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**The right of reply under the European Convention on Human Rights –  
An analysis of *Eker v Turkey* App no 24016/05 (ECtHR, 24 October  
2017)**

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# **The right of reply under the European Convention on Human Rights – An analysis of *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017)**

This article analyses the latest judgment of the European Court of Human Rights dealing with the right of reply. The court held that the compulsion for a publisher to print a reply to an editorial he had written and published in his newspaper did not violate his fundamental rights. Exploring the key findings, this case note sets out the decision's wider implications for freedom of expression, the right to a fair trial, and the right to a private life. Particularly, the case comes to significant conclusions that might result in the widening of the admissible content of a reply and an extension of the scope of the remedy. By reinterpreting the normative foundations of the right of reply, it also combines disparate approaches from previous case law. Thus, this case comment highlights both the ruling's practical implications and potential repercussions for future application of domestic and international law on the right of reply.

Keywords: right of reply; freedom of expression, right to a fair trial, right to a private life, European Court of Human Rights

## **1. Introduction**

On 24 October 2017, the European Court of Human Rights (ECtHR) held that the compulsion for a publisher to print a reply to an editorial he had written and published in his newspaper did not violate his fundamental rights under the European Convention on Human Rights (ECHR).<sup>1</sup> One of the key issues in the case was whether the lack of a public hearing during the domestic proceedings led to an unfair trial. In addition, the court examined whether the interference with the publisher's freedom of expression resulting from the right of reply was proportionate.<sup>2</sup>

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<sup>1</sup> *Eker v Turkey* App no 24016/05 (ECtHR, 24 October 2017).

<sup>2</sup> So far, this judgment is only available in French. The registrar of the ECtHR has published a summary in English (24 October 2017), available at <<http://bit.ly/2ywPBBm>> accessed 20

Reinforcing and combining the findings of previous case law,<sup>3</sup> this judgment highlights that the right of reply can be employed not merely to ensure the retraction of incorrect facts but also to offer an opportunity to vindicate reputational rights. Further, it acknowledges that the remedy enhances public discourse in general. By doing so, the ECtHR combines disparate approaches from previous case law and reinterpreted the normative foundations of the right of reply. In addition, the court provided significant guidance regarding the admissible scope of a right of reply, and the extent of procedural guarantees to be provided in court proceedings under the ECHR. Thus, the decision has wider implications for the remedy's impact on freedom of expression, the right to a fair trial, and the right to a private life. More specifically, it concerns the balance between the (editorial) freedom of the press, the public interest in access to accurate and plural information, and the reputational rights of a person affected by a statement made in the media.

Historically, the value of a right of reply has been the subject of controversy in academia and in practice.<sup>4</sup> As the obligation to print a reply interferes with the publisher's freedom to determine what to publish in his or her newspaper, the remedy is often seen as an inevitable restriction on the freedom of the press with a 'chilling effect' on

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<sup>3</sup> *Ediciones Tiempo SA v Spain* App no 13010/87 (ECtHR, 12 July 1989); *Melnychuk v Ukraine* App no 28743/03 (ECtHR, 5 July 2005); *Kaperzyński v Poland* App no 43206/07 (ECtHR, 3 April 2012). This is discussed in Sections 4.1 and 4.2 below.

<sup>4</sup> See for example: *N.Y. Times Co. v Sullivan*, 376 U.S. 254, 279 (1964); *Miami Herald Publishing Co v Tornillo* 418 U.S. 241 (1974); Andrew Martin, 'The right of reply in England' in Martin Löffler (ed), *The right of reply in Europe* (C.H. Beck 1974) 34–40; Report of the Committee on Privacy and Related Matters Cmd 1102 (London: HMSO, 1990) 44; Alastair Mullis and Andrew Scott, 'Tilting at Windmills: The Defamation Act 2013' (2014) 77(1) MLR 107–108.

editorial independence.<sup>5</sup> On the other hand, a right of reply enables an individual or organisation affected by facts or comments made in the press to publish their own viewpoint in the same forum.<sup>6</sup> Thus, the remedy is considered as the guarantee of an ‘equal fighting chance’ and the ‘right to be heard’ for those who are in a weaker position than the media.<sup>7</sup> This position stems from the assumption that an individual cannot, as a rule, counter the news media with the prospect of the same level of publicity.<sup>8</sup> Striking a balance between these interests is a recurring theme of the right of reply in general and, more specifically, of the present case.

