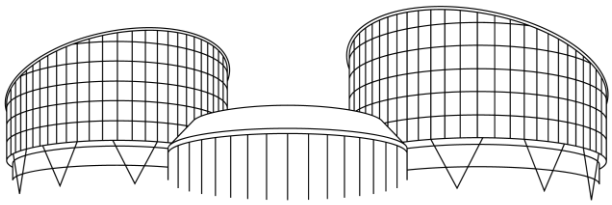

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF AXEL SPRINGER AG v. GERMANY

(Application no. 39954/08)

JUDGMENT

STRASBOURG

7 February 2012

This judgment is final but may be subject to editorial revision.

In the case of Axel Springer AG v. Germany,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Nicolas Bratza, *President*,
Jean-Paul Costa,
Françoise Tulkens,
Josep Casadevall,
Lech Garlicki,
Peer Lorenzen,
Karel Jungwiert,
Renate Jaeger,
David Thór Björgvinsson,
Ján Šikuta,
Mark Villiger,
Luis López Guerra,
Mirjana Lazarova Trajkovska,
Nona Tsotsoria,
Zdravka Kalaydjieva,
Mihai Poalelungi,
Kristina Pardalos, *judges*,

and Michael O'Boyle, *Deputy Registrar*,

Having deliberated in private on 13 October 2010 and on 7 December 2011,

Delivers the following judgment, which was adopted on the last-mentioned date:

PROCEDURE

1. The case originated in an application (no. 39954/08) against the Federal Republic of Germany lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a public limited company incorporated under German law, Axel Springer AG ("the applicant company"), on 18 August 2008.

2. Relying on Article 10, the applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of a well-known actor for a drug-related offence.

3. The application was initially allocated to the Fifth Section of the Court (Rule 52 § 1 of the Rules of Court – "the Rules"). On 13 November 2008 a Chamber of that Section decided to give notice of the application to the Government. By virtue of Article 29 § 3 of the Convention, as worded at the relevant time, it also decided that the admissibility and merits of the case should be considered together. On 30 March 2010 the Chamber, composed

of the following judges: Peer Lorenzen, *President*, Renate Jaeger, Karel Jungwiert, Rait Maruste, Mark Villiger, Mirjana Lazarova Trajkovska and Zdravka Kalaydjieva, and also Claudia Westerdiek, *Section Registrar*, after deciding to join the present application to the applications *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) concerning the refusal by the German courts to grant an injunction against any further publication of two photos, relinquished jurisdiction in favour of the Grand Chamber, none of the parties having objected to relinquishment (Article 30 of the Convention and Rule 72).

4. The composition of the Grand Chamber was determined according to the provisions of Article 26 §§ 2 and 3 of the Convention (now Article 26 §§ 4 and 5) and Rule 24 of the Rules of Court. On 3 November 2011 Jean-Paul Costa's term as President of the Court came to an end. Nicolas Bratza succeeded him in that capacity and took over the presidency of the Grand Chamber in the present case (Rule 9 § 2). Jean-Paul Costa continued to sit following the expiry of his term of office, in accordance with Article 23 § 3 of the Convention and Rule 24 § 4. At the final deliberations, Lech Garlicki and Nona Tsotsoria, substitute judges, replaced Rait Maruste and Christos Rozakis, who were unable to take part in the further consideration of the case (Rule 24 § 3).

5. The President of the Grand Chamber decided to maintain the application of Article 29 § 3 of the Convention before the Grand Chamber with a view to a joint examination of the admissibility and merits of the applications. He also decided that the proceedings in the present case should be conducted simultaneously with those in the *Von Hannover* cases cited above (Rule 42 § 2).

6. The applicant company and the Government each filed written observations on the admissibility and merits of the case. The Government filed written observations on the applicant company's observations.

7. In addition, third-party comments were received from the following non-governmental organisations: Media Lawyers Association, Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers, which had been given leave by the President to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 2). The parties were given the opportunity to reply to those comments (Rule 44 § 5).

8. A hearing took place in public in the Human Rights Building, Strasbourg, on 13 October 2010 (Rule 59 § 3).

There appeared before the Court:

(a) *for the Government*
Mrs A. WITTLING-VOGEL, Federal Ministry of Justice, *Agent*,
Mr C. WALTER, Professor of Public Law, *Counsel*,
Mrs A. VON UNGERN-STERNBERG, Assistant,
Mr R. SOMMERLATTE, Federal Office for Culture,
Mr A. MAATSCH, Judge of the Hamburg Regional Court, *Advisers*;

(b) *for the applicant company*
Mr U. BÖRGER, Lawyer, *Counsel*,
Mrs K. HESSE, Lawyer, *Adviser*.

The Court heard addresses, and answers to questions from judges, from Mr Walter and Mr Börger.

After being invited by the Court to provide additional information concerning the holding of a press conference by the Munich public prosecutor's office following the arrest of the actor X, the parties subsequently submitted a certain number of documents in that connection.

THE FACTS

I. THE CIRCUMSTANCES OF THE CASE

9. The applicant is a public limited company whose registered office is in Hamburg. It publishes the *Bild*, a daily newspaper with a large circulation. The present case concerns the publication by the newspaper of two articles about X, a well-known television actor. Between May 1998 and November 2003 X had played the part of Police Superintendent Y, the hero of a television series broadcast on a private television channel in the evenings, until 2005. By October 2004, 103 episodes had been broadcast, the last 54 of which had starred X in the role of Police Superintendent Y. The average audience rating was 18% (between 3 and 4,700,000 viewers per episode).

10. On 14 June 2003 the applicant company revealed that X had been convicted of unlawful possession of drugs. After receiving a warning from X, it undertook, on pain of an agreed penalty, to refrain from publishing information according to which four grams of cocaine had been found at X's home that he had had sent to him by post from Brazil and for which he had been given a prison sentence, suspended for five months, and fined 5,000 euros (EUR).

A. X's arrest

11. At approximately 11 p.m. on 23 September 2004 X was arrested at the Munich beer festival (*Oktoberfest*) for possession of cocaine. In a sworn statement (*eidesstattliche Versicherung*) a journalist from the applicant company declared that she had asked the police present at the scene whether X had been arrested and, if so, on what grounds. The police had confirmed that X had been arrested in the Käfer tent in possession of cocaine, without giving any further details.

12. According to that statement, the journalist had then contacted the public prosecutor, W., from the public prosecutor's office of Munich Regional Court I, in charge of relations with the press, and had asked him for information. W. had confirmed that X had been arrested in the Käfer tent in possession of cocaine. According to W., plain-clothes police officers had arrested X because they had seen him making a suspicious movement with his hand when coming out of the toilets. The officers had searched him, and, having found him to be in possession of an envelope containing 0.23 grams of cocaine, had arrested him. According to W., the arrest had taken place at approximately 11 p.m. on 23 September and a criminal complaint was currently being investigated.

B. The articles in issue

1. The first article

13. In its 29 September 2004 edition, the applicant company's daily newspaper, the *Bild*, published the following headline in large type on its front page:

> "Cocaine! Superintendent Y caught at the Munich beer festival."

The article, which was printed in small type, read as follows:

> "He came out of the gents tapping his nose suspiciously and was arrested! At the beer festival the police caught X (... years old, Superintendent Y on television), in possession of a small envelope of cocaine. See page 12 for the details."

The following headline appeared on page twelve of the daily:

> "TV star X caught in possession of cocaine. A bretzel (*Brezn*), a beer mug [containing a litre of beer – *Maß*] and a line of coke (*Koks*)."

The article, printed in small type, read as follows:

> "Thursday night, 11 p.m. At the beer festival there was drinking, partying, swaying arm in arm. And sniffing.... In the celebrities' tent the TV star X (... years old, whose real name is ...) came out of the gents tapping his nose and attracting the attention of police officers. They searched the star actor from the TV series Y (of which, by June, there had been more than 60 episodes in five years). COCAINE! X had a packet on him containing 0.23 grams of coke, and was arrested. Public prosecutor W. from Munich

> told the *Bild*: "He was making suspicious movements with his hand, tapping his nose with his fingers. This of course attracted the attention of our officers. An investigation is under way. Only a small quantity of cocaine is involved though. W. : "Right in the middle of the festival grounds (*Wiesn*) – it might have been snuff tobacco, but our men have a flair for this sort of thing...". X had already had a run-in with the law for possession of drugs. In July 2000 the Superintendent from the TV series had been given a five-month suspended prison sentence and two years' probation and fined EUR 5,000. He was accused of illegally importing drugs. On a trip to Brazil X had arranged for four grams of cocaine to be sent to his address in Munich. His probation period ended two years ago. The quantity of the drug found in the tent ... is negligible. What can the actor expect? According to a legal expert questioned by *Bild*: "Even if the probation period is over the previous conviction is recent. X may get an unsuspended prison sentence – up to six months". Why prison? "X has apparently not been sufficiently daunted by the suspended prison sentence". The actor has probably had to submit to a forensic head hair examination. Each centimetre of hair will enable the expert to determine whether and how much cocaine was taken. Yesterday X refused to comment. P.S: "In every toilet cubicle in the tent ... there are signs saying: "The use of drugs is liable to prosecution!"

The article was accompanied by three photos of X, one on the first page and the other two on page twelve.

