



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

COURT (CHAMBER)

CASE OF JACUBOWSKI v. GERMANY

(Application no. 15088/89)

JUDGMENT

STRASBOURG

23 June 1994

In the case of *Jacobowski v. Germany**,

The European Court of Human Rights, sitting, in accordance with Article 43 (art. 43) of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") and the relevant provisions of the Rules of Court, as a Chamber composed of the following judges:

Mr R. RYSSDAL, *President*,

Mr R. BERNHARDT,

Mr B. WALSH,

Mr R. MACDONALD,

Mr R. PEKKANEN,

Mr M.A. LOPES ROCHA,

Mr L. WILDHABER,

Mr G. MIFSUD BONNICI,

Mr D. GOTCHEV,

and also of Mr M.-A. EISSEN, *Registrar*, and Mr H. PETZOLD, *Deputy Registrar*,

Having deliberated in private on 24 November 1993 and 26 May 1994,

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

PROCEDURE

1. The case was referred to the Court by the Government of the Federal Republic of Germany ("the Government") and by the European Commission of Human Rights ("the Commission") on 19 February and 12 March 1993, within the three-month period laid down by Article 32 para. 1 and Article 47 (art. 32-1, art. 47) of the Convention. It originated in an application (no. 15088/89) against Germany lodged with the Commission under Article 25 (art. 25) by a German national, Mr Manfred Jacobowski, on 11 April 1989.

The Government's application referred to Articles 32 and 48 (art. 32, art. 48); the Commission's request referred to Articles 44 and 48 (art. 44, art. 48) and to the declaration whereby Germany recognised the compulsory jurisdiction of the Court (Article 46) (art. 46). The object of the application and of the request was to obtain a decision as to whether the facts of the

* Note by the Registrar. The case is numbered 7/1993/402/480. The first number is the case's position on the list of cases referred to the Court in the relevant year (second number). The last two numbers indicate the case's position on the list of cases referred to the Court since its creation and on the list of the corresponding originating applications to the Commission.

case disclosed a breach by the respondent State of its obligations under Article 10 (art. 10) of the Convention.

2. In response to the enquiry made in accordance with Rule 33 para. 3 (d) of the Rules of Court, the applicant stated that he wished to take part in the proceedings and designated the lawyer who would represent him (Rule 30). The lawyer was given leave by the President to use the German language (Rule 27 para. 3).

3. The Chamber to be constituted included ex officio Mr R. Bernhardt, the elected judge of German nationality (Article 43 of the Convention) (art. 43), and Mr R. Ryssdal, the President of the Court (Rule 21 para. 3 (b)). On 27 February 1993, in the presence of the Registrar, Mr Bernhardt, the Vice-President, drew by lot the names of the other seven members, namely Mr B. Walsh, Mr R. Macdonald, Mr R. Pekkanen, Mr M.A. Lopes Rocha, Mr L. Wildhaber, Mr G. Mifsud Bonnici and Mr D. Gotchev (Article 43 in fine of the Convention and Rule 21 para. 4) (art. 43).

4. As President of the Chamber (Rule 21 para. 5), Mr Ryssdal, acting through the Deputy Registrar, consulted the Agent of the Government, the applicant's lawyer and the Delegate of the Commission on the organisation of the proceedings (Rules 37 para. 1 and 38). Pursuant to the order made in consequence, the Registrar received the Government's memorial on 16 July 1993 and the applicant's memorial on 19 July. On 30 July the Deputy Secretary to the Commission informed the Registrar that the Delegate would submit his observations at the hearing.

5. On 14 September 1993 the Commission produced the file on the proceedings before it, as requested by the Registrar on the President's instructions.

6. In accordance with the decision of the President, who had also given the Government's representatives leave to address the Court in German (Rule 27 para. 2), the hearing took place in public in the Human Rights Building, Strasbourg, on 22 November 1993. The Court had held a preparatory meeting beforehand.

