "protection of the reputation or rights of others" bring Article 8 into play, the Court may be required to verify whether the domestic authorities struck a fair balance when protecting the two values guaranteed by the Convention – namely, on the one hand, freedom of expression (as protected by Article 10) and, on the other, the right to respect for private life, as enshrined in Article 8. The general principles applicable to the balancing of these rights were recently summarised in *Perinçek v. Switzerland* [GC] (no. 27510/08, § 198, ECHR 2015 (extracts)), as follows:

> "(i) In such cases, the outcome should not vary depending on whether the application was brought under Article 8 by the person who was the subject of the statement or under Article 10 by the person who has made it, because in principle the rights under these Articles deserve equal respect.
>
> (ii) The choice of the means to secure compliance with Article 8 in the sphere of the relations of individuals between themselves is in principle a matter that falls within the High Contracting Party's margin of appreciation, whether the obligations on it are positive or negative. There are different ways of ensuring respect for private life and the nature of the obligation will depend on the particular aspect of private life that is at issue.
>
> (iii) Likewise, under Article 10 of the Convention, the High Contracting Parties have a margin of appreciation in assessing whether and to what extent an interference with the right to freedom of expression is necessary.
>
> (iv) The margin of appreciation, however, goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those given by independent courts. In exercising its supervisory function, the Court does not have to take the place of the national courts but to review, in the light of the case as a whole, whether their decisions were compatible with the provisions of the Convention relied on.
>
> (v) If the balancing exercise has been carried out by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for theirs."

41. Where the right to freedom of expression is being balanced against the right to respect for private life, the relevant criteria laid down in the Court's case-law include: (a) whether a contribution was made to a debate of public interest, (b) how well-known the person concerned is, (c) the subject of the news report in question, (d) the prior conduct of the person concerned, and (e) the content, form and consequences of the publication of

the material in question. Where it examines an application lodged under Article 10, the Court will also examine (f) the way in which the information was obtained, and its veracity, and (g) the severity of the penalty imposed on the journalists or publishers (see, among other authorities, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 93, ECHR 2015 (extracts)).

42. In light of the Court's case-law relating to disparaging statements against public officials made in written complaints to the authorities the Court examines the proportionality of the interference by looking at (a) the nature and exact manner of communication of the statements; (b) the respective context within which they were made; (c) the extent to which they affected the person concerned; and (d) the severity of the sanctions imposed on the applicant (see *Zakharov v. Russia*, no. 14881/03, 5 October 2006; *Kazakov v. Russia*, no. 1758/02, 18 December 2008; *Sofranschi v. Moldova*, no. 34690/05, 21 December 2010; *Siryk v. Ukraine*, no. 6428/07, 31 March 2011; and *Marin Kostov v. Bulgaria*, no. 13801/07, 24 July 2012).,

43. Where the national authorities have weighed up the interests at stake, in compliance with the criteria laid down by the Court's case-law, weighty reasons are required if it is to substitute its view for that of the domestic courts (see *MGN Limited*, cited above, §§ 150 and 155; *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06 and 3 others, § 57, ECHR 2011; and, more recently, *Haldimann and Others v. Switzerland*, no. 21830/09, §§ 54-55, ECHR 2015). In exercising its supervisory jurisdiction, the Court must look at the impugned interference in the light of the case as a whole, including the content of the remarks held against the applicant and the context within which they were made (see *Radobuljac v. Croatia*, no. 51000/11, § 57, 28 June 2016).

(ii) Application of the above principles to the present case

44. In order to determine the approach to be applied in the present case, the Court has to look at the interference complained of in the light of the case as a whole, including the form in which the remarks held against the applicants were conveyed, their content, and the context within which the impugned statements were made (see *Stankiewicz and Others v. Poland*, no. 48723/07, § 61, 14 October 2014, and *Nikula v. Finland*, no. 31611/96, §§ 44 and 46, ECHR 2002-II).