14. On the same day, during the morning, press agencies and other newspapers and magazines reported on X's arrest, referring in part to the article published in the *Bild*. That day the prosecutor W. confirmed the facts reported in the *Bild* to other written media and television channels, two of which ("RTL" and "pro7") broadcast the same reports that evening. During one of the broadcasts the prosecutor W. made the following statement:

> "The police officers saw X making a suspicious movement with his hand while coming out of the men's toilets and concluded that he had taken something. They searched him and found an envelope containing 0.213 grams of cocaine. He had already been convicted of importing drugs and given a suspended prison sentence. He is not a first offender (*Ersttäter*). He should have known that he should not touch drugs. He can now expect a further prison sentence, even if the quantity found on him is insignificant."

2. The second article

15. In its 7 July 2005 edition the *Bild* printed the following headline on its inside pages: "TV series Superintendent X confesses in court to having taken cocaine. He is fined 18,000 euros!"

The article read as follows:

> "Munich – On TV he plays a superintendent who puts criminals behind bars. Yesterday, it was the turn of the actor X (... years old, ...) to be hauled up in front of the court and confess! X, who had to explain himself to the Munich District Court [*Amtsgericht*] on charges of "unlawful possession of drugs", has confessed to taking drugs! X's counsel ... stated: "We fully acknowledge the offence with which we have been charged in the indictment". X confessed to the court: "I have occasionally smoked cannabis and taken cocaine from time to time. This has not made me happy. It had not turned into a habit but is just something that I have done from time to time". Question from the court ...: "Are you currently taking drugs?" Reply from X: "No, I smoke cigarettes." The sentence: a fine of EUR 18,000. The court: "The accused's full

confession has counted in his favour." On TV X continues investigating on the side of law and order. In Vienna he is in front of the cameras for the television series ... which should be starting on the second channel in the autumn."

The article was accompanied by a photo of X.

C. The proceedings in the German courts

16. Immediately after the articles appeared, X. instituted proceedings against the applicant company in the Hamburg Regional Court. The applicant company attached to its initial reply the statement by its journalist (see paragraphs 11 and 12 above) and numerous press articles about X, including a number of interviews given by him, to *Bunte* magazine among others, together with photos of him.

1. The first set of proceedings

(a) The injunction proceedings

17. On 30 September 2004 the Hamburg Regional Court imposed an injunction on publication of the article, following a request lodged by X on 29 September 2004. In a judgment of 12 November 2004 it confirmed the injunction. That judgment was upheld by the Court of Appeal on 28 June 2005.

On 6 October 2004 the Regional Court also imposed an injunction on publication of the photos illustrating the article. It confirmed that decision in a judgment of 12 November 2004. The applicant company did not challenge that judgment, which became final.

(b) The main proceedings

(i) Judgment of the Regional Court

18. On 11 November 2005 the Hamburg Regional Court prohibited any further publication of almost the entire first article, on pain of an agreed penalty, under Articles 823 § 1 and 1004 § 1 (by analogy) of the Civil Code (see paragraph 47 below), read in the light of the right to protection of personality rights (*Allgemeines Persönlichkeitsrecht*). It ordered the applicant company to pay EUR 5,000 as a penalty under the agreement and to reimburse the procedural expenses (EUR 811.88, plus statutory interest accrued from 4 November 2004).

19. According to the Regional Court, the article in question, which mentioned X's name and was accompanied by photos of him, amounted to a serious interference with his right to the protection of his personality rights; the disclosure of his criminal conduct had, so to speak, resulted in his being pilloried and discredited in the eyes of the public. The court found that,

despite those negative effects, reporting of that kind would nonetheless have been lawful in the event of serious crimes that were part of contemporary society and on which the press was entitled to report. Any interference with a criminal's private sphere was limited, however, by the proportionality principle, which involved a balancing exercise between the competing interests. The court held that in the present case the right to protection of X's personality rights prevailed over the public's interest in being informed, even if the truth of the facts related by the daily had not been disputed. Neither the nature of the crime committed, nor the person of X, nor any other circumstances justified publication of the article at issue.

20. The court observed that whilst a drugs-related offence was not a petty crime, particularly as in the present case it had been cocaine, which was a hard drug, X had been in possession of only a small quantity of that drug and had not been accused of drug trafficking. The type of offence involved was of medium, or even minor, seriousness, was a very common one and there was no particular public interest in knowing about it. The court added that, unlike serious crimes (such as spectacular robberies, or murders), there were no particular circumstances distinguishing the offence in question from ordinary crimes, even if there was an assumption that drug abuse was more widespread amongst key figures from the arts world and the media than in other circles. Furthermore, the way in which the report had been made by the applicant company confirmed that the offence itself was not an important one. The report had focussed more on X's person than on the offence, which would probably never have been reported in the press if it had been committed by a person unknown to the public. Similarly, the court pointed out, whilst X's previous conviction for a similar offence was such as to increase the public's interest, it was his only previous conviction and, moreover, dated back several years.

21. The court also found that publication of the articles in question was not justified by the person of X. The public did admittedly show an interest in Police Superintendent Y, a character in a relatively popular television series, but not in the actual person of the actor playing the part. There was nothing to suggest that X attracted the attention of the public on account of his performance as an actor or other activities bringing him within a circle of persons about whom the public had a need for regular information. The interest in X did not, in any event, go beyond the interest habitually manifested by the public in leading actors in German television series.

22. The court observed that the applicant company had published many articles about X over a period of six years and particularly over the last three years. The vast majority of these publications had, however, merely mentioned X's name – often without a photo – among the names of celebrities invited to various events. Whilst it was undisputed that X had taken part in over 200 national and international cinematographic and televised productions, that did not convey much of an idea of his public importance.

Indeed, actors could have starred in hundreds of television series and still remain little known to the public. There was no evidence that X had made a name for himself on account of any particular performance or that he had occupied a prominent position in society which had brought him into the public eye.

23. X had, to an extent, sought to attract the public's attention by giving interviews to certain magazines between 2000 and 2003. He therefore had to be more tolerant towards reports published about him than other well-known figures who avoided the limelight. According to the court, X had not, however, courted the public to a degree that he could be considered to have implicitly waived his right to the protection of his personality rights.

24. The Regional Court conceded that the fact that the actor had broken the law whereas on television he played the role of a superintendent entrusted with crime prevention was more entertaining for the public than if the actor had played any other kind of role. However, that contrast between the television role and the personal lifestyle of the actor did not mean that the public confused the latter with the fictional character. The actor merely donned the persona of a superintendent, just as he could don that of any other character, without thereby adopting the conduct of the character in question in his daily life. The fact that an actor did not adopt the lifestyle of the character he played could not in any way be regarded as an extraordinary event worthy of being reported. In the court's view, viewers could distinguish between the actor and his role, even where the actor was well known essentially for playing one particular character.

25. The Regional Court found, further, that X had not sought to portray himself as an emblem of moral virtue; neither had he adopted a stand on matters relating to drug abuse. The interviews reported by the applicant company contained no comment by X on the subject. In issue no. 48/2003 of the magazine *Bunte*, X had stated, in passing, that he did not have any alcohol in the house and that he had become a big tea connaisseur. In the court's view, the fact that X had briefly remarked on his previous conviction in two interviews with magazines in 2000 and 2001 did not mean that he had portrayed himself as an advocate or critic of the fight against drugs or as an expert in the field. That subject had been only marginally covered in the interview, which had mainly concerned the actor's professional prospects and his difficulties in his relationships.

26. Observing that when balancing the competing interests, the decisive criteria were how well known X was and the seriousness of the offence with which he was charged, the Regional Court found that the case concerned an actor who was not exceptionally well known and was accused of an offence which, while not insignificant, was not particularly spectacular and could be regarded as fairly common in the entertainment world. The public did not therefore have a great interest in being informed of an event that was actually fairly anodyne, whereas the information published amounted to a serious

(*gravierend*) interference with X's right to the protection of his personality rights.

27. The Regional Court found, lastly, that the applicant company was not justified in arguing that the publication of the article was lawful because it pursued legitimate interests. Admittedly, the press officer from the public prosecutor's office at the Munich Regional Court I had informed a large number of media reporters of the offence with which X had been charged and had disclosed his identity to them; nor was there any doubt that the public prosecutor's office could be regarded as a "privileged source" (*privilegierte Quelle*) of information that did not, as a general rule, require verification as to the truth of its content. Moreover, three press agencies had disclosed similar details. However, even assuming that it had received all the information before publishing the article in question, the applicant company could only conclude that the published information was true and was not thereby absolved from the requirement to check whether its publication was justified in terms of X's right to protection of his personality rights. In the court's opinion, the question of the veracity of information issued by a public authority had to be distinguished from that of the lawfulness of the subsequent publication of that information by the press.

28. The court found that it could be presumed that institutions providing a public service, and in particular the public prosecutor's office and the police, made every effort, in accordance with the principle of neutrality, not to issue information unless the public interest in doing so had been carefully weighed against that of the persons concerned. However, such institutions were not necessarily in a better position than a publisher to weigh the conflicting interests at stake regarding the dissemination of the information through the media.

29. In the instant case the applicant company was actually better placed than a member of the Munich public prosecutor's office to judge the degree to which X was known and the question regarding whether the public had an interest in learning of his arrest. On that point the court considered that account also had to be taken of the context in which the information was published: the public services were not in a position to anticipate every possible form of dissemination of factual information in any foreseeable context or to foresee whether a report mentioning the person's name was justified or not. Accordingly, publishers could not generally consider that the disclosure of a person's identity by a privileged source would make any kind of report on the person concerned legal, without having first balanced the interests at stake.

30. The Regional Court pointed out that there were situations in which there may be doubts regarding the assessment by the public authorities. Accordingly, in the case of X, the question arose as to whether it was appropriate for the public prosecutor's office to have expressed an opinion on the sentence that X could expect to receive when the criminal investigation had only just started. The court concluded that the applicant company could not argue that it had relied on the disclosure of X's name by the public prosecutor's office.