After briefly setting out the facts of the judgement, this case comment highlights how the court reached its ruling regarding the key procedural and substantive issues noted above. It then focuses on why this decision is significant, how it fits in with previous case law, and what it adds to the jurisprudence of the ECtHR. To do so, the analysis explores how the right of reply has been conceptualised in previous case law and how this has changed over time. Lastly, the article considers the ruling’s potential impact on future applications concerning the right of reply under the ECHR.

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<sup>5</sup> For a rationale of the arguments, see, for example, Charles Danziger, ‘The right of reply in the US and Europe’ [1986] 19(1) *NYU Journal of International Law and Politics* 176–180; Eric Barndt, *Freedom of Speech* (OUP 2005) 422–426; Stephen Gardbaum, ‘A reply to the right of reply’ [2008] 76(4) *George Washington Law Review* 1065–1072; Andras Koltay, ‘The Right of Reply in a European Comparative Perspective’ [2013] 54(1) *Hungarian Journal of Legal Studies* 73–89. For further discussion, see below.

<sup>6</sup> The exact scope and requirements of a right of reply depend on the provision of each member state.

<sup>7</sup> See the analysis of the judgment below.

<sup>8</sup> See for example: David Björgvinsson, ‘The right of reply’ in Josep Casadevall (ed), *Freedom of Expression: Essays in Honour of Nicolas Bratza* (WLP 2012) 164.

## **2. Facts**

The case concerns an editorial, published by Mustafa Eker in his newspaper *Bizim Karadeniz*, circulated in Sinop, Turkey.<sup>9</sup> In his contribution, Mr Eker criticised the local journalists' association. He alleged that particular actions of the association contravened the organisation's main objective, and that it was no longer fit for its intended purpose. The association demanded the publication of a reply in the newspaper, but Mr Eker denied this request.

Subsequently, the president of the association applied to the local Magistrate's Court, seeking an order for the reply to be published. Both the domestic court of first instance and the appellate court ordered Mr Eker to print the reply. These proceedings were held without a public hearing involving the parties. Ultimately, Mr. Eker had no option but to publish the reply in his newspaper.

Following these events, Mr Eker applied to the ECtHR on 9 June 2005. He claimed that the lack of a hearing had resulted in a violation of his rights to a fair trial (Article 6), the right to respect for private and family life (Article 8), and the right to an effective remedy (Article 13). The court was also asked to consider whether the compulsion to print the reply in his newspaper had amounted to a violation of his right to freedom of expression under Article 10.

## **3. The judgment of the European Court of Human Rights**

In its judgment, the ECtHR adopted two lines of reasoning. First, it examined whether the lack of a hearing had resulted in a violation of Convention rights. Being the 'master of the legal characterisation' of the facts of the case,<sup>10</sup> the court decided to conduct this

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<sup>9</sup> *Eker* (n 1) para 5–13.

<sup>10</sup> *ibid*, para 18.

investigation solely from the point of view of the right to a fair trial, applying Article 6(1). Subsequently, the judges analysed whether the obligation to publish the reply had violated Mr Eker's freedom of expression under Article 10.