45. The Court notes that it has not been submitted (nor does it appear) that the accusations made against L.P. in the above-mentioned official document concerned conduct that was regarded as criminal under domestic law (contrast *White v. Sweden*, no. 42435/02, § 25, 19 September 2006; *Sanchez Cardenas v. Norway*, no. 12148/03, §§ 37-39, 4 October 2007; *Pfeifer v. Austria*, no. 12556/03, §§ 47-48, 15 November 2007; and *A. v. Norway*, cited above, § 73). However, it finds that accusing L.P. of

being unprofessional and of engaging in behaviour contrary to ethics in a document made known to a restricted number of persons was not only capable of tarnishing her reputation, but also of causing her harm in both her professional and social environment. Accordingly, the accusations attained a level of seriousness sufficient to harm L.P.'s rights under Article 8 of the Convention (see, *mutatis mutandis*, *Bergens Tidende and Others v. Norway*, no. 26132/95, § 51, ECHR 2000-IV, and *Kanellopoulou v. Greece*, no. 28504/05, § 38, 11 October 2007, both of which concerned accusations made against doctors). The Court must therefore ascertain whether the domestic authorities struck a fair balance between the two values guaranteed by the Convention – namely, on the one hand, the applicant's freedom of expression, as protected by Article 10, and, on the other, L.P.'s right to respect for her reputation under Article 8 (see *Axel Springer AG* [GC], cited above, § 84).

46. Where national jurisdictions have carried out a balancing exercise in relation to those rights, the Court has to examine whether, during their assessment, they applied the criteria established in its case-law on the subject (see *Axel Springer AG*, cited above, § 88) and whether the reasons that led them to take the impugned decisions were sufficient and relevant such as to justify the interference with the right to freedom of expression (see *Cicad v. Switzerland*, no. 17676/09, § 52, 7 June 2016). It will do so by examining those criteria established in its case-law that are of relevance to the present case. In this regard, the Court notes that it has not yet had the opportunity to rule in cases of defamation arising from statements in private documents between individuals that were not meant by their author to be publicly disseminated but which were made known to a restricted number of persons. However, it has dealt with disparaging statements made against public officials in written complaints to the authorities (see paragraph 42 above). Although different features become relevant when considering the quality of the addressee, the Court observes that the structure of the behavior in both types of cases is the same, that is to say the allegations were included in documents not made available publicly (see *Zakharov*, cited above, § 23). Therefore, some core principles developed within the context of that case-law apply, *mutatis mutandis*, in the present case.

(1) The nature and the exact manner of communication of the statements

47. The Court reiterates that in order to assess whether an impugned statement was justified, a distinction needs to be made between statements of fact and value judgments. While the existence of facts can be demonstrated, the truth of value judgments is not susceptible of proof. The requirement to prove the truth of a value judgment is impossible to fulfil and infringes freedom of opinion itself, which is a fundamental part of the right secured by Article 10. The classification of a statement as a fact or as a value judgment is a matter that in the first place falls within the margin of

appreciation of the national authorities – in particular the domestic courts. However, even where a statement amounts to a value judgment, there must exist a sufficient factual basis to support it, failing which it will be excessive (see, for example, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 76, ECHR 2004-XI). As a general rule, the Court considers that the necessity of a link between a value judgment and its supporting facts may vary from case to case according to the specific circumstances (see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 47, *Reports* 1997-I, and *Feldek v. Slovakia*, no. 29032/95, § 86, ECHR 2001-VIII).

48. In addition, the Court has had occasion to say that it is open to those authorities to adopt measures intended to respond appropriately and without excess to defamatory accusations devoid of foundation or formulated in bad faith (see *Castells v. Spain,* 23 April 1992, § 46, Series A no. 236).

49. As regards the nature of the comments in the present case, as noted above the statements amounted to allegations of misconduct on the part of the former lawyer of the company, Ms L.P., in the performance of her duties. In particular, the applicant argued that she had failed to properly inform him, as the new managing director of the company, of the pending legal cases involving the company and that that amounted to unprofessional and unethical behaviour (see paragraph 9 above).

50. The Court notes that the domestic courts classified the above-mentioned statements as "facts" and – following the above-mentioned evidentiary procedure – deemed them to be false (see paragraph 13 above). However, they did not provide convincing reasons for that conclusion. Rather, they merely assessed whether the expressions used in the official document had been capable of causing damage to the plaintiff's personality rights and reputation (see, *mutatis mutandis*, *I Avgi Publishing and Press Agency S.A. and Karis v. Greece*, no. 15909/06, § 33, 5 June 2008). However, the role of the domestic courts in such proceedings does not include indicating to the defendant what style he should have adopted in exercising his right to criticism, however caustic the remarks in question may have been.