(ii) Judgment of the Court of Appeal

31. On 21 March 2006 the Court of Appeal dismissed an appeal by the applicant company, but reduced the amount of the agreed penalty to EUR 1,000. It upheld the conclusions of the Regional Court, pointing out that the disclosure of a suspect's name when reporting on an offence constituted, as a general rule, a serious infringement of the right to the protection of personality rights, even if it was a drug offence of medium or minor seriousness. In X's case the fact of informing the public that he had taken cocaine could adversely affect his future prospects of securing acting roles and, in particular, of obtaining a role in an advertisement or in television series aimed at a young audience.

32. The Court of Appeal reiterated the relevant criteria when balancing the rights of the press against the right to protection of personality rights, as established by the Federal Court of Justice (see paragraph 48 below). It confirmed that the nature of the offence and the exact circumstances in which it had been committed made it an everyday offence and would not have aroused any interest if the perpetrator had been little known. In the court's opinion, the possession and consumption of low quantities of drugs did not have adverse effects on third parties or on the general public. As X had not taken cocaine in the tent in front of everyone, his conduct did not imperil a young audience that might be likely to imitate him on account of his being a well-known television star.

33. The Court of Appeal acknowledged that the public had a particular interest in being informed and entertained because X was a well-known figure and had played the part of a police superintendent over a long period of time (*längerer Zeitraum*). However, even if X played that role, this did not mean that he had himself necessarily become an idol or role model as a law-enforcement officer, which could have increased the public's interest in the question whether in his private life he actually behaved like his character. It was clear that the actor X could not be identified with the fictitious character of Superintendent Y that he played. The fact that X had his fan clubs and had made public appearances as the actor who played the part of Superintendent Y did not alter that finding. It could well be that X's appearance, his manner of presenting himself, and the relaxed attitude portrayed in his films appealed to others, particularly a young audience. That did not mean, though, that

others saw in him a moral role model whose image should be corrected by the newspaper report in question.

34. The publications submitted by the applicant company were indeed evidence that X was hugely popular, but did not support the contention that he had used confessions about his private life to attract the public's attention. Nor was the newspaper report justifiable on the ground that X had been arrested in public, in a tent, because the drug had actually been consumed in the men's toilets, that is, in a place that fell within the protected private sphere, and out of public view. Lastly, even if it were to be established that X's arrest was a matter of substantial public interest, the same could not be said of the description and characterisation of the offence committed out of public view.

35. Lastly, while upholding the conclusions of the Regional Court regarding the role of the Munich public prosecutor's office, the Court of Appeal stated that the applicant company's liability did not extend beyond minor negligence given that the information disclosed by the public prosecutor's office had led it to believe that the report was lawful. The illegal disclosure by the public prosecutor's office did not, however, make publication by the applicant company legal. The Court of Appeal accordingly reduced the agreed penalty to EUR 1,000. It refused leave to appeal on points of law because its judgment did not conflict with the case-law of the Federal Court of Justice.

(iii) The decisions of the Federal Court of Justice

36. On 7 November 2006 the Federal Court of Justice refused the applicant company leave to appeal on points of law on the ground that the case did not raise a question of fundamental importance and was not necessary for the development of the law or to guarantee uniformity of the case-law.

37. On 11 December 2006 the Federal Court of Justice dismissed an appeal lodged by the applicant company claiming that it had not had a sufficient opportunity to make submissions (*Anhörungsrüge*). It stated that when balancing the public's interest in being informed about public criminal proceedings against an interference with the defendant's private sphere, the Court of Appeal had taken into account the circumstances of the case and had reached its decision in accordance with the criteria established in its case-law. There was no evidence that the relevant criteria for the balancing exercise had been disregarded. The Federal Court of Justice stated that the fact that the civil courts had found against the applicant company did not permit the latter to lodge an appeal on points of law and did not amount to a violation of the right to be heard.

2. The second set of proceedings

(a) The injunction proceedings

38. On 15 August 2005 the Hamburg Regional Court granted an application by X for an injunction against any further publication of the second article.

(b) The main proceedings

(i) Judgment of the Regional Court

39. By a judgment of 5 May 2006, the Regional Court granted X's application in the main proceedings, ordered the applicant company to refrain from any further publication of the second article on pain of penalty and ordered it to pay EUR 449.96 in costs, plus statutory interest accrued from 22 September 2005. It based its decision on essentially the same grounds as those set out in its judgment of 11 November 2005 (see paragraphs 18-30 above). It stated that the case in question had to be distinguished from the one that had been the subject of the judgment of the Federal Court of Justice of 15 November 2005 (see paragraph 48 below) in that the person concerned in that case, Prince Ernst August von Hannover, was much more widely known than X, so the press had been entitled to report on the substantial penalty imposed in that case.

(ii) Judgment of the Court of Appeal

40. On 12 September 2006 the Hamburg Court of Appeal dismissed an appeal by the applicant company on essentially the same grounds as those given in its judgment of 21 March 2006 (see paragraphs 31-35 above). On the subject of the relevant criteria for weighing the conflicting interests, it stated that, according to the judgment of the Federal Constitutional Court of 13 June 2006 (see paragraph 49 below), the fact that a person was a prominent figure or one known to the public was not a sufficient factor in itself to justify the existence of an interest on the part of the public in being informed of his or her conduct. In the present case, the public's interest in being informed and entertained, which derived from the fact that X was a well-known figure and starred as a superintendent in a television series, was insufficient to justify the interference with his right to decide for himself which information he was willing to disclose (*informationelle Selbstbestimmung*).

41. The applicant company's reliance on the high audience rating of the television series Y. did not, in the Court of Appeal's opinion, prove that X. had served as a role model or a counter model. If a role model existed for millions of viewers, the role model in question was the character of the superintendent. The Court of Appeal reiterated that the fact that X. had been arrested in a public place did not make the newspaper article lawful because

the offence itself had been committed out of public view, in the men's toilets. The suspicious movement that X had made with his hand had admittedly attracted the attention of the police at the scene, but it had not been established that other persons present in the tent had noticed that X had taken cocaine.

42. The Court of Appeal added that whilst the fact that the "quality press" had reported the case might indicate that there was a not insignificant (*nicht geringes*) interest in reporting it, that was not a basis on which to conclude that the interference with X's right to the protection of his personality rights had been lawful.

43. The Court of Appeal refused the applicant company leave to appeal on points of law on the ground that its judgment did not conflict with the case-law of the Federal Court of Justice, in particular the latter's judgment of 15 November 2005 (see paragraph 48 below).

(iii) Decisions of the Federal Court of Justice

44. On 17 April 2007 the Federal Court of Justice refused the applicant company leave to appeal on points of law on the ground that the case did not raise a question of fundamental importance and was not necessary for the development of the law or to guarantee uniformity of the case-law. On 12 June 2007 it dismissed an appeal lodged by the applicant company claiming that it had not had a sufficient opportunity to make submissions.

3. Decision of the Federal Constitutional Court

45. On 5 March 2008 a three-judge panel of the Federal Constitutional Court declined to entertain constitutional appeals lodged by the applicant company against the court decisions delivered in the first and second sets of proceedings. It stated that it was not giving reasons for its decision.

4. Other judicial decisions concerning the applicant company

46. On 12 September 2006 and 29 January 2008 the Hamburg Regional Court ordered the applicant company to pay X two penalty payments of EUR 5,000, each one for having breached the order of 15 August 2005 (see paragraph 38 above). The court criticised the applicant company for, *inter alia*, publishing in the 7 July 2006 edition of the daily newspaper *Die Welt* and on the newspaper's internet page (welt.de) on 22 March 2007 the following statement by one of its editors:

> "Accordingly, we had no right whatsoever to report on the trial of the popular actor X for possession of cocaine, even though he was a very well-known recidivist and the offence was committed at the beer festival in Munich."

II. RELEVANT DOMESTIC LAW AND PRACTICE AND EUROPEAN TEXTS

A. Domestic law and practice

1. The Civil Code

47. Article 823 § 1 of the Civil Code (*Bürgerliches Gestezbuch*) provides that anyone who, intentionally or negligently, unlawfully infringes another's right to life, physical integrity, health, freedom, property or other similar right, shall be liable to make compensation for the resulting damage.

In accordance with Article 1004 § 1, where another's property is damaged otherwise than by removal or illegal retention the owner may require the perpetrator to cease the interference. If there are reasonable fears that further damage will be inflicted, the owner may seek an injunction.

2. Relevant case-law

48. In its judgment of 15 November 2005 (no. Vi ZR 286/04) the Federal Court of Justice reiterated its established case-law according to which the decisive criteria for evaluating the lawfulness of a news report mentioning the name of the person concerned were the nature of the offence and the person of the suspect. The facts of the case were a fine and a prohibition on driving imposed by the French courts for speeding on a motorway (211 instead of 130 km per hour) on a person known to the public. The Federal Court of Justice found, firstly, that the speed limit had been exceeded to such an extent that it could be regarded as an expression of extreme contempt for the highway regulations, and, secondly, that the offence had put other motorists at considerable risk. Moreover, both the manner in which the person concerned had behaved in public in the past and his origins and the fact that he was the husband of a very well-known individual meant that the interest of the press in publishing a news report prevailed over the right to protection of the personality rights of the person concerned. The Federal Court of Justice pointed out that the Court's judgment in the case of *Von Hannover v. Germany* of 24 June 2004 (no. 59320/00, ECHR 2004-VI) allowed of no other conclusion. The articles (and photos) in that case had concerned only scenes from Caroline von Hannover's daily life, and had aimed merely to satisfy the curiosity of a particular readership regarding her private life.