### ***3.1 Did the lack of a public hearing result in an unfair trial?***

As neither of the domestic courts had held an oral hearing, the ECtHR investigated whether this resulted in an unfair trial. The judges, consistent with previous case law,<sup>11</sup> reiterated that despite the importance of the public character of the proceedings, the obligation to hold a public hearing is not absolute.<sup>12</sup> Instead, this should be examined on a case-by-case basis.<sup>13</sup>

Consequently, in cases that raise no question of credibility or do not give rise to a sufficient controversy over the facts, the ECtHR stressed that courts may decide such disputes in a fair and reasonable manner solely by the submissions made by the parties.<sup>14</sup> Recalling that news is a perishable commodity and even a short delay in its publication might well deprive it of all its value and interest,<sup>15</sup> the court applied this rule to the facts of the present case. Ultimately, the judges found that the legal issues had not been especially complex. Hence, they did not require oral presentation of evidence.<sup>16</sup>

Therefore, the ECtHR did not consider the domestic court's conclusions or procedures to be arbitrary or patently unreasonable. Rather, the judges emphasised that the

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<sup>11</sup> See, for example, *Jussila v Finland* App no 73053/01 (ECtHR, 23 November 2006) para 41.

<sup>12</sup> *Eker* (n 1) para 24.

<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

<sup>15</sup> *ibid.*, para 30.

<sup>16</sup> *ibid.*, para 31.

promptness in the present case<sup>17</sup> was a necessary and justifiable element of these proceedings to enable untruthful information published in the media to be contested.<sup>18</sup> According to the ECtHR, this swiftness also ensures a plurality of opinions in the exchange of ideas on matters of general interest.<sup>19</sup>

Concluding, the judges stressed that the applicant had still been able to present his arguments against publication of the reply to the domestic court in writing.<sup>20</sup> Hence, the ECtHR unanimously held that the lack of a public hearing did not violate Article 6(1).

### ***3.2 Does the right of reply endanger freedom of expression?***

As the Turkish courts had limited the editor's right to determine the content of his newspaper, the ECtHR examined whether the compulsion to print a reply had interfered with Mr Eker's rights under Article 10 of the Convention, which guarantees freedom of expression. The judges found that the domestic court order had restricted the editorial power of the publisher to decide whether to include contributions from individuals in his newspaper.<sup>21</sup> Therefore, this interfered with the applicant's freedom of expression.

However, under Article 10(2), the exercise of this right may be subject to lawful restrictions. Consequently, the court, consistent with previous case law,<sup>22</sup> examined

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<sup>17</sup> Right of reply proceedings under Turkish law require national courts to rule within three days. This is shorter than average compared to other countries.

<sup>18</sup> *Eker* (n 1) para 30.

<sup>19</sup> *ibid.*

<sup>20</sup> *ibid.*

<sup>21</sup> *ibid.*, para 45.

<sup>22</sup> For the general principles on freedom of expression, the court referred to *Morice v France* App no 29369/10 (ECtHR, 23 April 2015) para 124–125.

whether the obligation to print the reply had been prescribed by law, had pursued a legitimate aim, was necessary in a democratic society, and was proportionate to the aim.

Reiterating that the interference with the publisher's freedom of expression had been prescribed by Turkish law,<sup>23</sup> the court focused on the aim of the reply in the present case. The ECtHR held that the remedy is 'intended to afford all persons the possibility of protecting themselves against certain statements or opinions disseminated by the mass media that are likely to be injurious to their private life, honour and dignity'.<sup>24</sup>

Thus, by giving the affected association the ability to defend themselves against allegations in the press, the restriction of Mr Eker's rights was found to have the legitimate aim of protecting the 'reputation or rights of others' as set out in Article 10(2).<sup>25</sup> Significantly, the court also stressed that the publication of the reply enabled the affected journalist association to exercise their own right to freedom of expression.<sup>26</sup> Consequently, the ECtHR emphasised that the right of reply is a necessary guarantee of the pluralism of information, which must be respected in a democratic society.<sup>27</sup> It thus considered the remedy addressed not only the social need to allow false information to be challenged, but also to ensure a plurality of opinions.<sup>28</sup>

However, reinforcing previous case law,<sup>29</sup> the judges highlighted that a limitation of the applicant's freedom of expression must also be proportionate to the aim pursued. As there had been no obligation for the publisher to amend the original article, and

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<sup>23</sup> Article 32 of the Turkish Constitution and Article 14 of the Turkish Press Act No. 5187.