There appeared before the Court:

- for the Government

Mr J. MEYER-LADEWIG, Ministerialdirigent,
Federal Ministry of Justice,

Agent,

Mr A. VON MÜHLENDAHL, Ministerialrat,
Federal Ministry of Justice,

Adviser;

- for the Commission

Mr J.A. FROWEIN,

Delegate;

- for the applicant

Mr W. MEILICKE, Rechtsanwalt,

Counsel,

Mr T. HEIDEL, Rechtsanwalt,

Adviser.

The Court heard addresses by Mr Meyer-Ladewig, Mr von Mühlendahl, Mr Frowein and Mr Meilicke, and also replies to its questions.

AS TO THE FACTS

7. Mr Manfred Jacobowski lives in Bonn and is a journalist by profession. At the material time he was working as editor-in-chief of a news agency run by a commercial company, the Deutsche Depeschendienst GmbH, of which he was a founder member and manager. This company filed a petition in bankruptcy (Eröffnung des Konkursverfahrens) on 31 March 1983. A new company, the Deutsche Depeschendienst AG ("the ddp"), was created subsequently, and Mr Jacobowski became its sole director (Vorstand) and editor-in-chief on 3 May 1983.

8. Shortly afterwards, he instituted two different sets of proceedings. In the first (A) he sought to challenge his dismissal and in the second (B) he claimed the right to reply to a press release issued by his employer. At almost the same time, he became involved in a third set of proceedings (C) brought against him under the Unfair Competition Act of 7 June 1909 (Gesetz gegen den unlauteren Wettbewerb - "the 1909 Act").

A. The applicant's dismissal

9. For reasons connected with the applicant's financial management, the ddp's supervisory board (Aufsichtsrat) dismissed him without notice from all his duties on 17 July 1984. On 25 August it sent him another letter of dismissal on the ground that he had allegedly communicated inside information to third persons. Mr Jacobowski challenged the validity of the latter dismissal, which was renewed on 12 October. A further dismissal letter was sent to him on 28 October, after he had distributed a circular letter and newspaper cuttings among fellow professionals on 25 September (see paragraph 14 below). A final dismissal notice, based on new grounds, was sent to him on 12 February 1985.

10. At the end of legal proceedings instituted by the applicant, the Cologne Court of Appeal (Oberlandesgericht) held on 11 October 1988 that he had been validly dismissed on 28 October 1984.

According to the court, the distribution of the circular and cuttings was to be regarded as such a serious breach of Mr Jacobowski's duty of loyalty that it was not possible for the employer to continue his contract, nor could it reasonably be expected. By sending press articles to a large number of influential professionals and endorsing in the circular their objectively unfavourable statements about the ddp's competence and business situation, Mr Jacobowski had knowingly run the risk of causing the company considerable prejudice; such behaviour on the part of a leading employee was unacceptable and therefore not covered by the constitutional right to freedom of expression.

Furthermore, it could not be inferred from the circular that its main aim was to defend the applicant's reputation and honour; it contained neither

any reference to the ddp's allegations nor any arguments in Mr Jacubowski's defence. The circular's last paragraph clearly showed that the sole purpose of the mailing had been to disseminate adverse comments on the applicant's former employer and to establish contact with the addressees.

11. Mr Jacubowski challenged this judgment in the Federal Court of Justice (Bundesgerichtshof) and the Federal Constitutional Court (Bundesverfassungsgericht), but on 26 June and 25 October 1989 respectively those courts declined to accept for adjudication his applications on the ground that they had no prospects of success.

B. The applicant's reply to his employer's press release

12. In the meantime, on 16 August 1984, the agency had published a press release concerning its own reorganisation. In this it also criticised the applicant's management in the following terms:

"... after the private limited company ... had filed a petition in bankruptcy on 31 March 1983, the public limited company D. - again under the management of Manfred Jacubowski - started up on 20 April 1983 with a capital of one million DM. Jacubowski's unchanged business methods and his inappropriate behaviour to clients, together with the lack of any efficient, reliable editorial management meant that no advantage was taken of the opportunity to make a fresh start, and indeed they led to a loss of clients. Until this spring Jacubowski misled the supervisory board about vital aspects of the developments. In particular, liabilities incurred in the private company's period of existence were transferred to the public company, and this put the D. agency into financial difficulties again. Only the timely intervention of the former finance and accounting director, K., the current director, prevented more serious harm being done, so that today D. is once again on a sound financial footing. On 17 July - the date of the general meeting - Jacubowski was dismissed without notice on account of his business incompetence ... K. was appointed sole director."