49. In a decision of 13 June 2006 (no. 1 BvR 565/06), a three-judge panel of the Federal Constitutional Court decided not to entertain a constitutional appeal lodged against the judgment of the Federal Court of Justice and upheld the latter's findings.

B. Texts adopted by the Council of Europe

1. Recommendation Rec(2003)13 of the Committee of Ministers

50. The relevant passages of Recommendation (Rec(2003)13 of the Committee of Ministers to member states on the provision of information through the media in relation to criminal proceedings, adopted on 10 July 2003 at the 848th meeting of the Ministers' Deputies, read as follows:-

"...

Recalling that the media have the right to inform the public due to the right of the public to receive information, including information on matters of public concern, under Article 10 of the Convention, and that they have a professional duty to do so;

Recalling that the rights to presumption of innocence, to a fair trial and to respect for private and family life under Articles 6 and 8 of the Convention constitute fundamental requirements which must be respected in any democratic society;

Stressing the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible as well as in ensuring public scrutiny of the functioning of the criminal justice system;

Considering the possibly conflicting interests protected by Articles 6, 8 and 10 of the Convention and the necessity to balance these rights in view of the facts of every individual case, with due regard to the supervisory role of the European Court of Human Rights in ensuring the observance of the commitments under the Convention;

...

Recommends, while acknowledging the diversity of national legal systems concerning criminal procedure, that the governments of member states:

1. take or reinforce, as the case may be, all measures which they consider necessary with a view to the implementation of the principles appended to this recommendation, within the limits of their respective constitutional provisions,

...

Appendix to Recommendation Rec(2003)13

Principles concerning the provision of information through the media in relation to criminal proceedings

Principle 1 - Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

Principle 2 - Presumption of innocence

Respect for the principle of the presumption of innocence is an integral part of the right to a fair trial.

Accordingly, opinions and information relating to on-going criminal proceedings should only be communicated or disseminated through the media where this does not prejudice the presumption of innocence of the suspect or accused.

Principle 3 - Accuracy of information

Judicial authorities and police services should provide to the media only verified information or information which is based on reasonable assumptions. In the latter case, this should be clearly indicated to the media.

Principle 4 - Access to information

When journalists have lawfully obtained information in the context of on-going criminal proceedings from judicial authorities or police services, those authorities and services should make available such information, without discrimination, to all journalists who make or have made the same request.

(...)

Principle 8 - Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

2. Resolution 1165 (1998) of the Parliamentary Assembly of the Council of Europe on the right to privacy

51. The relevant passages of this resolution, adopted by the Parliamentary Assembly on 26 June 1998, read as follows:-

"...

6. The Assembly is aware that personal privacy is often invaded, even in countries with specific legislation to protect it, as people's private lives have become a highly lucrative commodity for certain sectors of the media. The victims are essentially public figures, since details of their private lives serve as a stimulus to sales. At the same time, public figures must recognise that the special position they occupy in society - in many cases by choice - automatically entails increased pressure on their privacy.

7. Public figures are persons holding public office and/or using public resources and, more broadly speaking, all those who play a role in public life, whether in politics, the economy, the arts, the social sphere, sport or in any other domain.

8. It is often in the name of a one-sided interpretation of the right to freedom of expression, which is guaranteed in Article 10 of the European Convention on Human Rights, that the media invade people's privacy, claiming that their readers are entitled to know everything about public figures.

9. Certain facts relating to the private lives of public figures, particularly politicians, may indeed be of interest to citizens, and it may therefore be legitimate for readers, who are also voters, to be informed of those facts.

10. It is therefore necessary to find a way of balancing the exercise of two fundamental rights, both of which are guaranteed by the European Convention on Human Rights: the right to respect for one's private life and the right to freedom of expression.

11. The Assembly reaffirms the importance of every person's right to privacy, and of the right to freedom of expression, as fundamental to a democratic society. These rights are neither absolute nor in any hierarchical order, since they are of equal value.

12. However, the Assembly points out that the right to privacy afforded by Article 8 of the European Convention on Human Rights should not only protect an individual against interference by public authorities, but also against interference by private persons or institutions, including the mass media.

13. The Assembly believes that, since all member states have now ratified the European Convention on Human Rights, and since many systems of national legislation comprise provisions guaranteeing this protection, there is no need to propose that a new convention guaranteeing the right to privacy should be adopted. ..."

THE LAW

I. DISJOINDER OF THE APPLICATION

52. The Court notes that before relinquishing jurisdiction in favour of the Grand Chamber the Chamber had joined the present application to the applications in *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) – see paragraph 3 above). Having regard, however, to the nature of the facts and the substantive issues raised in those cases, the Grand Chamber considers it appropriate to disjoin applications nos. 40660/08 and 60641/08 from the present application.

II. ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

53. The applicant company complained about the injunction imposed on it against reporting on the arrest and conviction of X. It relied on Article 10 of the Convention, the relevant parts of which read as follows:

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

A. Admissibility

54. The Court observes that this complaint is not manifestly ill-founded within the meaning of Article 35 § 3 a) of the Convention. It notes further that no other ground for declaring it inadmissible has been established and that it must therefore be declared admissible.

B. Merits

1. The parties' submissions

(a) The Government

55. The Government acknowledged that the impugned court decisions amounted to an interference with the applicant company's right to freedom of expression. However, the interference was prescribed by law and pursued an aim recognised as legitimate by the Court, namely, the protection of the private sphere (*News Verlags GmbH & Co.KG v. Austria*, no. 31457/96, § 44, ECHR 2000-I). The question at issue between the parties in the present case was whether the interference had been proportionate, and in particular whether the balancing exercise undertaken by the national courts of the applicant company's right to freedom of expression against X's right to respect for his private life was in conformity with the criteria established by the Court's case-law. In that connection regard had to be had to the role of the person concerned, the purpose of the publication and the severity of the sanction imposed on the press.

56. The Government referred to the national courts' finding that, unlike Superintendent Y, X was not well known to the public and accordingly could not be regarded as a public figure. In its judgment concerning the second article, the Regional Court had, moreover, differentiated X from Prince Ernst August von Hannover (see paragraph 39 above). The press interviews given by X had not been sufficient in themselves to increase the public's interest in his person. In the Government's submission, the task of assessing how well a person was known to the public should fall to the domestic courts. That was particularly true in borderline cases, which required an assessment of the facts and of social situations that the Court could not undertake in respect of each and every potential public figure in 47 States.

57. With regard to the subject matter of media reports, the Government acknowledged that where the press reported on the commission of an offence it was generally playing its role as "public watchdog", in particular where criminal proceedings were concerned. There was a greater public interest in this case than when the press merely reported details of the private life of an individual. In the present case, however, the public had no interest in being informed about the offence committed by X, whom they could not have dissociated from the person of the defendant. The present case had not called into question the workings of the justice system, like the case of *Obukhova v. Russia* (no. 34736/03, 8 January 2009), but had concerned only a minor drugs-related offence committed by a relatively well-known actor.

58. The task of assessing the seriousness of the offence should fall within the margin of appreciation of the national authorities. In the instant case the courts considered that the offence was of medium, or even minor, seriousness. The Government pointed out that the amount of the fine was relatively high on account of X's income. The criminal courts had fixed the amount at 90 day-fines, so the offence did not appear in X's certificate of good conduct (destined for employers) or in his criminal record.

59. The Government disputed the applicant company's allegation that the Munich prosecutor had held a press conference and published a press release about X's arrest prior to publication of the first article (see paragraph 69 below).

60. As regards the nature of the penalty imposed on the applicant company, the Government observed that the latter had merely been prevented from publishing the content of the articles in question and had been ordered to reimburse modest legal costs. The applicant company had neither been convicted under criminal law nor ordered to pay damages, unlike publishers in other cases who had been given a custodial sentence; nor had it been prevented from carrying on the profession of journalist or faced an order for the seizure of all copies of the particular edition of a newspaper or an order to pay hefty damages (*Cumpănă and Mazăre v. Romania* [GC], no. 33348/96, § 112, ECHR 2004-XI; *Wirtschafts-Trend Zeitschriften-Verlags GmbH v. Austria*, no. 58547/00, § 41, 27 October 2005; and *Flinkkilä and Others v.*

Finland, no. 25576/04, § 89, 6 April 2010). The Government added that the German courts had not, moreover, imposed a blanket ban on all reporting of X's arrest and trial; the problem had been that the applicant company had failed to maintain the anonymity of the actor at the time of his arrest and prior to the trial.

61. The Government highlighted the margin of appreciation enjoyed by the State in the present case. That margin depended on the nature of the activities in question and the aim pursued by the restrictions. In its recent case-law, the Court had moreover left the State a broad margin of appreciation in cases concerning Article 8 of the Convention. (*Armonienė v. Lithuania*, no. 36919/02, § 38, 25 November 2008, and *A. v. Norway*, no. 28070/06, § 66, 9 April 2009). Generally speaking, the margin enjoyed by the States was broader where there was no European consensus. In the Government's submission, whilst there was admittedly a trend towards harmonisation of the legal systems in Europe, differences nevertheless remained, as evidenced by the failure of the negotiations for the adoption of a regulation of the European Union on conflict-of-law rules regarding non-contractual obligations (Regulation EC No. 864/2007 of 11 July 2007 – Rome II Regulation). The margin of appreciation was also broad where the national authorities had to strike a balance between competing private and public interests or Convention rights (*Evans v. the United Kingdom* [GC], no. 6339/05, § 77, ECHR 2007-I, and *Dickson v. the United Kingdom* [GC], no. 44362/04, § 78 ECHR 2007-XIII). Moreover, the case-law of the Court of Justice of the European Union apparently took the same approach (cases of *Omega* of 14 October 2004, C-36/02, and *Schmidberger* of 12 June 2003, C-112/00).

