

EUROPEAN COMMISSION OF HUMAN RIGHTS

Application No. 15088/89

Manfred JACUBOWSKI

against

GERMANY

REPORT OF THE COMMISSION

(adopted on 7 January 1993)

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I. INTRODUCTION

1. The following is an outline of the case as submitted to the European Commission of Human Rights, and of the procedure before the Commission.

A. The application

2. The applicant, born in 1933, is a German national and resident in Bonn. He is a journalist by profession. Before the Commission he was represented by Mr. Meilicke, a lawyer practising in Bonn.

3. The application is directed against the Federal Republic of Germany. The Government were represented by their Agents, Mr. Meyer-Ladewig, Ministerialdirigent, and Mr. Stöcker, Ministerialrat, of the Federal Ministry of Justice.

4. The application relates to the applicant's complaint under Article 10 of the Convention about a court order under the Unfair Competition Act prohibiting him from sending to third parties articles making adverse comments about his former employer, a news agency, with whom he was in dispute over his dismissal.

B. The proceedings

5. The application was introduced on 11 April 1989 and registered on 7 June 1989.

6. On 7 May 1990 the Commission decided to bring the application to the notice of the respondent Government and invite them to submit written observations on its admissibility and merits.

7. The Government's observations were submitted on 15 October 1990. On 12 December 1990 the applicant submitted his observations in reply.

8. On 5 September 1991 the Commission decided to invite the parties to a hearing on the admissibility and merits of the application.

9. The hearing took place on 3 December 1991. The applicant attended in person and was assisted by his lawyer Mr. Meilicke, Representative, and Mr. Heidel, Adviser. The respondent Government were represented by Mr. Meyer-Ladewig, Agent, and by Mr. von Mühlendahl and Mrs. Babby, both of the Federal Ministry of Justice, as Advisers.

10. Following the hearing the Commission declared the application admissible.

11. After declaring the case admissible, the Commission, acting in accordance with Article 28 para. 1 (b) of the Convention, placed itself at the disposal of the parties with a view to securing a friendly settlement of the case. Active consultations with the parties took place between 17 January and 24 March 1992. The Commission now finds that there is no basis on which such a settlement can be effected.

C. The present Report

12. The present Report has been drawn up by the Commission in pursuance of Article 31 of the Convention and after deliberations and votes, the following members being present:

MM. C. A. NØRGAARD, President
J. A. FROWEIN
E. BUSUTTIL
A. WEITZEL
J.-C. SOYER
H. DANELIUS
Mrs. G. H. THUNE
MM. F. MARTINEZ
Mrs. J. LIDDY
MM. L. LOUCAIDES

J.-C. GEUS
M.P. PELLONPÄÄ

13. The text of this Report was adopted on 7 January 1993 and is now transmitted to the Committee of Ministers of the Council of Europe, in accordance with Article 31 para. 2 of the Convention.

14. The purpose of the Report, pursuant to Article 31 of the Convention, is:

- i) to establish the facts, and
- ii) to state an opinion as to whether the facts found disclose a breach by the State concerned of its obligations under the Convention.

15. A schedule setting out the history of the proceedings before the Commission is attached hereto as Appendix I and the Commission's decision on the admissibility of the application as Appendix II.

16. The full text of the parties' submissions, together with the documents lodged as exhibits, are held in the archives of the Commission.

II. ESTABLISHMENT OF THE FACTS

A. The particular circumstances of the case

17. The applicant was co-founder, partner and manager of a private company operating a news agency, which went bankrupt in March 1983. Subsequently, a successor news agency D., operated by a limited company, was founded. On 3 May 1983 the applicant was appointed, for a period of five years, sole managing director and employed as chief editor of this news agency.

18. On 17 July 1984 the applicant was dismissed without notice. He instituted court proceedings before the Bonn Regional Court (Landgericht) challenging his dismissal. Later the news agency D. repeated the applicant's dismissal on several occasions invoking other reasons.