51. In view of the limited scope of the domestic courts' reasoning in this respect, the Court is not persuaded by their approach and cannot share their conclusion for the following reasons. Given the wording of the applicant's statements and the explanations that he gave before the domestic courts, the Court is of the opinion that the applicant's comments contain a combination of value judgments and statements of fact. It is persuaded that the characterisations that the applicant attributed to L.P. – namely that her conduct had been contrary to ethics and unprofessional, and that she had acted in a spirit of revenge owing to her dismissal by the company – amounted to value judgements. As regards the rest of the statements contained in the official document (namely that L.P. had still not fully

informed the applicant about all pending legal cases), those did not constitute merely value judgments but also (as the Court of Appeal indicated) allegations of fact that supported his value judgments. In this regard, the Court notes that even private documents disseminated to a restricted number of persons need to have some factual basis (see *Bilan v. Croatia* (dec.), no. 57860/14, § 37, 20 October 2020). The question, therefore, is whether a sufficiently accurate and reliable factual basis proportionate to the nature and degree of the applicant's statements and allegations can be established (see *Reznik v. Russia*, no. 4977/05, § 46, 4 April 2013, and *Rungainis v. Latvia*, no. 40597/08, § 63, 14 June 2018).

52. In this regard the Court notes that the domestic courts tried to assess whether the applicant's statements had been true or false and concluded that none of the evidence adduced supported the applicant's allegations (see paragraph 13 above). However, the Court notes that the applicant submitted to those courts various arguments that supported his allegations (for example, that (i) the date of an upcoming trial hearing had been erroneously indicated as 15 February 2008, whereas in reality it had been scheduled for 15 January 2008 and (ii) he had only by chance been informed of the real date by the opposite party's lawyer – see paragraph 12 above). Nevertheless, the domestic courts' judgments contain no specific reasoning rebutting the applicant's arguments; the only relevant passage refers to the sworn testimony given by the new legal advisor, which the Court of Appeal did not consider relevant (see paragraph 13 above).

53. The Court cannot assess the truthfulness of the applicant's allegations in respect of the incompleteness of the information supplied by L.P. regarding pending legal cases, as this is a task entrusted to the relevant national authorities. Nevertheless, it considers that the dismissal of the relevant arguments was not justified by sufficient reasoning and that the domestic courts thus failed to classify the applicant's statements as value judgments (which by their nature are not susceptible of proof) and to determine whether they had had a sufficient factual basis. It follows that the domestic courts did not consider carefully the applicant's arguments regarding his statements, namely that, in his submission, he had expressed his personal, subjective opinion, which had been based on what he had perceived as "true facts". Accordingly, the Court cannot but note that the domestic courts did not apply rigorously one of the key standards established in its case-law regarding the right to freedom of expression (see *Tolmachev v. Russia*, no. 42182/11, § 50, 2 June 2020).

54. As regards the way in which the applicant expressed himself, the Court notes that while the applicant's allegations concerning L.P.'s professional behaviour were quite serious, the language used was not strong, vexatious or immoderate. The Court's case-law draws a clear distinction between criticism and insult in terms of whether sanctions may be justified for such statements (see *Skałka v. Poland*, no. 43425/98, § 34,