62. The Government argued that the special nature of certain cases, such as the present one, in which the domestic courts were required to balance the rights and interests of two or more private individuals lay in the fact that the proceedings before the Court were in fact a continuation of the original legal action, with each party to the domestic proceedings potentially able to apply to the Court. It was precisely for that reason that one result alone of the balancing exercise of the competing interests was insufficient, and that there should be a "corridor" of solutions within the confines of which the national courts should be allowed to give decisions in conformity with the Convention. Failing that, the Court would have to take the decision on every case itself, which could hardly be its role.

63. The Government stated that there had been slightly less of a tendency to do this at domestic level because the Federal Constitutional Court granted the ordinary courts a margin of appreciation in that respect and refrained from carrying out its own balancing exercise in their stead. That could, moreover, explain the absence of reasons given for the decision of the Federal Constitutional Court in the present case. The tendency, at national level, to reduce the scope of review by a constitutional court should apply *a fortiori* to the European Court of Human Rights, which had the task of examining the

outcome of balancing exercises carried out by the courts in 47 Contracting States, whose legal systems were still very heterogeneous.

64. In the Government's submission, the Court should intervene only where the domestic courts had not taken account of certain specific circumstances when undertaking the balancing exercise or where the result of that exercise was patently disproportionate (*Cumpănă and Mazăre*, cited above, §§ 111-120). That conclusion was confirmed, moreover, by Article 53 of the Convention: where the relationship between State and citizen was concerned, a gain of freedom for the individual concerned involved only a loss of competence for the State, whereas in the relationship between two citizens the fact of attaching more weight to the right of one of the persons concerned restricted the right of the others, which was forbidden under Article 53 of the Convention.

(b) The applicant company

65. The applicant company maintained that at the material time X was a well-known actor who played the main role in a television crime series that was extremely popular, especially among young male adults; X had, moreover, been voted second most popular actor in 2002. He was not therefore just an ordinary individual who did not attract media attention, as had been so in other cases decided by the Court (see, *inter alia*, *Sciacca v. Italy*, no. 50774/99, ECHR 2005-I; *Toma v. Romania*, no. 42716/02, 24 February 2009; and *Egeland and Hanseid v. Norway*, no. 34438/04, 16 April 2009).

66. In the applicant company's submission, the commission of a criminal offence was, by its very nature, never a purely private matter. Furthermore, in the present case X was a repeat offender as he had already been given a five-month suspended prison sentence in July 2000 and fined EUR 5,000 for possession of drugs.

67. The public's interest in being informed prevailed over X's right to respect for his private life. X had – of his own initiative – courted public attention, had a market value corresponding to his high profile, had willingly allowed photos to be taken of himself on public occasions and had given press interviews revealing aspects of his private life, including his drug consumption. As a role model and having himself entered the public arena, X should have accepted that he would attract the public's attention, in particular if he committed a criminal offence. The applicant company argued that anyone who used the media for self-promotion should expect their conduct to be truthfully reported on by the media. This was

particularly true in X's case because, following his first conviction for possession of drugs, he had asserted that he had given up taking drugs. He had accordingly waived his right to privacy.

68. The applicant company stated, further, that the truth of the facts reported in the articles in question was not disputed (citing, conversely, *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, ECHR 2004-XI). The information given had, moreover, not affected the conduct of the preliminary investigation or the trial (citing, conversely, *Tourancheau and July v. France*, no. 53886/00, 24 November 2005); it had included details not only about X's private life, but also serious factual information about criminal law and the consequences of drug taking. The present case was thus distinguishable from the case of *Von Hannover* (cited above), especially as, unlike X, the applicant in that case had always sought to protect her private life.

69. The applicant company reiterated that it had reported on X's arrest after the prosecution authorities had disclosed the facts and the identity of the person arrested. In its submissions at the hearing, particularly in reply to the judges' questions, it had stated that prior to publication of the articles the Munich public prosecutor's office had held a press conference – in the presence of television cameras – during which it had provided detailed information. The public prosecutor's office had also published a long press release on the subject. Accordingly, the applicant company had published only information that had already been made public. It would be demotivating for journalists not to be able to publish such information. Attending a press conference would be a complete waste of time.

70. In conclusion, the applicant company submitted that the press should not be reduced to reporting only on political figures. Since prominent persons were able to establish a certain image of themselves by seeking the attention of the media, the latter should be permitted to correct that image when it no longer corresponded to the reality. It was not a question of asserting the primacy of the freedom of expression over the right to respect for private life. Freedom of expression should, however, prevail where the person concerned enjoyed a more than regional degree of prominence and had freely engaged in his or her self-promotion.

2. Third parties' observations

(a) Media Lawyers Association

71. The third-party association submitted that the right to reputation was not protected by the Convention. Publication of a defamatory article about a person did not, of itself, amount to an interference with the exercise of the rights guaranteed under Article 8. When balancing the rights under Articles 8 and 10 of the Convention wide and strong protection should be given to the right of the media to report on all matters of public interest and in particular

to inform the public about judicial proceedings. The third-party association observed that the inclusion of a person's name or other identifying detail played an important part in fulfilling the task of informing the public.

72. According to a United Kingdom Supreme Court ruling, if the names of the parties were not revealed when reporting on court proceedings the report would be disembodied, readers would be less interested and editors would give the report lower priority. The Media Lawyers Association also stressed the importance of preserving a wide editorial discretion and the principle of open justice to which the media contributed an essential element, adding that there should be no incursion into that principle except where strictly necessary such as protecting a defendant or witness by anonymity. Other than in those circumstances, there should be no restriction on the right of the media to publish reports on court proceedings including photographs.

(b) Joint submissions by the Media Legal Defence Initiative, International Press Institute and World Association of Newspapers and News Publishers

73. The three third-party associations submitted that a broad trend could be observed across the Contracting States towards the assimilation by the national courts of the principles and standards articulated by the Court relating to the balancing of the rights under Article 8 against those under Article 10 of the Convention, even if the individual weight given to a particular factor might vary from one State to another. They invited the Court to grant a broad margin of appreciation to the Contracting States, submitting that such was the thrust of Article 53 of the Convention. They referred to the Court's judgment in the case of *Chassagnou and Others v. France* ([GC], nos. 25088/94, 28331/95 and 28443/95, § 113, ECHR 1999-III), submitting that the Court had indicated that it would allow Contracting States a wide margin of appreciation in situations of competing interests.

74. The Contracting States were likewise generally granted a wider margin in respect of positive obligations in relationships between private parties or other areas in which opinions within a democratic society might reasonably differ significantly (*Fretté v. France*, no. 36515/97, § 41, ECHR 2002-I). The Court had, moreover, already allowed the Contracting States a broad margin of appreciation in a case concerning a balancing exercise in respect of rights under Articles 8 and 10 of the Convention (*A. v. Norway*, cited above, § 66). Its role was precisely to confirm that the Contracting States had put in place a mechanism for the determination of a fair balance and whether particular factors taken into account by the national courts in striking such a balance were consistent with the Convention and its case-law. It should only intervene where the domestic courts had considered irrelevant factors to be significant or where the conclusions reached by the domestic courts were clearly arbitrary or summarily dismissive of the privacy or reputational interests at stake. Otherwise, it ran the risk of becoming a court of appeal for such cases.

3. The Court's assessment

75. The parties agreed that the judicial decisions given in the present case constituted an interference with the applicant company's right to freedom of expression as guaranteed by Article 10 of the Convention.

76. Such interference contravenes the Convention if it does not satisfy the requirements of paragraph 2 of Article 10. It therefore falls to be determined whether the interference was "prescribed by law", had an aim or aims that is or are legitimate under Article 10 § 2 and was "necessary in a democratic society" for the aforesaid aim or aims.

77. It is common ground between the parties that the interference was prescribed by Articles 823 § 1 and 1004 § 1 of the Civil Code (see paragraphs 18 and 47 above), read in the light of the right to protection of personality rights. They also agree that it pursued a legitimate aim – namely, the protection of the reputation or rights of others – within the meaning of Article 10 § 2 of the Convention, which, according to the Court's case-law (*Chauvy and Others v. France*, no. 64915/01, § 70, ECHR 2004-VI, and *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007), can encompass the right to respect for private life within the meaning of Article 8. The parties disagree, however, as to whether the interference was "necessary in a democratic society".

(a) General principles

(i) Freedom of expression

78. 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, freedom of expression is subject to exceptions, which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see, among other authorities, *Handyside v. the United Kingdom*, 7 December 1976, § 49, Series A no. 24; *Editions Plon v. France*, no. 58148/00, § 42, ECHR 2004-IV; and *Lindon, Otchakovsky-Laurens and July v. France* [GC], nos. 21279/02 and 36448/02, § 45, ECHR 2007-IV).

79. The Court has also repeatedly emphasised the essential role played by the press in a democratic society. Although the press must not overstep certain bounds, regarding in particular protection of the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of

public interest. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see *Bladet Tromsø and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62, ECHR 1999-III, and *Pedersen and Baadsgaard*, cited above, § 71).