19. On 16 August 1984 his employer D., in its news network, published a press release concerning its reorganisation of personnel, which also commented upon the applicant's qualifications and his performance as a journalist and managing director. The press release, so far as relevant, reads as follows:

<German>

"<D.> stellt behauptungen richtig

bonn, 16 August 84 <D.> - die verwaltung der <D.> hat in branchendiensten wiedergegebene darstellungen ueber vorgaenge bei der personellen neugliederung der unternehmens- und redaktionsfuehrung als unzutreffend zurueckgewiesen. im einzelnen nahm <D.> zu diesen versionen wie folgt stellung:

1. nachdem die ... gmbh am 31. maerz den konkurs anmeldete, startete the <D.> ag - weiterhin unter der leitung von manfred jacubowski - am 20. april 1983 mit einem grundkapital von einer million dm. jacubowskis unveraendertes geschaeftsgebaren und unangemessenes verhalten im umgang mit kunden einerseits sowie das fehlen einer zielstrebigen und verlaesslichen redaktionsfuehrung andererseits verhinderten, dass die chance des neubeginns genutzt wurde, und hatten vielmehr verluste von kunden

zur folge. ueber diese entwicklung wurde der damalige aufsichtsrat in gravierenden punkten bis in dieses fruehjahr hinein von jacobowski falsch informiert. insbesondere wurden verbindlichkeiten aus der gmbh-zeit der ag angelastet und damit <D.> erneut in finanzielle schwierigkeiten manoevriert. nur durch das rechtzeitige eingreifen des damaligen leiters des finanz- und rechnungswesens, des heutigen vorstands <K.>, konnte groesserer schaden verhindert werden, so dass <D.> heute wieder wirtschaftlich auf gesunden fuessen steht. wegen kaufmaennischen versagens und besonders wegen uebertragung von verbindlichkeiten der gmbh auf die ag wurde jacobowski zum 17. juli - dem tag der hauptversammlung - fristlos gekuendigt. zum neuen alleinvorstand wurde <K.> ernannt.

2. der neugewaehlte aufsichtsrat bot jacobowski einen neuen vertrag als chefredakteur an. gleichzeitig beschlossen aufsichtsrat und vorstand die erweiterung der chefredaktion. jacobowski lehnte die taetigkeit in diesem gremium nach eingeraeumter bedenkzeit mit der begruendung ab, er bestehe auf einhaltung seines frueheren vertrages. ..."

<English translation>

"<D.> puts allegations right

Bonn, 16 August 84 <D.> - The administration of <D.> rejected statements made in several bulletins aimed at specialised sectors about events in the course of the reorganisation of personnel in the management of the firm and the editor's office. In particular <D.> commented as follows:

1. After the ... private company declared itself bankrupt on 31 March 1983, the <D.> limited company started - still under the management of Manfred Jacobowski - with a capital stock of one million DM. The unchanged business policy of Jacobowski and his inappropriate attitude towards clients on the one hand, and the lack of an efficient and reliable editorial management on the other hand, prevented the chance of a new start from being used, and moreover resulted in the loss of clients. Until this spring Jacobowski, in important matters, wrongly informed the managing board. In particular, the limited company was charged with debts, originating from the period of the private company, and thus <D.> was again manoeuvred into financial difficulties. Only through the timely intervention of the then Head of Finance and Accounting, the present Managing Director <K.>, more serious damage could be prevented with the result that <D.> has today again a good financial foundation. Having regard to his failure as a businessman and in particular the transfer of debts from the private company to the limited company, Jacobowski was dismissed without notice as from 17 July - the date of the general meeting. <K.> was appointed new managing director.

2. The newly appointed supervisory board offered Jacobowski a new contract as chief editor. At the same time the supervisory board and the managing director decided to enlarge the editorial management. Jacobowski refused to work in such a group after time for reflection on the ground that he insisted on his previous contract. ..."

20. On 29 August and 4 September 1984 the applicant requested the news agency D. to publish, in its network, his reply (Gegendarstellung) to the above press release. The news agency refused. On 17 September 1984 the Bonn Regional Court dismissed the applicant's request for an injunction (einstweilige Verfügung) concerning his claim of a right to reply.