<sup>24</sup> *Eker* (n 1) para 47.

<sup>25</sup> *ibid*, para 47, 50.

<sup>26</sup> *ibid*, para 45, 46.

<sup>27</sup> *ibid*, para 48.

<sup>28</sup> *ibid*, para 43.

<sup>29</sup> *Karácsony and Others v Hungary* App nos. 42461/13 and 44357/13 (ECtHR, 17 May 2016) para 132.

he still had the opportunity to re-publish his version of the facts, the court found that the requirement to publish the reply was proportionate.<sup>30</sup> Hence, the ECtHR, unanimously concluded that the order to print a reply did not amount to a violation of the applicant's freedom of expression.

#### **4. Commentary and analysis**

This section considers the significance of the judgement for our understanding of the normative foundation, content and scope of the right of reply, as well as the procedural implications of the ruling for domestic courts when making a right of reply order. To date, this is only the third time that a newspaper has claimed that an obligation to publish a reply under domestic law violates the ECHR.

##### ***4.1 The normative foundation for a right of reply under the ECHR prior to Eker***

In the first of these cases *Ediciones Tiempo SA v Spain*,<sup>31</sup> dating back to 1989, a newspaper claimed an unlawful violation of their convention rights caused by the compulsion to print a reply. The European Commission of Human Rights ('the Commission')<sup>32</sup> saw the main aim of the right of reply as protecting 'private life, honour or dignity' against 'certain statements or opinions, disseminated by the mass media.'<sup>33</sup> Significantly, these rights are guaranteed under Article 8.<sup>34</sup> Despite briefly mentioning the remedy's importance in serving the public's right to information and the pluralism of infor-

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<sup>30</sup> *Eker* (n 1) para 51.

<sup>31</sup> App no 13010/87 (ECtHR, 12 July 1989).

<sup>32</sup> Prior to becoming obsolete with the restructuring of the ECtHR in 1998, applications under the ECHR were preliminarily examined by the European Commission of Human Rights.

<sup>33</sup> *Ediciones Tiempo* (n 31) p 253.

<sup>34</sup> Ronan Ó Fathaigh, 'The Recognition of a Right of Reply under the European Convention' (2012) 4(2) *Journal of Media Law* 325.

mation,<sup>35</sup> the Commission did not determine whether a right of reply is a part of the freedom of expression of an individual.<sup>36</sup>

Remarkably, in the subsequent case of *Melnychuk v Ukraine*,<sup>37</sup> where an individual applied to the ECtHR after a newspaper had rejected his demand to publish his reply and the domestic courts had not compelled them to do so, the court deviated from these previous conclusions. Instead of deriving the right of reply from Article 8, the judges characterised it as an aspect of the freedom of speech of the complainant.<sup>38</sup> Not even mentioning *Ediciones Tiempo*, the court highlighted that the remedy ‘falls within the scope of Article 10 of the Convention’.<sup>39</sup> According to *Melnychuk*, the basis for this finding was the need to be able to contest untruthful information, and the need to ensure a plurality of opinions in literary and political debate.<sup>40</sup> These arguments had not been brought forward in *Ediciones Tiempo*.

Seven years later, a newspaper again claimed that an obligation to publish a reply under domestic law violated the ECHR. In *Kaperzyński v Poland*,<sup>41</sup> the ECtHR recalled *Melnychuk’s* conclusions that the right of reply ‘falls within the scope of Article 10’. Again, *Kaperzyński* failed to refer to *Ediciones Tiempo* and its findings regarding Article 8. Instead, the court emphasised that the remedy has the purpose of contesting untruthful information and ensuring the plurality of opinions.<sup>42</sup>

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<sup>35</sup> *Ediciones Tiempo* (n 31) p 254.