13. On 29 August and 4 September 1984 the applicant requested the ddp to publish his reply (Gegendarstellung) to the press release, but without success. He then sought an interim injunction (einstweilige Verfügung) from the Bonn Regional Court (Landgericht), but this was refused on 17 September 1984, on the ground that the proposed reply was not limited to answering the allegations of fact in the press release (gegenteilige Tatsachenbehauptung) but gave a completely new version of the sequence of events (Auflistung), which had not been an issue in the ddp's press release.

On 11 October the Cologne Court of Appeal reversed the Regional Court's judgment and ordered the agency to accede to Mr Jacubowski's request, which it did a month later. In the reply then published the applicant answered in detail all the main accusations contained in the ddp's press release.

C. The proceedings under the Unfair Competition Act

14. In the meantime, on 25 September 1984, Mr Jacubowski had sent thirteen articles from newspapers with large circulations to forty newspaper publishers and newspaper, radio and television journalists who, as clients of the ddp, had received the press release of 16 August (see paragraph 12 above). These articles gave critical accounts of his dismissal, the circumstances surrounding it and the ddp's activities in general. They reported in particular that the ddp's financial position had worsened again since the bankruptcy in April 1983 (see paragraph 7 above) and that some of its clients were preparing to dispense with its services, mainly because of their poor standard and the lack of certain technical facilities.

He had appended a circular letter that read as follows:

"The enclosed selection - which is inevitably incomplete - of articles on the Jacubowski v. D. case will undoubtedly throw light on certain matters that are still obscure, even though you may already be familiar with one or other of the accounts of the facts. Some of the facts are admittedly reported inaccurately, but they scarcely alter the picture as a whole. The pending court proceedings that members of D.'s staff affected by current developments at the agency and I have brought will ensure that all the details finally become clear.

I should be glad to be able to meet you in person before too long, in order to discuss not only the past but also future developments in the German 'news market'. I will ask for an appointment in due course."

15. Shortly afterwards, on 11 March 1985, the applicant set up a "public-relations" agency.

16. In the meantime the E. company, which had acquired 25% of the ddp's capital, had applied for a restraining injunction (Unterlassung) against Mr Jacubowski. On 29 January 1986 the Düsseldorf Regional Court refused the application on the ground that E. had no legal interest (rechtliches Interesse).

17. On 11 December 1986, on an appeal by E., joined (Eintritt in den Rechtsstreit) by the agency, the Düsseldorf Court of Appeal refused to grant an injunction prohibiting the applicant from systematically criticising the ddp but ordered that he should desist from any further such mailings, on pain of a fine; it went on to hold that he would have to "compensate the [E. company] for all the damage that the acts [in question] ha[d] caused and [would] cause the [ddp]". The judgment was based on section 1 of the 1909 Act, which provides: "Any person who, in the course of business commits, for purposes of competition, acts contrary to accepted moral standards may be enjoined from further engaging in those acts and held liable for damages."

The court held that in his circular the respondent had repeated in his own name the allegations made in the attached articles. Admittedly, he had sought to correct assertions made about him in the press release that were

possibly false but he had acted above all for purposes of competition in the course of business.

The court said, *inter alia*:

"... the respondent sent his circular of 25 September 1984 for purposes of competition in the course of business.

An action is said to be for purposes of competition where it is on the face of it apt to promote one person's sales to the detriment of another's and where it is carried out with a corresponding intention, although that intention need not be the only or the essential motive for the action (settled case-law, see Federal Court of Justice in GRUR 1952, p. 410 - Constanze I; Baumbach-Hefermehl, Wettbewerbsrecht, 14th edition, intro. to Unfair Competition Act, marginal notes 209 et seq., with further references).