21. On 25 September 1984 the applicant addressed a circular letter to a number of leading newspaper and radio journalists known to him, including clients of the news agency D. The letter was phrased in the following terms:

<German>

"Die beigefügte - wenn auch zwangsläufig nicht vollständige - Auswahl von Berichten über die Sache Jacobowski ./.. <D.> kann sicher einiges aufhellen, das noch im dunkeln liegt, auch wenn Ihnen die eine oder andere Schilderung schon bekannt sein sollte. Dies gilt trotz manchmal unzutreffender 'facts', die das Gesamtbild allerdings kaum verändern. Die noch laufenden Gerichtsverfahren, die von der gegenwärtigen <D.>-Entwicklung betroffene Mitarbeiter und ich einleiteten, werden aber auch in Details für endgültige Klarheit sorgen.

Ich würde mich freuen, wenn sich schon bald die Gelegenheit für ein persönliches Gespräch bieten würde, um nicht nur die Vergangenheit, sondern auch die künftige Entwicklung am deutschen 'Nachrichtenmarkt' zu erörtern. Um einen Termin dafür werde ich mich rechtzeitig bemühen."

<English translation>

"The enclosed selection of articles concerning the case of Jacobowski v. D. which is necessarily not complete will certainly clarify some matters which are still in the dark, even if you should already know one or the other reported fact. This is so despite partly incorrect facts which however hardly affect the picture as a whole. The pending court proceedings which have been instituted by staff members affected by the current development of D. and by myself will finally throw light on all details.

I would be pleased to have the opportunity for a personal conversation in which I could discuss not only the past, but also future developments on the German media market. I shall in due time ask for an appointment for this purpose."

22. The letter was accompanied by various articles concerning the financial and staff situation of D. which had been subsequently published by six newspapers with a wide circulation. While containing critical remarks on the applicant they also expressed severe criticism of his former employer. One article of 21/22 September 1984 stated that D.'s financial situation had become worse than at the time of the bankruptcy in April 1983, and also mentioned that five clients intended to terminate their contractual relations with D. Another article reported that a number of clients of news agency D. had stopped their subscription to its services because of deficiencies in the quality of the journalistic product and failure to provide for particular forms of distribution such as online text or teletext. This was illustrated by several examples. The article also mentioned that the news agency risked to lose one of its major clients, which subsidised a news service in English which had become rather poor.

23. On 11 October 1984 the Cologne Court of Appeal (Oberlandesgericht), upon the applicant's appeal (Beschwerde), quashed the Bonn Regional Court's decision of 17 September 1984, and recognised the applicant's right to reply to his employer's press release in the terms chosen by him. The applicant's reply was printed one month later.

24. On 28 October 1984 the news agency D., referring to the applicant's circular letter, again pronounced his dismissal.

25. In February 1985 D. transferred any claims against the applicant to the limited company E. holding 25% of the shares of D., and authorised it to bring such claims in its own name. Thereupon, E. extended injunction proceedings before the Düsseldorf Regional Court, which it had brought against the author of the first of the above-mentioned articles, a journalist, to the applicant. E. submitted that the applicant had infringed unfair competition law, inter alia, by addressing the above circular letter with enclosures to clients of the news agency. In a judgment of 24 October 1984, the journalist concerned was prohibited from stating that D.'s financial situation had become worse than at the time of the bankruptcy in 1983.

26. In March 1985 the applicant himself started a news agency.

27. On 29 January 1986 the Düsseldorf Regional Court dismissed the action of the limited company E. against the applicant. The Regional Court found in particular that E. was not entitled to bring, in its own name, injunction proceedings against him.

28. On 11 December 1986 the Düsseldorf Court of Appeal, upon the appeal of the company E., which was joined by the news agency D., partly amended the Regional Court's decision. The Court of Appeal, by a prohibitory injunction, ordered the applicant to refrain from adverse comments on the activities of the news agency D. by transmitting to third persons a selection of articles on his litigation with D. with the remark that despite partly incorrect facts, the picture as a whole would hardly be affected, and that pending court proceedings which had been introduced by staff members affected by the current development of D. and by the applicant himself would finally throw light on all details. It also ordered him to disclose to the limited company E. the recipients of his circular letter of 25 September 1984. It finally held that he was liable to compensate E. for all damage caused to D. by the distribution of the circular letter. The remainder of the appeal was dismissed.