<sup>36</sup> Regarding *Ediciones Tiempo* see also: John Hayes, ‘The Right to Reply: A Conflict of Fundamental Rights’ (2004) 37 *Columbia Journal of Law and Social Problems* 574.

<sup>37</sup> App no 28743/03 (ECtHR, 5 July 2005).

<sup>38</sup> Andras Koltay (n 5) 76.

<sup>39</sup> *Melnychuk* (n 37) para 2

<sup>40</sup> *ibid.*

<sup>41</sup> App no 43206/07 (ECtHR, 3 April 2012).

<sup>42</sup> *ibid.*, para 66.

In the third case, *Marunic v Croatia*,<sup>43</sup> the ECtHR very briefly touched upon the normative basis of the right of reply being mainly concerned with the issue of whether the dismissal of the applicant over statements she had made in the media had been lawful. By simply reiterating that the remedy ‘falls within the scope of Article 10’, the court came to the same conclusions as *Kaperzyński* and *Melnychuk*.<sup>44</sup>

#### ***4.2. What is the right of reply’s normative foundation according to Eker and why is this significant?***

Since 1989, no ECtHR judgment has derived the right of reply from Article 8. This has caused uncertainty over whether this approach has been abandoned and whether rooting the remedy solely in Article 10 should be seen as settled case law.

*Eker* makes a significant contribution to our understanding of the right’s normative foundation. Instead of placing the remedy within either Article 8 or Article 10, *Eker* convincingly establishes that the protective purpose of the right of reply is (at least) twofold. By holding that the right has its normative foundation in both Article 8 *and* Article 10, it combines the two approaches from previous case law.<sup>45</sup> According to *Eker*, a right of reply is intended to enable any individual to protect him or herself from information or opinions, disseminated by means of mass communication, which infringe the claimant’s private life, honour and dignity,<sup>46</sup> as well as reputation.<sup>47</sup> Though not expressly noted in the ruling, the right to reputation has been recognised as a part of

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<sup>43</sup> App no 51706/11 (ECtHR, 28 March 2017).

<sup>44</sup> *ibid*, para 50.

<sup>45</sup> In *Eker*, the ECtHR refers to all judgments mentioned in Section 4.1 apart from *Marunic* (n 43).

<sup>46</sup> *Eker* (n 1) para 47.

<sup>47</sup> *ibid*, para 47, 50.

the right to private life under Article 8 since 2004.<sup>48</sup> Most importantly, this judgement is the first to reiterate the conclusions made in *Ediciones Tiempo*.<sup>49</sup>

However, drawing upon the rulings of both *Melnychuk* and *Kaperzyński*,<sup>50</sup> the court went beyond reliance solely on Article 8. The judges added that the right of reply is needed, not only to allow false information to be challenged, but also to ensure a plurality of opinions, particularly in areas of general interest.<sup>51</sup> Thus, it is part of an individual's freedom of expression.<sup>52</sup> Consequently, the ECtHR emphasised that the publication of the journalists' association's reply in Mr Eker's newspaper concerned the exercise of their own freedom of expression under Article 10.<sup>53</sup>

Hence, *Eker* reinterprets the normative foundation of the remedy. This 'two-pillar theory' suggests that a right of reply requires more than merely the retraction of incorrect facts and offers an opportunity to vindicate reputational rights. Further, it acknowledges that the remedy enhances public discourse in general, whilst ensuring plural, reliable media coverage. Thus, after almost 20 years of uncertainty of whether the right of reply also derives from Article 8 or if rooting the remedy solely in Article 10 should be seen as settled case law, the court introduced a new interpretation, which clarifies that both options are viable.

These findings are likely to have repercussions for future applications concerning the right of reply. Ultimately, one may conclude from the judgment that individuals can claim protection under Article 8 through a right of reply in relation to allegations,

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<sup>48</sup> *Radio France v France* App no 53984/00 (ECtHR, 30 March 2004) para 31.