Remarks which, according to the witness Leisner, the respondent made several times show that even before sending out the circular the latter had planned to set up his own news agency after he left the employ of the [ddp]. The distribution of the circular referring to the enclosed adverse newspaper reports on, *inter alia*, the [ddp]'s activities as a news agency to current clients of the [ddp] and/or potential clients of both the [ddp] and the news agency that the respondent proposed to set up was apt to enhance the competitive position of the respondent's company and impair that of the [ddp]. Admittedly, the respondent's company did not then exist. However, for it to be held that there is a competitive relationship, it is sufficient that traders have, or at least will in the future have, the same potential clientele. This was the case as regards the respondent's company and the [ddp] ...

Behind the respondent's conduct there was furthermore a ... competitive intention.

Experience shows that the fact that activities are objectively apt to enhance one's own competitive position at the expense of another's is not the only basis for presuming a competitive intention ...

In the present case such an intention is also apparent from the other facts that emerged during the proceedings. According to what he told the witness Leisner, the respondent had already been planning for a long time to set up his own agency in the event of his leaving the [ddp]'s service. In the middle of July 1984 the [ddp] had removed him from the post of director and in the middle of August [it] had terminated his contract of employment. The circular and newspaper cuttings were sent out about a month later to selected addressees, including - and this is not disputed - important clients of the [ddp]. A few months later the respondent's new agency was set up. This chronological sequence of events is a further indication of the respondent's intention to lower the [ddp] in the esteem of potential clients of both parties and thereby make it easier for his own agency to gain a foothold in the market in preparation for competition with the [ddp].

The last paragraph of the circular likewise makes the competitive intention clear. It shows that the respondent intended to provoke discussion not only with a view to correcting assertions concerning himself that were possibly false, but also, at the very least, in order to promote his future activities as a competitor of the [ddp]. It is not apparent what else the respondent could have meant when he wrote that he wished to discuss 'not only the past but also future developments in the German "news market"'. By taking up these unfavourable comments on the [ddp] and distributing them anew as his own statements and assessments, he unnecessarily handicapped the [ddp] as a

competitor. In this connection it does not matter whether the unfavourable factual statements concerning the [ddp]'s activities were accurate and whether they justified the unfavourable assessments accompanying them. This is because even true statements may only be used to disparage a competitor where the person making them has sufficient reason to link his own competitive position with disparagement of the competitor and provided that the criticism does not in nature or degree exceed what is necessary (Federal Court of Justice in GRUR 1968, pp. 262 and 265 - Fälschung). It does not appear that there was any such reason to disparage the [ddp] by taking up the unfavourable comments on its activities in the Horizont article."

In short, Mr Jacubowski had needlessly handicapped (behinderte unnötig) a competitor and accordingly infringed section 1 of the 1909 Act.

18. On 26 November 1987 the Federal Court of Justice declined to accept for adjudication an appeal on points of law (Revision) by the applicant on the ground that it had no prospects of success.

19. Thereupon Mr Jacubowski applied to the Federal Constitutional Court, complaining in particular of an infringement of freedom of expression (Article 5 para. 1, first sentence, of the Basic Law). On 4 October 1988 the Federal Constitutional Court declined to accept the complaint for adjudication on the ground that it was unfounded.

It noted, firstly, that the prohibition in issue related solely to the applicant's chosen method of circulating his information. The information was, moreover, of a business nature, but this did not mean that it ceased to be an opinion whose expression was protected by Article 5 para. 1, first sentence, of the Basic Law. This provision therefore had to be weighed against section 1 of the 1909 Act, on which the prohibition had been founded.

The court went on:

"In order for it to be determined how [freedom of expression and fair competition] are to be related to each other in the case of damaging comment by a competitor, the following points are decisive, having regard to earlier decisions of the Constitutional Court in cases involving a call for a boycott (see Constitutional Court Decisions [vol.] 62, 230 at 244 et seq., with further references).

In the first place, the motives of the person concerned and, linked to them, the aim and purpose of the comment are crucial. If the comment is motivated not by personal interests of an economic nature, but by concern for the political, economic, social or cultural interests of the community, if it serves to influence public opinion, the appeal will probably qualify for the protection of Article 5 para. 1 of the Basic Law, even if private and, more particularly, economic interests are adversely affected as a result. Conversely, the importance of protecting the latter interests is the greater, the less the comment is a contribution to public debate on a major issue of public concern and the more it is immediately directed against those interests in the course of business and in pursuit of a self-serving goal (see Constitutional Court Decisions [vol.] 66, 116 at 139) such as improving one's own competitive position ...