29. The decision was based on S. 1 of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb).

30. The Court of Appeal found that the applicant, in his circular letter enclosing especially two critical articles, had adversely commented upon D.'s activities, particularly the quality of its reporting, the unreasonable costs of its services and the lack of modern techniques. Such statements were likely to depreciate D. in the eyes of its present or future clients. While these critical remarks were not contained in the circular letter itself but in the press articles annexed to it, the applicant had endorsed the factual statements and value judgments by confirming them in his circular letter as being essentially correct.

31. Furthermore the Court of Appeal considered that the applicant had acted for purposes of competition in business transactions. Already before sending his circular letter, the applicant had planned to found his own news agency. The distribution of his circular letter with enclosures to clients of D. as well as D.'s or his potential clients was capable of promoting the competitiveness of his own envisaged news agency. Taking the identical clientele into account, a competitive relationship could be assumed, although the applicant's news agency had not yet existed at the relevant time.

32. The applicant had also acted with competitive intent. There was a factual assumption (tatsächliche Vermutung) of competitive intent where activities were objectively capable of promoting one's own competitiveness to the detriment of somebody else's. The applicant's competitive intent was further confirmed by the circumstances of the

case, in particular his plans to set up his own news agency and the timing of their realisation, and the suggestion, in the last paragraph of the circular letter, to have conversations about, inter alia, the future development of the German news market.

33. The question whether the detrimental statements concerning D. had been correct justifying the negative judgments based thereupon could be left open as even the distribution of true information constituted unfair competition if a competitor was depreciated without sufficient reason.

34. As regards the remainder of the action, the Court of Appeal found that the plaintiffs had failed to prove that the applicant had disclosed professional secrets.

35. On 26 November 1987 the Federal Court of Justice (Bundesgerichtshof) refused to admit the applicant's appeal on points of law (Revision) on the grounds that the case was of no fundamental importance, and that the appeal offered no prospect of success.

36. On 4 October 1988 the Federal Constitutional Court (Bundesverfassungsgericht) refused to admit the applicant's constitutional complaint (Verfassungsbeschwerde) on the ground that it was ill-founded.

37. The Constitutional Court found that the civil court decisions complained of did not disclose any appearance of a violation of the applicant's rights to the free development of his personality, to freedom of expression and to the free choice of trade, occupation or profession, as guaranteed by the Basic Law (Grundgesetz).

38. The Constitutional Court considered that the impugned court decisions had only prohibited the applicant from using a particular form of expression and particular formulations. The Court of Appeal's decision did not extend to the expression of particular ideas irrespective of the means of expression or the form of their presentation. The applicant had not generally been prevented from uttering criticism of the news agency D. Having regard to this evident limitation of the injunction, there was no danger of chilling effects or other negative consequences of considerable importance on the general exercise of the applicant's freedom of expression.

39. The constitutional review had to be based on the Court of Appeal's finding that the applicant's circular letter had been intended to serve his economic interests and that he had acted for purposes of competition. Constitutional law could only be violated so far as the applicant's rights under the Basic Law were relevant for the interpretation and application of S. 1 of the Unfair Competition Act, in particular the notion of acting contrary to honest practices.

40. The Constitutional Court found that there was no indication that the impugned decisions violated the applicant's right to freedom of expression.

41. The Constitutional Court accepted that the applicant, in distributing his circular letter with annexes, had expressed an opinion covered by Article 5 para. 1 of the Basic Law, notwithstanding that it also came within the scope of unfair competition law.

42. The interference with the applicant's freedom of expression was based upon S. 1 of the Unfair Competition Act, a law of general application limiting the freedom of expression. It had to be interpreted with due regard to the importance of freedom of expression; thus its limiting effect on that freedom had to be restricted accordingly. Relevant criteria for the qualification of a detrimental

statement by a competitor were its motive, and its aim and purpose. If it was not motivated by a person's own economic interests, but by his concern for political, economic, social or cultural interests of public importance, the freedom of expression prevailed over private and in particular economic interests. However, the protection of such private interests was to be given more weight, if the statement in question was directly affecting private interests in pursuance of self-interest, and not contributing to the exchange of opinions on matters of considerable public interest. In any case, the prejudice to the person concerned had to remain within the limits of necessity and appropriateness. In this context the means used to achieve the intended aim were important. The applicant had distributed a great number of critical and mostly negative press articles to D.'s actual or potential clients.