<sup>49</sup> *Eker* (n 1) para 47.

<sup>50</sup> The court did not refer to *Marunic* (n 43).

<sup>51</sup> *Eker* (n 1) para 43.

<sup>52</sup> *ibid*, para 43, 45, 46.

<sup>53</sup> *ibid*, para 45, 46.

regardless of the truth or falsity of the statement complained about. This strengthens the position of the affected person against the editorial freedom of a publisher to determine what (or what not) to publish. Hence, it can be seen as a reinforcement of the argument that the remedy is crucial to guarantee an ‘equal fighting chance’ and a ‘right to be heard’ for a person who is in a weaker position than the media.<sup>54</sup>

Nevertheless, the court’s finding that the right of reply is, *inter alia*, justified by the protection of the affected person’s private life can be criticised. Replying to a statement in the press will not usually result in private matters remaining private – it might even cause the opposite effect. As the affected person will necessarily add his or her view to the already existing story published in the media, it becomes possible that even more people will take notice of the original allegation.<sup>55</sup> Achieving similar publicity as the statement that gave rise to the complaint is one of the key elements of the right of reply, in order to establish a level playing field between the individual and the publisher. Thus, the remedy allows a claimant the opportunity to ‘set the record straight’,<sup>56</sup> but is unlikely to keep information about the affected person out of the public eye.

### ***4.3 The judgement’s controversial findings regarding the content of the right of reply***

In *Eker*, the ECtHR had to decide whether the reply was an appropriate answer to the newspaper’s statements, despite including possibly disparaging remarks about the ap-

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<sup>54</sup> David Björgvinsson (n 8) 164.

<sup>55</sup> For an analysis of the ‘Streisand Effect’, see Rebecca Moosavian, ‘Jigsaws and curiosities: the unintended consequences of misuse of private information injunctions’ [2016] 21(4) Communications Law 104–115.

<sup>56</sup> Andrew Scott, ‘“Ceci n’est pas une pipe”: the autopoietic inanity of the single meaning rule’ in Andrew Kenyon (ed), *Comparative Defamation and Privacy Law* (CUP 2013) 53.

plicant.<sup>57</sup> The same issue, but with a different outcome, had been decided once before. In *Melnychuk*, the court found the application inadmissible because the reply went beyond stating the point of view of the affected person and contained criticism of the publisher.<sup>58</sup> In contrast, the court in *Eker* did not object to the fact that the reply contained criticism of the complainant and insinuations as to his professional integrity.<sup>59</sup> This was the case even though the journalists' association did not have to prove the veracity of claims in the reply.

*Eker* is thus the first ECtHR judgement to hold a reply containing criticism against the publisher admissible. Hence, the ruling opens the door for future replies to do the same. The court argued that the tone of the reply in the present case was 'substantially similar to the original contribution'.<sup>60</sup> Therefore, it seemed reasonable to allow the reply.

Again, this finding reinforces the argument that the right of reply is crucial to guarantee an 'equal fighting chance' and a 'right to be heard' for a person who is in a weaker position than the media. Further, the ECtHR justified its decision by stressing that the right of reply did not obligate the newspaper to amend the original article, or prohibit them from republishing their version of the facts.<sup>61</sup> This approach clearly seeks to establish a level playing field between the rights and interests of the publisher and the affected person. Balancing out both positions is a recurring theme of the right of reply.

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<sup>57</sup> *Eker* (n 1) para 48, 49.

<sup>58</sup> *Melnychuk* (n 37) para 2. In this case, the reply in question called the publisher of the news paper a 'subhuman' and a 'member' (член) [i.e. a slang term for a part of the male anatomy]. Further, it gave a confusing account of the publisher's political and business activities.

<sup>59</sup> *Eker* (n 1) para 48.