...

In the light of these facts, the distribution of the applicant's circular can hardly be regarded as an attempt to influence public opinion. Rather it was designed almost exclusively to promote his private business interests and to secure or improve his competitive position in the news market.

It follows ... that the prejudice caused to the complainants by the distribution of the circular was disproportionate to the applicant's aim, stated in it, of clarifying his relationship with the ddp and 'current developments at the agency'. In principle, freedom of expression takes precedence over rights (Rechtsgüter) protected by ordinary laws in so far as the statement is part of the ongoing discussion of questions of public importance which is absolutely fundamental to a free democratic system. This condition is not satisfied where the statement is made to ensure that certain business interests prevail over others in the context of business competition. The fact that an interest is made to prevail by means which are in principle protected under Article 5 para. 1 of the Basic Law cannot therefore justify subordinating to it the other interest, which is in turn entitled to the protection of an ordinary law that places restrictions on freedom of expression, in this case section 1 of the Unfair Competition Act (see Constitutional Court Decisions [vol.] 62, 230 at 247 et seq.). It follows that the finding by the Court of Appeal that the applicant's distribution of the circular was contrary to accepted moral standards is not incompatible with Article 5 para. 1 of the Basic Law."

The Constitutional Court added that the fact that the impugned circular followed a press release directed against him which had been issued by the ddp (see paragraph 12 above) did not invalidate this conclusion, since in order to claim the protection of the Constitution, his response would have had to be intended to influence public opinion, which it was not.

20. On 30 November 1988 the Düsseldorf Regional Court dismissed a claim for damages brought by the ddp in reliance on the Court of Appeal's judgment of 11 December 1986 (see paragraph 17 above). It held that the ddp had insufficiently substantiated its claim and had failed to prove any causal link between the alleged damage and the distribution of Mr Jacobowski's circular.

PROCEEDINGS BEFORE THE COMMISSION

21. Mr Jacobowski applied to the Commission on 11 April 1989. Relying on Article 10 (art. 10) of the Convention, he complained of a breach of his right to freedom of expression.

22. The Commission declared the application (no. 15088/89) admissible on 3 December 1991. In its report of 7 January 1993 (made under Article 31) (art. 31), it expressed the unanimous opinion that there had been a

violation of Article 10 (art. 10). The full text of the Commission's opinion is reproduced as an annex to this judgment*.

AS TO THE LAW

ALLEGED VIOLATION OF ARTICLE 10 (art. 10)

23. The applicant complained of the court order of 11 December 1986, later confirmed on 26 November 1987 by the Federal Court of Justice, prohibiting him from continuing to distribute his circular of 25 September 1984 (see paragraphs 17-18 above). He alleged a violation of Article 10 (art. 10), which provides:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. This Article (art. 10) shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

The order of 11 December 1986 had, he said, prevented further distribution of his reply of 25 September 1984 to a press release in which his former employer had openly put his professional abilities in question. He had tried unsuccessfully to have his reply published by the ddp itself, by applying firstly to the agency and then to the Bonn Regional Court (see paragraphs 12-13 above). These attempts having failed, he had had to resort to other means, without awaiting the judgment of the Cologne Court of Appeal, since his reputation was at stake. In any case, there had been nothing extreme about the circular in issue, which had merely approved in a few lines the substance of the attached articles from newspapers that had already been widely distributed.

The Commission shared this view for the most part.

* Note by the Registrar: for practical reasons this annex will appear only with the printed version of the judgment (volume 291-A of Series A of the Publications of the Court), but a copy of the Commission's report is available from the registry.

24. The Government challenged it. In issuing an injunction consequent upon an act of unfair competition, the Düsseldorf Court of Appeal had done no more than exercise a discretion in commercial matters, as it was empowered to do under the doctrine of the margin of appreciation. Although it could not be regarded as the only possible one, its decision appeared at the very least defensible in the light of the wording of the circular of 25 September 1984, in which Mr Jacobowski had first of all broadly endorsed the criticisms of the ddp in the press cuttings he reproduced and then, in the last paragraph, expressed the intention, thinly disguised, of establishing business relations between the recipients of the circular and the new agency he was preparing to set up. Rather than defend himself, he had therefore clearly denigrated a competitor the better to be able to poach clients, and this was, moreover, shown by the appreciable difference in content between the circular and the reply eventually published after the judgment of 11 October 1984 (see paragraph 13 above).