43. The Court of Appeal had applied these principles in line with the constitutional requirements. It had explained in detail that the applicant's expression of opinion served purposes of competition, and that it was not justified in the circumstances of the present case.

44. According to the Constitutional Court, the applicant had not aimed at influencing public opinion, but sent his circular letter only to a limited number of persons working in this business sector and known to him. His suggestion of a personal conversation disclosed his predominant intention to ensure existing and future business contacts with the addressees of his circular letter, and thus to promote his own commercial interests and his competitiveness in the news market. There was therefore no appropriate balance between the aim pursued by the applicant and the interference with the interests of the news agency D. and its share-holding company.

45. The press release of the news agency D., which contained depreciating remarks about the applicant, could not justify the applicant's behaviour either. An attack in a public debate could in principle justify a sharp and even depreciating reaction within the sphere of public debate. However, the applicant's reaction had taken place outside the sphere of public discussion and had not aimed at influencing public opinion.

46. Meanwhile, in the proceedings concerning the applicant's dismissal, the Bonn Regional Court had declared that the applicant's contract had not been terminated. On 11 October 1988 the Cologne Court of Appeal, upon D.'s appeal, partly amended the Regional Court's decision to the effect that the contract of employment had been terminated upon the applicant's dismissal of 28 October 1984 following the distribution of the circular letter.

47. Compensation proceedings instituted by company E. against the applicant on the basis of the Court of Appeal's judgment of 11 December 1986 remained unsuccessful.

B. Relevant domestic law

48. S. 1 of the Unfair Competition Act (Gesetz gegen den unlauteren Wettbewerb) reads:

<German>

"Wer im geschäftlichen Verkehr zu Zwecken des Wettbewerbes Handlungen vornimmt, die gegen die guten Sitten verstoßen, kann auf Unterlassung und Schadensersatz in Anspruch genommen werden."

<English translation>

"Any person who in the course of business commits, for purposes

of competition, acts contrary to honest practices may be enjoined from further engaging in those acts and held liable for damages."

III. OPINION OF THE COMMISSION

A. Complaint declared admissible

49. The Commission has declared admissible the applicant's complaint that the prohibitory injunction issued against him on 11 December 1986 in respect of his circular letter of 25 September 1984 violated his right to freedom of expression.

B. Point at issue

50. Accordingly, the issue to be determined is whether there has been a violation of Article 10 (Art. 10) of the Convention.

C. Article 10 (Art. 10) of the Convention

51. Article 10 (Art. 10) of the Convention provides, so far as relevant:

"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, ..."

52. The prohibitory injunction of 11 December 1986, issued by the Düsseldorf Court of Appeal in respect of adverse comments upon the activities of the news agency D., such as in the applicant's circular letter of 25 September 1984, constituted an interference with the applicant's right to freedom of expression under Article 10 para. 1 (Art. 10-1). This interference contravenes Article 10 (Art. 10) if it is not justified under Article 10 para. 2 (Art. 10-2), as being prescribed by law, pursuing a legitimate aim and being necessary in a democratic society for the said aim.

53. The Commission notes that the prohibitory injunction was based on S. 1 of the Unfair Competition Act. This provision, having regard to the German case-law on matters of competition and the extensive commentary, has been accepted as a legal basis under Article 10 para. 2 (Art. 10-2) (cf. Eur. Court H.R., Barthold judgment of 25 March 1985, Series A no. 90, p. 22, para. 47; Markt Intern Verlag GmbH and Klaus Beermann judgment of 20 November 1989, Series A no. 165, pp. 18-19, para. 30). The Commission, though no reference has been made to case-law on the particular issues of the present case, is satisfied that the case-law on S. 1 of the Unfair Competition Act was such as to enable persons in the commercial area to regulate their conduct. The interference complained of was, therefore, prescribed by German law.

54. Moreover, this decision had the aim of protecting the reputation and rights of others, namely the competitive interests of the news agency D., which is legitimate under Article 10 para. 2 (Art. 10-2).

55. It remains to be determined whether the interference complained of was necessary in a democratic society in order to accomplish this aim.