80. This duty extends to the reporting and commenting on court proceedings which, provided that they do not overstep the bounds set out above, contribute to their publicity and are thus consonant with the requirement under Article 6 § 1 of the Convention that hearings be public. It is inconceivable that there can be no prior or contemporaneous discussion of the subject matter of trials, be it in specialised journals, in the general press or amongst the public at large. Not only do the media have the task of imparting such information and ideas; the public also has a right to receive them (see *News Verlags GmbH & Co. KG v. Austria*, no. 31457/96, § 56, ECHR 2000-I; *Dupuis and Others v. France*, no. 1914/02 § 35, ECHR 2007-VII; and *Campos Dâmaso v. Portugal*, no. 17107/05, § 31, 24 April 2008).

81. Journalistic freedom also covers possible recourse to a degree of exaggeration, or even provocation (see *Pedersen and Baadsgaard*, cited above, § 71). Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Jersild v. Denmark*, 23 September 1994, § 31, Series A no. 298, and *Eerikäinen and Others v. Finland*, no. 3514/02, § 65, 10 February 2009).

(ii) Limits on the freedom of expression

82. However, Article 10 § 2 of the Convention states that freedom of expression carries with it "duties and responsibilities", which also apply to the media even with respect to matters of serious public concern. These duties and responsibilities are liable to assume significance when there is a question of attacking the reputation of a named individual and infringing the "rights of others". Thus, special grounds are required before the media can be dispensed from their ordinary obligation to verify factual statements that are defamatory of private individuals. Whether such grounds exist depends in particular on the nature and degree of the defamation in question and the extent to which the media can reasonably regard their sources as reliable

with respect to the allegations (see *Pedersen and Baadsgaard*, cited above, § 78, and *Tønsbergs Blad A.S. and Haukom v. Norway*, no. 510/04, § 89, ECHR 2007-III).

83. The Court reiterates that the right to protection of reputation is a right which is protected by Article 8 of the Convention as part of the right to respect for private life (see *Chauvy and Others*, cited above, § 70; *Pfeifer*, cited above, § 35; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010). The concept of "private life" is a broad term not susceptible to exhaustive definition, which covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to their image (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008-...). It covers personal information which individuals can legitimately expect should not be published without their consent (see *Flinkkilä and Others*, cited above, § 75, and *Saaristo and Others v. Finland*, no. 184/06, § 61, 12 October 2010).

In order for Article 8 to come into play, however, an attack on a person's reputation must attain a certain level of seriousness and in a manner causing prejudice to personal enjoyment of the right to respect for private life (see *A. v. Norway*, cited above, § 64). The Court has held, moreover, that Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions such as, for example, the commission of a criminal offence (see *Sidabras and Džiautas v. Lithuania*, nos. 55480/00 and 59330/00, § 49, ECHR 2004-VIII).

84. When examining 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 verify whether the domestic authorities struck a fair balance when protecting two values guaranteed by the Convention which may come into conflict with each other in certain cases, namely, on the one hand, freedom of expression protected by Article 10 and, on the other, the right to respect for private life enshrined in Article 8 (see *Hachette Filipacchi Associés v. France*, no. 71111/01, § 43, 14 June 2007, and *MGN Limited v. the United Kingdom*, no. 39401/04, § 142, 18 January 2011).

(iii) Margin of appreciation

85. The Court reiterates that, under Article 10 of the Convention, the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent an interference with the freedom of expression guaranteed under that provision is necessary (see *Tammer v. Estonia*, no. 41205/98, § 60, ECHR 2001-I, and *Pedersen and Baadsgaard*, cited above, § 68).

86. However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those

delivered by an independent court (see *Karhuvaara and Iltalehti v. Finland*, no. 53678/00, § 38, ECHR 2004-X, and *Flinkkilä and Others*, cited above, § 70). In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Polanco Torres and Movilla Polanco*, cited above, § 41; and *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010).

87. In cases such as the present one the Court considers that the outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 10 of the Convention by the publisher who has published the offending article or under Article 8 of the Convention by the person who was the subject of that article. Indeed, as a matter of principle these rights deserve equal respect (see *Hachette Filipacchi Associés* (*ICI PARIS*) *v. France*, no. 12268/03, § 41, 23 July 2009; *Timciuc v. Romania* (dec.), no. 28999/03, § 144, 12 October 2010; and *Mosley v. the United Kingdom*, no. 48009/08, § 111, 10 May 2011; see also point 11 of the Resolution of the Parliamentary Assembly – paragraph 51 above). Accordingly, the margin of appreciation should in principle be the same in both cases.

88. Where the balancing exercise between those two rights has been undertaken 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 that of the domestic courts (see *MGN Limited*, cited above, §§ 150 and 155, and *Palomo Sánchez and Others v. Spain* [GC], nos. 28955/06, 28957/06, 28959/06 and 28964/06, § 57, 12 September 2011).

(iv) Criteria relevant for the balancing exercise

89. Where the right to freedom of expression is being balanced against the right to respect for private life, the criteria laid down in the case-law that are relevant to the present case are set out below.

(α) Contribution to a debate of general interest

90. An initial essential criterion is the contribution made by photos or articles in the press to a debate of general interest (see *Von Hannover*, cited above, § 60; *Leempoel & S.A. ED. Ciné Revue v. Belgium*, no. 64772/01, § 68, 9 November 2006; and *Standard Verlags GmbH v. Austria (no. 2)*, no. 21277/05 § 46, 4 June 2009). The definition of what constitutes a subject of general interest will depend on the circumstances of the case. The Court nevertheless considers it useful to point out that it has recognised the existence of such an interest not only where the publication concerned political issues or crimes (see *White v. Sweden*, no. 42435/02, § 29, 19 September 2006; *Egeland and Hanseid*, cited above, § 58; and *Leempoel*

& S.A. ED. Ciné Revue, cited above, § 72), but also where it concerned sporting issues or performing artists (see *Nikowitz and Verlagsgruppe News GmbH v. Austria*, no. 5266/03, § 25, 22 February 2007; *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal*, nos. 11182/03 and 11319/03, § 28, 26 April 2007; and *Sapan v. Turkey*, no. 44102/04, § 34, 8 June 2010). However, the rumoured marital difficulties of a president of the Republic or the financial difficulties of a famous singer were not deemed to be matters of general interest (see *Standard Verlags GmbH*, cited above, § 52, and *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 43).

(β) How well known is the person concerned and what is the subject of the report?

91. The role or function of the person concerned and the nature of the activities that are the subject of the report and/or photo constitute another important criterion, related to the preceding one. In that connection a distinction has to be made between private individuals and persons acting in a public context, as political figures or public figures. Accordingly, whilst a private individual unknown to the public may claim particular protection of his or her right to private life, the same is not true of public figures (see *Minelli v. Switzerland* (dec.), no. 14991/02, 14 June 2005, and *Petrenco*, cited above, § 55). A fundamental distinction needs to be made between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions for example, and reporting details of the private life of an individual who does not exercise such functions (see *Von Hannover*, cited above, § 63, and *Standard Verlags GmbH*, cited above, § 47).

Whilst in the former case the press exercises its role of "public watchdog" in a democracy by imparting information and ideas on matters of public interest, that role appears less important in the latter case. Similarly, although in certain special circumstances the public's right to be informed can even extend to aspects of the private life of public figures, particularly where politicians are concerned, this will not be the case – even where the persons concerned are quite well known to the public – where the published photos and accompanying commentaries relate exclusively to details of the person's private life and have the sole aim of satisfying the curiosity of a particular readership in that respect (see *Von Hannover*, cited above, § 65 with the references cited therein, and *Standard Verlags GmbH*, cited above, § 53; see also point 8 of the Resolution of the Parliamentary Assembly –

paragraph 51 above). In the latter case, freedom of expression calls for a narrower interpretation (see *Von Hannover*, cited above, § 66; *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 40; and *MGN Limited*, cited above, § 143).

(γ) Prior conduct of the person concerned

92. The conduct of the person concerned prior to publication of the report or the fact that the photo and the related information have already appeared in an earlier publication are also factors to be taken into consideration (see *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, §§ 52 and 53, and *Sapan*, cited above, § 34). However, the mere fact of having cooperated with the press on previous occasions cannot serve as an argument for depriving the party concerned of all protection against publication of the report or photo at issue (see *Egeland and Hanseid*, cited above, § 62).

(δ) Method of obtaining the information and its veracity

93. The way in which the information was obtained and its veracity are also important factors. Indeed, the Court has held that the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the proviso that they are acting in good faith and on an accurate factual basis and provide "reliable and precise" information in accordance with the ethics of journalism (see, for example, *Fressoz and Roire v. France* [GC], no. 29183/95, § 54, ECHR 1999-I; *Pedersen and Baadsgaard*, cited above, § 78; and *Stoll v. Switzerland* [GC], no. 69698/01, § 103, ECHR 2007-V).

(ε) Content, form and consequences of the publication

94. The way in which the photo or report are published and the manner in which the person concerned is represented in the photo or report may also be factors to be taken into consideration (see *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria (no. 3)*, nos. 66298/01 and 15653/02, § 47, 13 December 2005; *Reklos and Davourlis v. Greece*, no. 1234/05, § 42, 15 January 2009; and *Jokitaipale and Others v. Finland*, no. 43349/05, § 68, 6 April 2010). The extent to which the report and photo have been disseminated may also be an important factor, depending on whether the newspaper is a national or local one, and has a large or a limited circulation (see *Karhuvaara and Iltalehti*, cited above, § 47, and *Gurgenidze v. Georgia*, no. 71678/01, § 55, 17 October 2006).