In addition, the national courts had shown moderation in going no further than prohibiting any redistribution of the circular of 25 September 1984; the applicant still had complete freedom to voice his opinions in any other way.

25. The Court notes that the impugned measure was, without a doubt, an interference with Mr Jacobowski's exercise of his freedom of expression. The fact that, in a given case, that freedom is exercised other than in the discussion of matters of public interest does not deprive it of the protection of Article 10 (art. 10) (see, *mutatis mutandis*, the *Casado Coca v. Spain* judgment of 24 February 1994, Series A no. 285-A, p. 16, para. 35).

The interference was "prescribed by law" and pursued a legitimate aim under the Convention, namely "the protection of the reputation or rights of others" (see, *mutatis mutandis*, the *Barthold v. Germany* judgment of 25 March 1985, Series A no. 90, pp. 21-23, paras. 44-51, and the *markt intern Verlag GmbH and Klaus Beermann v. Germany* judgment of 20 November 1989, Series A no. 165, pp. 17-19, paras. 27-31). It consequently remains to be ascertained whether the interference can be regarded as having been "necessary in a democratic society".

26. The Court has consistently held that a certain margin of appreciation is to be left to the Contracting States in assessing whether and to what extent an interference is necessary, but this margin goes hand in hand with European supervision covering both the legislation and the decisions applying it, even those given by an independent court.

Such a margin of appreciation appears essential in commercial matters, in particular in an area as complex and fluctuating as that of unfair competition. The Court must confine its review to the question whether the measures taken at national level are justifiable in principle and proportionate (see the *markt intern Verlag GmbH and Klaus Beermann* judgment previously cited, pp. 19-20, para. 33).

27. In the instant case the requirements of protecting the reputation and rights of others must be weighed against the applicant's freedom to distribute his circular and the newspaper cuttings.

All three of the national courts that considered the merits of Mr Jacubowski's course of action were unanimous in regarding it as an act of unfair competition in breach of "accepted moral standards", as in their view it had been mainly designed to draw the ddp's clients away to the new press agency that he set up shortly afterwards. Their judgments were based principally on the circular's wording, especially its last paragraph, in which, so they held, the sender clearly expressed his wish to establish personal business contacts with the addressees. The domestic courts further relied on testimony that, even before sending his circular, the applicant had planned to found his own news agency (see paragraphs 10, 15, 17 and 19 above). The evidence put before the Court does not undermine that conclusion.

28. All three domestic courts took into account the fact that Mr Jacubowski had been personally attacked in a press release issued by his former employer. However, in view of the aforementioned circumstances, they attached less importance to it than to what they regarded as the cardinal feature, namely the essentially competitive purpose of the exercise. In the reply he eventually published Mr Jacubowski responded in detail to the main accusations contained in the ddp's press release; but the content of his reply was substantially different from that of his circular (see paragraph 13 above).

29. Lastly, it should be emphasised that the impugned court order went no further than to prohibit distribution of the circular; the Düsseldorf Court of Appeal refused the ddp's application for an injunction prohibiting Mr Jacubowski from systematically criticising the ddp (see paragraph 17 above). He thus retained the right to voice his opinions and to defend himself by any other means. The interference complained of therefore cannot be regarded as disproportionate.

30. Accordingly, it cannot be said that the German courts overstepped the margin of appreciation left to national authorities and no breach of Article 10 (art. 10) has been made out.

FOR THESE REASONS, THE COURT

Holds by six votes to three that there has been no breach of Article 10 (art. 10).

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 23 June 1994.

Rolv RYSSDAL
President

Herbert PETZOLD
Acting Registrar

In accordance with Article 51 para. 2 (art. 51-2) of the Convention and Rule 53 para. 2 of the Rules of Court, the joint dissenting opinion of Mr Walsh, Mr Macdonald and Mr Wildhaber is annexed to this judgment.