27 May 2003; *Uj v. Hungary*, no. 23954/10, § 20, 19 July 2011; and *Palomo Sánchez and Others*, cited above, § 67).

55. Turning to the manner of communication of the statements, the Court observes that the official document was sent privately, and the applicant did not publish or otherwise make his allegations available to the outside world. The Court accordingly notes that the defamation claim was born of the applicant's correspondence with L.P. rather than material published in the media and that the impugned statements were not therefore made publicly (see the above-cited cases of *Bezymyannyy*, § 39, *Siryk*, § 45, and *Marin Kostov*, § 46). For instance, they were not made orally in front of members of the public (contrast *Janowski v. Poland* [GC], no. 25716/94, § 33, ECHR 1999-I), or in letters addressed or made available to the public or the media (contrast *Coutant v. France* (dec.), no. 17155/03, 24 January 2008, and *Morice v. France* [GC], no. 29369/10, § 140, 23 April 2015). The fact that they were never made public is relevant, according to the pertinent case-law, to an assessment of the proportionality of the interference under Article 10 of the Convention (see *Yankov v. Bulgaria*, no. 39084/97, § 141, ECHR 2003-XII (extracts)). Nor were the statements made outside the proper channels of complaint (contrast *Puzinas v. Lithuania (no. 2)*, no. 63767/00, §§ 30 and 34, 9 January 2007). Their negative impact, if any, on L.P.'s reputation was thus quite limited.

(2) The context within which the statements were made

56. The Court notes that the remarks of the applicant were made within the context of a dispute between him, as the managing director of the company, and L.P., in her capacity as former legal advisor to the company. The applicant was engaged in serving numerous official documents to L.P. (see paragraph 7 above). L.P. in her turn, replied with serving an official document to the applicant in which she informed him that she would come at the company's premises on that same day in order to hand over the files relating to the pending legal cases in which the company was involved (see paragraph 8 above). That document was served more than one and a half months after the applicant had assumed his duties on 5 November 2007. It appears, therefore, that there was already tension between the applicant and L.P., with the former insisting that he had not been fully informed of all pending court cases, even after the company had dismissed L.P. from her duties, and with the latter participating in the exchange of official documents contesting his allegations and coming to the company premises (without giving sufficient notice) only after the passage of a considerable amount of time in order to hand over the files relating to pending legal issues facing the company (see paragraph 8 above).

57. In this regard, the Court notes that there is nothing in the domestic courts' reasoning to indicate that they took into consideration the ongoing dispute between the applicant and the plaintiff. It follows that the domestic

courts failed to assess the context within which the applicant's statements had been made, even though the applicant had provided a full history of his dispute with L.P. (see paragraph 12 above).

(3) The extent to which the statements affected the person concerned

58. The Court has already noted that the applicant's allegations were susceptible of tarnishing L.P.'s professional and social reputation (see paragraph 45 above). That said, the Court reiterates that the comments were made in a private document that was not intended for public dissemination. Contrary to the domestic courts' assessment, it cannot be ascertained that the contents of that document became known to numerous people, such as the lawyer who drafted it, the bailiff who served it or the residents of the building in which it was served. In particular, the lawyer and the bailiff became aware of the content of the document when carrying out their duties. As regards the residents of the above-mentioned building, the Court observes that under Article 121 of the Code of Civil Procedure, the procedure for posting a document on a door requires that the document be placed in a sealed envelope; therefore, the content of the document concerned in this case cannot possibly have been known to the residents of the building. The Court thus notes that in any event, the domestic courts failed to assess correctly the limited impact that the document could possibly have had on L.P.'s reputation.

(4) The severity of the sanctions imposed on the applicant

59. Lastly, the nature and severity of the penalty imposed are factors to be taken into account when assessing the proportionality of the interference (see *Katrami v. Greece*, no. 19331/05, § 38, 6 December 2007; *Mika v. Greece*, no. 10347/10, § 32, 19 December 2013; and *Athanasios Makris v. Greece*, no. 55135/10, § 38, 9 March 2017). In the instant case, the Court takes into account the fact that the applicant was sentenced to a five-month suspended prison sentence. In that regard, the Court reiterates that while the use of criminal-law sanctions in defamation cases is not in itself disproportionate (see *Radio France and Others v. France*, no. 53984/00, § 40, ECHR 2004-II; *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 47, ECHR 2007-IV; and *Ziembiński v. Poland (no. 2)*, no. 1799/07, § 46, 5 July 2016), a criminal conviction is a serious sanction, having regard to the existence of other means of intervention and rebuttal, particularly through civil remedies (see *Frisk and Jensen v. Denmark*, no. 19657/12, § 77, 5 December 2017). The Court has emphasised on many occasions that the imposition of a prison sentence in defamation cases will be compatible with freedom of expression, as guaranteed by Article 10 of the Convention, only in exceptional circumstances – notably where other fundamental rights have been seriously

impaired, as, for example, in the case of hate speech or incitement to violence (see, *mutatis mutandis*, *Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 115, ECHR 2004-XI, and *Mika*, cited above, § 33).