(ζ) Severity of the sanction imposed

95. Lastly, the nature and severity of the sanctions imposed are also factors to be taken into account when assessing the proportionality of an interference with the exercise of the freedom of expression (see *Pedersen and Baadsgaard*, cited above, § 93, and *Jokitaipale and Others*, cited above, § 77).

(b) Application to the present case

(i) Contribution to a debate of general interest

96. The Court notes that the articles in question concern the arrest and conviction of the actor X, that is, public judicial facts that may be considered to present a degree of general interest. The public do, in principle, have an interest in being informed – and in being able to inform themselves – about criminal proceedings, whilst strictly observing the presumption of innocence (see *News Verlags GmbH & Co. KG*, cited above, § 56; *Dupuis and Others*, cited above, § 37; and *Campos Dâmaso*, cited above, § 32; see also Recommendation Rec(2003)13 of the Committee of Ministers and in particular principles nos. 1 and 2 appended thereto – paragraph 50 above). That interest will vary in degree, however, as it may evolve during the course of the proceedings – from the time of the arrest – according to a number of different factors, such as the degree to which the person concerned is known, the circumstances of the case and any further developments arising during the proceedings.

(ii) How well known is the person concerned and what is the subject of the report?

97. The Court notes the substantially different conclusions reached by the national courts in assessing how well known X was. In the Regional Court's opinion, X was not a figure at the centre of public attention and had not courted the public to a degree that he could be considered to have waived his right to the protection of his personality rights, despite being a well-known actor and frequently appearing on television (see paragraph 23 above). The Court of Appeal, however, found that X was a well-known and very popular figure and had played the part of a police superintendent over a long period of time without himself having become a model law-enforcement officer, which would have justified the public's interest in the question whether in his private life he actually behaved like his character (see paragraphs 33 and 34 above).

98. The Court considers that it is, in principle, primarily for the domestic courts to assess how well known a person is, especially where that person is mainly known at national level. It notes in the present case that at the material time X was the main actor in a very popular detective series, in which he played the main character, Superintendent Y. The actor's popularity was

mainly due to that television series, of which, when the first article appeared, 103 episodes had been broadcast, the last 54 of which had starred X in the role of Superintendent Y. Accordingly, he was not, as the Regional Court appeared to suggest, a minor actor whose renown, despite a large number of appearances in films (more than 200 – see paragraph 22 above), remained limited. It should also be noted in that connection that the Court of Appeal referred not only to the existence of X's fan clubs, but also to the fact that his admirers could have been encouraged to imitate him by taking drugs, if the offence had not been committed out of public view (see paragraph 32 above).

99. Furthermore, whilst it can be said that the public does generally make a distinction between an actor and the character he or she plays, there may nonetheless be a close link between the popularity of the actor in question and his or her character where, as in the instant case, the actor is mainly known for that particular role. In the case of X, that role was, moreover, that of a police superintendent, whose mission was law enforcement and crime prevention. That fact was such as to increase the public's interest in being informed of X's arrest for a criminal offence. Having regard to those factors and to the terms employed by the domestic courts in assessing the degree to which X was known to the public, the Court considers that he was sufficiently well known to qualify as a public figure. That consideration thus reinforces the public's interest in being informed of X's arrest and of the criminal proceedings against him.

100. With regard to the subject of the articles, the domestic courts found that the offence committed by X was not a petty offence as cocaine was a hard drug. The offence was nevertheless of medium, or even minor, seriousness, owing both to the small quantity of drugs in X's possession – which, moreover, were for his own personal consumption – and to the high number of offences of that type and related criminal proceedings. The domestic courts did not attach much importance to the fact that X had already been convicted of a similar offence, pointing out that this had been his only previous offence and, moreover, had been committed some years previously. They concluded that the applicant company's interest in publishing the articles in question was solely due to the fact that X had committed an offence which, if it had been committed by a person unknown to the public, would probably never have been reported on (see paragraph 20 above).

The Court can broadly agree with that assessment. It would observe, however, that X was arrested in public, in a tent at the beer festival in Munich. In the Court of Appeal's opinion, that fact was a matter of important public interest in this case, even if that interest did not extend to the description and characterisation of the offence in question as it had been committed out of public view.

(iii) X's conduct prior to publication of the impugned articles

101. Another factor is X's prior conduct *vis-à-vis* the media. He had himself revealed details about his private life in a number of interviews (see paragraph 25 above). In the Court's view, he had therefore actively sought the limelight, so that, having regard to the degree to which he was known to the public, his "legitimate expectation" that his private life would be effectively protected was henceforth reduced (see, *mutatis mutandis*, *Hachette Filipacchi Associés* (*ICI PARIS*), cited above, § 53, and, by converse implication, *Eerikäinen and Others*, cited above, § 66).

(iv) Method of obtaining the information and its veracity

102. With regard to the method of obtaining the published information, the applicant company submitted that it had reported on X's arrest only after the disclosure, by the prosecuting authorities, of the facts and of the identity of the accused. It also asserted that all the information that it had published had already been made public, particularly during a press conference and in a press release issued by the public prosecutor's office (see paragraph 69 above). The Government denied that any such press conference had been held by the public prosecutor's office and submitted that it was not until after the applicant company had published the first article that the prosecutor W. had confirmed to other media the facts related by the applicant company.

103. The Court observes that it cannot be determined from the documents in its possession whether or not the applicant company's assertions that a press conference had been held and a press release issued prior to publication of the first article are substantiated. On the contrary, following a question put by the Court at the hearing the assertions in question turned out to be unfounded. The Court finds the attitude of the applicant company regrettable in this respect.

104. It can be seen, however, from the court decisions delivered in the present case and the observations of the parties to the domestic proceedings that this point was not dealt with before the domestic courts. For the purposes of examination of the present case, the Court will merely observe that the applicant company attached to all its replies in the various domestic proceedings a statement by one of its journalists as to how the information published on 29 September 2004 had been obtained (see paragraphs 11 and 12 above) and that the Government have not contested the truth of that statement. Consequently, whilst the applicant company is not justified in claiming that it had merely published information made public at a press conference held by the Munich public prosecutor's office, the fact remains that the confirmation of the published information, and in particular X's identity, emanated from the police and the prosecutor W., who was, moreover, press officer for the Munich public prosecutor's office at the time.

105. Consequently, as the first article was based on information provided by the press officer at the Munich public prosecutor's office, it had a sufficient factual basis (see *Bladet Tromsø and Stensaas*, cited above, § 72;

Eerikäinen and Others, cited above, § 64; and *Pipi v. Turkey* (dec.), no. 4020/03, 15 May 2009). The truth of the information related in both articles was, moreover, not in dispute between the parties to the domestic proceedings, and neither is it in dispute between the parties to the proceedings before the Court (see *Karhuvaara and Iltalehti*, cited above, § 44).

106. However, in the opinion of the domestic courts examining the case, the fact that the information had emanated from the Munich public prosecutor's office merely meant that the applicant company could rely on its veracity; it did not dispense it from the duty to balance its interest in publishing the information against X's right to respect for his private life. They found that that balancing exercise could only be undertaken by the press because a public authority was not in a position to know how or in what form the information would be published (see paragraphs 27-30 above).

107. In the Court's opinion, there is nothing to suggest that such a balancing exercise was not undertaken. The fact is, however, that having regard to the nature of the offence committed by X, the degree to which X is well known to the public, the circumstances of his arrest and the veracity of the information in question, the applicant company – having obtained confirmation of that information from the prosecuting authorities themselves – did not have sufficiently strong grounds for believing that it should preserve X's anonymity. In that context, it should also be pointed out that all the information revealed by the applicant company on the day on which the first article appeared was confirmed by the prosecutor W. to other magazines and to television channels. Likewise, when the second article appeared, the facts leading to X's conviction were already known to the public (see, *mutatis mutandis*, *Aleksey Ovchinnikov v. Russia*, no. 24061/04, § 49, 16 December 2010). Moreover, the Court of Appeal itself considered that the applicant company's liability did not extend beyond minor negligence given that the information disclosed by the public prosecutor's office had led it to believe that the report was lawful (see paragraph 35 above). In the Court's view, it has not therefore been shown that the applicant company acted in bad faith when publishing the articles in question.

(v) Content, form and consequences of the impugned articles

108. The Court observes that the first article merely related X's arrest, the information obtained from W. and the legal assessment of the seriousness of the offence by a legal expert (see paragraph 13 above). The second article only reported the sentence imposed by the court at the end of a public hearing and after X had confessed (see paragraph 15 above). The articles did not therefore reveal details about X's private life, but mainly concerned the circumstances of and events following his arrest (see *Flinkkilä and Others*, cited above, § 84, and *Jokitaipale and Others*, cited above, § 72). They contained no disparaging expression or unsubstantiated allegation (see the case-law cited in paragraph 82 above). The fact that the first article contained

certain expressions which, to all intents and purposes, were designed to attract the public's attention cannot in itself raise an issue under the Court's case-law (see *Flinkkilä and Others*, cited above, § 74, and *Pipi*, above-cited decision).

The Court notes, moreover, that the Regional Court imposed an injunction on publication of the photos accompanying the impugned articles and that the applicant company did not challenge that injunction. It therefore considers that the form of the articles in question did not constitute a ground for banning their publication. Furthermore, the Government did not show that publication of the articles had resulted in serious consequences for X.

(vi) Severity of the sanction imposed on the applicant company

109. Regarding, lastly, the severity of the sanctions imposed on the applicant company, the Court considers that, although these were lenient, they were capable of having a chilling effect on the applicant company. In any event, they were not justified in the light of the factors set out above.