R.R.
H.P.

DISSENTING OPINION OF JUDGES WALSH,
MACDONALD AND WILDHABER

This is an important case in which admittedly the requirements of protecting the reputation and rights of others (of potential commercial competitors) must be weighed against the applicant's freedom to distribute his circular of 25 September 1984 along with the appended thirteen newspaper articles.

In our opinion, the majority judgment makes it appear as though this case involves simply a choice between two conflicting principles of equal weight. It relies too heavily on the findings of fact by the national courts. In so doing, it gives an excessive significance to the doctrine of the margin of appreciation.

In our view, freedom of expression is the guiding principle in the instant case. Exceptions to this fundamental principle must be interpreted narrowly (see, *mutatis mutandis*, the *Sunday Times v. the United Kingdom* (no. 1) judgment of 26 April 1979, Series A no. 30, p. 41, para. 65). The findings of fact by the national courts must be assessed with the proper respect due to them, but without excessive deference. It is crucial that the margin of appreciation which is left to national legislatures and courts must remain subject to an effective European supervision.

In the instant case, the applicant had been harshly attacked by his employer in a press release in which his professional abilities had been seriously questioned and he himself had been held responsible for the collapse of the *Deutsche Depeschendienst GmbH*. Shortly afterwards his dispute with the *ddp* culminated in his being dismissed without notice from all his duties. He accordingly had an obvious and pressing interest in trying to protect his impugned reputation without delay, especially as he was seeking a new job in the same sector and had to wait almost two months for his right to reply to be recognised and another month for his reply to be published (see paragraphs 12-13 of the judgment). There was a parallel public interest to learn whether the applicant would defend himself against his former employer.

In this situation, the applicant sent his circular of 25 September 1984. At the time he sent it, some six weeks had already elapsed since the *ddp* had issued its press release of 16 August 1984 (see paragraphs 12 and 14 of the judgment). He still did not know whether the courts would eventually grant him a right of reply. Given this situation, there was nothing extreme or improper in the circular at issue. On the contrary, he merely approved in a few lines the substance of thirteen articles from newspapers with a large circulation, which were already in the public domain. Subsequently, the *Düsseldorf Court of Appeal* ruled that the applicant should desist from any further such mailings, on pain of a fine, and that he would have to pay compensation for all actual or potential damage suffered by the *ddp* as a

consequence of his action (see paragraph 17 of the judgment). In effect, the German Unfair Competition Act was interpreted so as to make unlawful the distribution of widely circulated newspaper articles, at a time when the applicant had no way to re-establish his impugned reputation and did not know whether any such way would be available to him in the foreseeable future. Thus the Düsseldorf Court of Appeal accepted that he had acted, among other reasons, in order to correct assertions about him that were "possibly false" (see paragraph 17 of the judgment).

Admittedly, in the eyes of the national courts, the injunction in issue was founded on the fact that in addition to defending himself the applicant had above all sought to "disparage" his former employer - "as a competitor" - to the recipients of the circular (see paragraph 17 of the judgment). The recipients of the circular, however, were among those who had also received the ddp's press release of 16 August 1984, in which the applicant had been attacked and to which he had finally secured the right to reply on 11 October 1984 (see paragraphs 12-13 of the judgment). The motives which prompted the applicant's action - protecting his reputation and securing his future career - appear both legitimate and intertwined. They are so intertwined, in fact, that he could not be expected to justify himself without making reference to both his past and his future professional career. Moreover, as we have stressed, he did not do so in an extreme or improper fashion, since he confined himself to sending out newspaper cuttings, to which he added only a few comments. To put it succinctly, he distributed newspaper articles which were already in the public domain, and added that they gave, on the whole, a fair picture.

We fail to see how it could have been proportionate to prevent him from doing this. The competitive element cannot be regarded as having played a preponderant role in the particular circumstances of the case. To accept in this case a preponderance of the competitive element amounts to reducing the principle of freedom of expression to the level of an exception and to elevating the Unfair Competition Act to the status of a rule. We cannot agree that this constitutes the proper way of exercising a European supervision.