56. The applicant submits that the restriction imposed upon him was

not necessary in a democratic society for the protection of the rights of others. In particular, he had reacted to the preceding attack upon his professional reputation by the news agency D. in writing to leading journalists who had been informed of the discussion on the policies of this news agency. At the time in question, the news agency had refused his claim to reply, and court proceedings in this respect had been unsuccessful at first instance. As he did not dispose of the same publishing means as this news agency, it was for him to choose the means by which he could best defend his interests. In a democratic society within the meaning of the Convention he could not solely be referred to court remedies, i.e. the request for an injunction to ensure his right to reply, and otherwise be obliged to remain silent in the situation of his case.

57. The Government, referring to the Markt Intern Verlag GmbH and Klaus Beermann judgment, maintain that the interference with the applicant's freedom of expression was necessary in a democratic society within the meaning of Article 10 para. 2 (Art. 10-2).

58. They submit in particular that statements with economic aims were not at the core of freedom of expression, but rather at its periphery. The examination of the present case had to start from the Court of Appeal's finding that the applicant acted, at least partly, for competitive purposes. In his circular letter, he did not only bring the annexed press articles again to the attention of the addressees in prominent positions in press and broadcasting, but also shared their contents. Thus the considerable danger arose that the addressees would at least doubt the quality of D.'s services, and would terminate contracts with D. The applicant could not invoke a right of defence as he could await the outcome of the court proceedings concerning his claim to reply to D.'s press release.

59. The Commission recalls that the adjective "necessary" within the meaning of Article 10 para. 2 (Art. 10-2) implies the existence of a "pressing social need". The Contracting States enjoy a margin of appreciation in determining whether such a need exists, but this goes hand in hand with a European supervision which is more or less extensive depending upon the circumstances. The European Court of Human Rights has held that such a margin of appreciation is essential in commercial matters and, in particular, in an area as complex and fluctuating as that of unfair competition. Otherwise, it would have to undertake a re-examination of the facts and all circumstances of the case. The review under the Convention must be confined to the question whether the measures taken on the national level are, in the light of the case as a whole, justifiable in principle and proportionate (cf. Eur. Court H.R., Markt Intern Verlag GmbH and Klaus Beermann judgment, loc. cit., pp. 19-20, para. 33; Sunday Times (No. 2) judgment of 26 November 1991, Series A no. 217, pp. 28-29, para. 50).

60. In the present case, the Düsseldorf Court of Appeal, in its injunction of 11 December 1986, ordered the applicant to refrain from adverse comments on the activities of the news agency D. by transmitting to third persons a selection of articles on his litigation with D. with the remark that partly incorrect facts hardly affected the picture as a whole, and that pending court proceedings which had been introduced by staff members affected by the current development of D. and by the applicant himself would finally throw light on all details.

61. The Commission recalls that since 1983 the applicant had been sole managing director and chief editor of the news agency D. Previously, he had been co-founder, partner and manager of a predecessor news agency, which went bankrupt. Following controversies with his employer D., the applicant was dismissed without notice on a number of occasions, the first time on 17 July 1984. Labour court proceedings brought by the applicant ultimately remained unsuccessful.

62. On 16 August 1984, in the context of these controversies, the applicant's employer D., in its news network, published a press release concerning its reorganisation of personnel, which also commented upon the applicant's qualifications and his performance as a journalist and managing director. In this press release, D., referring to the bankruptcy of its predecessor, expressed its opinion that the applicant had failed as a businessman. In particular his business policy had not changed, his attitude towards clients was inappropriate, his editorial management lacked efficiency and reliability, he had thereby prevented the chance of a new start from being used and lost clients. Moreover, the applicant, in important matters, had wrongly informed the managing board.

63. The news agency D. subsequently refused to publish a reply drafted in respect of the above press release. On 17 September 1984 the applicant's request for an injunction concerning his claim for a right to reply was dismissed at first instance. The Cologne Court of Appeal allowed the claim on 11 October 1984, and the applicant's reply was printed one month later.

64. In the meantime, on 25 September 1984, the applicant had addressed his circular letter to a number of leading newspaper and radio journalists. He had enclosed a selection of articles concerning the financial and staff situation of D. which had been published by six newspapers with a wide circulation and contained both critical remarks on the applicant as well as severe criticism of his former employer. In the accompanying letter, the applicant had mentioned his intention thereby to clarify some matters. He had closed in stating his interest in a personal conversation concerning the past and future developments on the German media market.