(c) Conclusion

110. In conclusion, the grounds advanced by the respondent State, although relevant, are not sufficient to establish that the interference complained of was necessary in a democratic society. Despite the margin of appreciation enjoyed by the Contracting States, the Court considers that there is no reasonable relationship of proportionality between, on the one hand, the restrictions imposed by the national courts on the applicant company's right to freedom of expression and, on the other hand, the legitimate aim pursued.

111. Accordingly, there has been a violation of Article 10 of the Convention.

III. APPLICATION OF ARTICLE 41 OF THE CONVENTION

112. 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

113. The applicant company claimed EUR 27,734.28 in respect of pecuniary damage, corresponding to the three penalties that it had had to pay X (EUR 11,000 – see paragraphs 31 and 46 above), and X's legal costs (EUR 1,261.84 – paragraphs 18 and 40 above) and lawyers' fees (EUR 15,472.44) which it had had to reimburse. It referred, on the latter point, to the case of

Verlagsgruppe News GmbH v. Austria (no. 2), (no. 10520/02, § 46, 14 December 2006).

114. The Government did not comment in that connection.

115. The Court finds that there is a sufficient causal link between the violation found and the amounts claimed, except those corresponding to the two penalty payments of EUR 5,000. Accordingly, it awards EUR 17,734.28 under this head.

B. Costs and expenses

116. The applicant company sought EUR 32,522.80 in respect of costs and expenses. That sum included court costs (EUR 6,610) and lawyers' fees for the proceedings before the civil courts (EUR 13,972.50), the Federal Constitutional Court (EUR 5,000) and the Court (EUR 5,000), plus translation costs for the proceedings before the Court (EUR 1,941.30). The applicant company specified that although it had agreed on a higher amount of fees with its lawyers, it was claiming only the amounts provided for in the statutory fee scales. With regard to the amounts claimed for lodging the appeal with the Federal Constitutional Court and the application before the Court, the applicant company left the matter to the Court's discretion, whilst specifying that it sought at least EUR 5,000 in respect of each set of proceedings.

117. The Government noted that the applicant company limited its claims for lawyers' fees to the amounts set out in the scales applicable in Germany, which was not open to criticism. They contested the amounts claimed for the proceedings before the Federal Constitutional Court and before the Court, however, for lack of particulars. They indicated that where the Federal Constitutional Court declined to entertain a constitutional appeal, it generally fixed the value of the subject matter of the case at EUR 4,000. The corresponding lawyers' fees would in that case amount to EUR 500 inclusive of tax.

118. The Court finds the sums claimed to be reasonable and, accordingly, awards those sums.

C. Default interest

119. The Court considers it appropriate that the default interest 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

1. *Disjoins*, unanimously, the applications in the case of *Von Hannover v. Germany* (nos. 40660/08 and 60641/08) from the present application;

2. *Declares*, unanimously, the application admissible;

3. *Holds*, by twelve votes to five, that there has been a violation of Article 10 of the Convention;

4. *Holds*, by twelve votes to five,
   (a) that the respondent State is to pay the applicant company, within three months, the following amounts:
      (i) EUR 17,734.28 (seventeen thousand seven hundred and thirty-four euros and twenty-eight centimes), plus any tax that may be chargeable, in respect of pecuniary damage;
      (ii) EUR 32,522.80 (thirty-two thousand five hundred and twenty-two euros and eighty centimes), plus any tax that may be chargeable to the applicant company, in respect of costs and expenses;
   (b) that from the expiry of the above-mentioned three months until settlement simple interest shall be payable on the above amounts at a rate equal to the marginal lending rate of the European Central Bank during the default period plus three percentage points;

5. *Dismisses*, unanimously, the remainder of the applicant company's claim in respect of just satisfaction.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 7 February 2012.

Michael O'Boyle
Deputy Registrar

Nicolas Bratza
President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the dissenting opinion of Judge López Guerra joined by Judges Jungwiert, Jaeger, Villiger and Poalelungi is annexed to this judgment.

N.B.
M.O'B.

DISSENTING OPINION OF JUDGE LÓPEZ GUERRA JOINED BY JUDGES JUNGWIERT, JAEGER, VILLIGER AND POALELUNGI

I do not agree with the finding by the Grand Chamber of a violation of Article 10 of the Convention. In my opinion, in the present case the Grand Chamber had no grounds for concluding that the domestic courts did not duly protect the applicant company's right to freedom of expression.

I certainly agree with the Grand Chamber's determination of the facts of the case. It correctly established that there had been an interference with the applicant company's right to freedom of expression as recognised in Article 10 of the Convention (in this case, the right to publish certain information) as a result of court sanctions imposed on it for publishing two press articles concerning the arrest and sentencing of a third person. I also agree with the Grand Chamber that the sanctions were provided for by law and pursued a legitimate end, namely, respect for the rights of others, in this case the right to privacy (including the right to respect for one's reputation) as recognised in Article 8 of the Convention. I also agree with the Grand Chamber's assertion (see paragraph 76 of the judgment) that the Court's task was to determine whether those sanctions were necessary in a democratic society pursuant to the terms of Article 10 § 2 of the Convention. Also, as indicated in subsequent paragraphs of the Grand Chamber judgment, in order to answer this question this Court had to decide whether the domestic courts had adequately weighed the conflicting rights and interests, namely, the right to freedom of expression versus the right to privacy.

My difference of opinion with the Grand Chamber judgment derives from its further reasoning. According to our consolidated case-law as cited in this judgment (see *Petrenco v. Moldova*, no. 20928/05, § 54, 30 March 2010; *Petrov v. Bulgaria* (dec.), no. 27103/04, 2 November 2010; and *Polanco Torres and Movilla Polanco v. Spain*, no. 34147/06, § 40, 21 September 2010), it is not the task of this Court to assume the role of the competent national courts in determining the merits of the case, but rather to review the decisions those courts render in the exercise of their powers of appreciation. Concerning compliance with Article 10 of the Convention, the domestic courts have a certain margin of appreciation (see *Von Hannover v. Germany*, no. 59320/00, § 57, ECHR 2004-VI, and *Lappalainen v. Finland* (dec.), no. 22175/06, 20 January 2009) although, as the Grand Chamber underscores in the present judgment (see paragraph 86) their decisions are subject to the scrutiny of this Court. In that regard, this Court has established a series of criteria which must be followed when assessing how the domestic courts have balanced conflicting rights, including, *inter alia*, the published information's contribution to a debate of general interest, the previous behavior and degree of notoriety of the person affected, the content and veracity of the information, and the nature of the sanctions and penalties imposed. In

balancing the conflicting rights in the cases brought before them, national authorities (in this case, the national courts) must apply these criteria in reaching their decision, whilst appraising, with the benefit of direct examination, the facts and circumstances of the case when applying their domestic law.

In order to exercise this Court's powers of review without becoming a fourth instance, our task in guaranteeing respect for Convention rights in this type of case is essentially to verify whether the domestic courts have duly balanced the conflicting rights and have taken into account the relevant criteria established in our case-law without any manifest error or omission of any important factor. Where these prerequisites have been met, that is, the domestic courts have expressly weighed the conflicting rights and interests and applied the pertinent criteria established in our above-cited case-law, an additional assessment of the competing interests by this Court, examining anew the facts and circumstances of the case, is tantamount to acting as a fourth instance (or, as now, a fifth instance).

In the present case the domestic courts (mainly the Hamburg Regional Court and the Court of Appeal) certainly performed the required balancing exercise. Concerning each of the published articles, on two consecutive occasions those courts assessed the competing interests derived from freedom of expression and the safeguard of privacy. In extensive reasoning they explained their final judgments and their reasons for giving more weight to the protection of the right to privacy and reputation. These judgments exhaustively examined the different aspects and circumstances of the question, including the relevance of the matter for the public interest, the degree of notoriety of the person affected, the nature of the crime of which he was suspected and subsequently accused and sentenced, and the severity of the sanction imposed on the applicant company. Furthermore – albeit indirectly – the domestic Court of Appeal consciously applied our Court's criteria by using as a point of reference the judgment of the Federal Court of Justice of 15 November 2005, a judgment which expressly cited and applied the criteria established in our *Von Hannover v. Germany* judgment of 24 June 2004.

There is certainly a possibility that domestic courts may apply the relevant criteria in a manifestly unreasonable way or may fail to duly assess the presence of some important factor. But in this case the judgments of both the Hamburg Regional Court and the Court of Appeal demonstrate that both domestic courts carefully weighed all the relevant facts of the case, with the advantage of their knowledge and their continuous contact with the social and cultural reality of their country, in a way which cannot be considered arbitrary, careless or manifestly unreasonable.

In view of the above, none of the grounds which would justify a review by this Court of the judgments of the domestic courts are present in this case. The domestic courts did not fail to balance the conflicting interests or to apply the relevant criteria in doing so. They made no manifest error of appreciation; nor did they fail to consider all the relevant factors. Nevertheless, on this occasion and instead of concentrating its assessment on whether the domestic courts applied the above-mentioned criteria effectively, the Grand Chamber has chosen to re-examine the same facts that were brought before the national courts. And this was done in spite of the national courts having extensively assessed the circumstances of the case in a way that was not manifestly unreasonable, and with the added benefit of their direct examination of the context in which the events occurred. Analysing the same facts and using the same criteria and same balancing approach as the domestic courts, the Grand Chamber came to a different conclusion, giving more weight to the protection of the right to freedom of expression than to the protection of the right to privacy. But that is precisely what the case-law of this Court has established is not our task, that is, to set ourselves up as a fourth instance to repeat anew assessments duly performed by the domestic courts.