60. The serious sanctions imposed on the applicant could only be regarded as necessary in exceptional circumstances. However, in the instant case, given the nature of the complaints, the manner of their communication, the context within which they were made, and the effect that they could possibly have on L.P., the Court is not satisfied that this was so and that therefore, the circumstances of the instant case – a private dispute between the managing director of a company and that company's former legal advisor, which did not reach the public – presented no justification for the imposition of a prison sentence. Such a sanction, by its very nature, will inevitably have a chilling effect on freedom of speech, and the notion that the applicant's sentence was in fact suspended does not alter that conclusion, particularly given the fact that the conviction itself was not expunged (see *Paraskevopoulos v. Greece*, no. 64184/11, § 42, 28 June 2018; *Marchenko v. Ukraine*, no. 4063/04, § 52, 19 February 2009; and *Malisiewicz-Gąsior v. Poland*, no. 43797/98, § 67, 6 April 2006).

(5) Conclusion

61. The above elements lead the Court to conclude that the reasons adduced by the domestic courts to justify the interference with the applicant's right to freedom of expression were not "relevant and sufficient". The Court is mindful of the fundamentally subsidiary role of the Convention system (see *Dubská and Krejzová v. the Czech Republic* [GC], nos. 28859/11 and 28473/12, § 175, ECHR 2016). Faced, however, with the domestic courts' failure to provide relevant and sufficient reasons to justify the interference in question, the Court finds that they cannot be said to have applied standards that were "in conformity with the principles embodied in Article 10 of the Convention" or to have "based themselves on an acceptable assessment of the relevant facts". The Court accordingly concludes that the interference with the applicant's right to freedom of expression was not "necessary in a democratic society".

62. There has therefore been a violation of Article 10 of the Convention.

II. APPLICATION OF ARTICLE 41 OF THE CONVENTION

63. 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

64. The applicant claimed 50,000 euros (EUR) in respect of non-pecuniary damage, relying on various consequences that his criminal conviction had had for his personal and professional life.

65. The Government argued that the finding of a violation should constitute sufficient compensation for the non-pecuniary damage sustained by the applicant, especially given the financial situation of the country. In any event, the amount requested was excessive and unjustified in view of the circumstances of the case, as well as the fact that the applicant had failed to invoke Article 10 of the Convention before the domestic courts.

66. The Court, making its assessment on an equitable basis, awards the applicant EUR 9,000 in respect of non-pecuniary damage, plus any tax that may be chargeable.

B. Costs and expenses

67. The applicant also claimed EUR 4,360.35 for the costs and expenses incurred before the domestic courts and EUR 6,200 for those incurred before the Court, submitting a legal agreement that he had concluded with his lawyer stipulating that the amount owed should be deposited in the lawyer's bank account at the end of the proceedings.

68. The Government submitted that the amount requested by the applicant as regards the costs and expenses incurred before the domestic courts was excessive. As regards the legal agreement governing the legal services provided in respect of the proceedings before the Court, the Government observed that any such agreement between an applicant and his lawyer did not bind the Court to any particular action.

69. 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 were actually and necessarily incurred and are reasonable as to quantum (see, for example, *Editions Plon v. France*, no. 58148/00, § 64, ECHR 2004-IV). In the present case, regard being had to the documents in its possession and the above criteria, the Court considers it reasonable to award the sum of EUR 3,000 for costs and expenses incurred in respect of the domestic proceedings and EUR 1,200 incurred in respect of the proceedings before the Court – a total of EUR 4,200, plus any tax that may be chargeable to the applicant.

C. Default interest

70. 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 complaint under Article 10 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 9,000 (nine thousand euros), plus any tax that may be chargeable, in respect of non-pecuniary damage;
      (ii) EUR 4,200 (four thousand two hundred euros), plus any tax that may be chargeable to the applicant, 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 March 2021, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Renata Degener	Ksenija Turković
Registrar	President