65. The Commission considers that the applicant's circular letter has to be seen in the light of the discussion in German media concerning the situation of the news agency D. and the applicant's part in the developments, and in particular the news agency's press release of 16 August 1984. The news agency had thereby brought its controversies with the applicant to the attention primarily of those connected to its network. Its publication contained serious attacks upon the applicant's professional performance and reputation. After the applicant's claim for a reply had been refused by the news agency D., and his application for an injunction to enforce his right to reply in the news agency's network had been dismissed at first instance, there was sufficient cause for the applicant to react by other means to the news agency's publication. His choice of a limited circle of persons in the news business as addressees of his comments does not, in this situation, appear inappropriate.

66. The Düsseldorf Court of Appeal founded its decision of 11 December 1986 on unfair competition law. It assumed a competitive relationship between the applicant and the news agency D., and also the applicant's competitive intent in respect of his press release. The Court of Appeal considered that the applicant had adversely commented upon D.'s activities in that he had endorsed the factual statements and value judgments contained in the enclosed press articles by confirming them in his circular letter as being essentially correct. The question whether the detrimental statements concerning D. had been correct justifying the negative judgments based thereupon was left open.

67. The Federal Constitutional Court, in its decision of 4 October 1988, confirms this evaluation. According to the Federal Constitutional Court, freedom of expression only prevailed over private and in particular economic interests if a detrimental statement in the field of competition was motivated by a concern for interests of public importance and contributed to the exchange of opinions on matters of

considerable public interest. The applicant's circular letter was found to be in pursuance of commercial self-interest, not aimed at influencing public opinion. The limited number of addressees of the applicant's circular letter placed it outside the sphere of public discussion and could not, therefore, justify it as reaction to the news agency's press release with its depreciating remarks about the applicant.

68. The Commission considers that, in the circumstances of the present case, these considerations appear not sufficient to justify the prohibitory injunction complained of.

69. The German courts emphasised the assumed competitive aspects of the applicant's circular letter. Yet, at the time in question, the applicant was still involved in labour court proceedings against the news agency concerning his dismissal, and only subsequently did he open his own news agency. Furthermore, the concluding paragraph of his accompanying letter seeking a personal discussion of the past and future developments on the news market did not solely serve the purpose of preparing future business relations. The applicant's legitimate interest in defending himself against the news agency's public attack on his personal and professional reputation, the inefficiency of court remedies to enforce his claim to an immediate reply in the news agency's network, and the moderate and cautious drafting of his circular letter which mainly referred to an enclosed selection of previously published press articles are ignored or underrated. The German courts' standard that an adverse statement must be motivated by a concern for interests of public importance and contribute to an exchange of opinions on matters of considerable public interest does not fairly balance the right to freedom of expression, in the applicant's situation as described above, and the employer's private interests affected by such statements.

70. Consequently, the Commission finds that the prohibitory injunction issued by the Düsseldorf Court of Appeal and confirmed by the Federal Court of Justice as well as, from the constitutional point of view, by the Federal Constitutional Court, was not proportionate to the legitimate aim pursued. Accordingly, this interference was not necessary in a democratic society for the protection of the reputation and rights of others within the meaning of Article 10 para. 2 (Art. 10-2) of the Convention.

D. Conclusion

71. The Commission concludes, unanimously that there has been a violation of Article 10 (Art. 10) of the Convention.

Secretary to the Commission

(H.C. Krüger)

President of the Commission

(C.A. Nørgaard)

APPENDIX I

HISTORY OF PROCEEDINGS

Date

Item

11 April 1989 Introduction of the application

7 June 1989 Registration of the application

Examination of Admissibility

7 May 1990 Commission's decision to invite

the Government to submit observations on the admissibility and merits of the application

15 October 1990

Government's observations

12 December 1990

Applicant's observations in reply

5 September 1991

Commission's decision to hold an oral hearing

3 December 1991

Oral hearing on admissibility and merits; Commission's decision to declare the application admissible

Examination of the merits

4 April 1992

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Commission's consideration of the state of proceedings

5 September 1992

)

7 January 1993

Commission's deliberations on the merits, final vote and adoption of the Report