<sup>60</sup> *ibid*, para 50; see also (although not cited by *Eker*) *Saliyev v Russia* App no 35016/03 (ECtHR, 21 October 2010) para 52.

<sup>61</sup> *Eker* (n 1) para 51.

However, the judges failed to set out clear criteria on where to draw a line, as they did not specify what exactly renders a criticism admissible. Considering that the criticism was held admissible because it was ‘substantially similar to the original contribution’, this raises the question as to whether, and, if so, to what extent a reply can criticise the publisher. However, this article argues that allowing criticism in a reply goes too far as it results in follow-up questions that make balancing the individual’s and publisher’s rights even more complicated. For example, can a reply include an inaccurate statement of facts as long as the original statement did so too? Would the ECtHR have held the reply admissible if the remarks had gone beyond Mr Eker’s professional integrity and concerned his personal life?

By failing to address these questions, the court missed the opportunity to establish clear guidelines for the affected person, the publisher, and the domestic courts. Most importantly, the decision did not take into account the publisher’s discretionary ‘editorial power’ to decide whether to publish articles, comments or letters from individuals.<sup>62</sup> Therefore, the ruling might support the argument of those who claim that a right of reply has the potential to have a ‘chilling effect’ on a newspaper’s editorial freedom,<sup>63</sup> which could result in them publishing fewer controversial news or stories.<sup>64</sup> In the United Kingdom, this potential ‘chilling effect’ and the danger that it could lead

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<sup>62</sup> *Eker* (n 1) para 45.

<sup>63</sup> See Stephen Gardbaum (n 5) 1068, who points out that due to the lack of empirical research the existence of the chilling effect is difficult to prove.

<sup>64</sup> Regarding the view that the right of reply has a ‘chilling effect’ see *N.Y. Times Co. v Sullivan*, 376 U.S. 254, 279 (1964); *Miami Herald Publishing Co v Tornillo* 418 U.S. 241 (1974). For a contradictory view, see Charles Danziger (n 5) 176–180.

to a ‘paralysation’ of the press has historically formed one of the main arguments against the implementation of a statutory reply.<sup>65</sup>

#### ***4.4 Court proceedings involving the right of reply under the ECHR***

Another significant finding in *Eker* was the unanimous decision that the lack of a hearing in the domestic courts did not cause an unfair trial.<sup>66</sup> Significantly, this is the first time the ECtHR has reached this conclusion regarding the right of reply. Despite being raised in *Melnychuk*,<sup>67</sup> the court did not comment on whether it agreed with the claim that the domestic proceedings regarding the right of reply interfered with the applicant’s right to a fair trial.

As mentioned above, the court in *Eker* stressed that right of reply proceedings in general do not require an oral hearing. Thus, by highlighting that swift proceedings are crucial for the effectiveness of the right of reply, the court underlined the immediate and prompt nature of this remedy. In their decision, the judges convincingly acknowledged that right of reply procedures, in general, are not concerned with the veracity of allegations. This was supported by the argument that right of reply procedures usually take place independently of any subsequent defamation proceedings in which the veracity of any claims may be carried out in strict compliance with the adversarial principle.<sup>68</sup> This is inevitable, as examining the truth or falsity of the statement complained about would require an evaluation of the evidence provided by the parties and more time. Instead,

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<sup>65</sup> See for example: HC Deb 10 March 1993 Standing Committee F, vol 8 cc 72.

<sup>66</sup> Regarding the right of reply.

<sup>67</sup> *Melnychuk* (n 37) para 1: As the applicant failed to substantiate his claim, the complaint under Article 6 was held manifestly ill-founded. See also *Vitrenko and others v Ukraine* App no. 23510/02 (ECtHR, 16 December 2008), where the court found the claim that the domestic courts were impartial as inadmissible.

<sup>68</sup> *Eker* (n 1) para 28.

right of reply proceedings usually aim, at this stage, to strike a balance between the rights of the affected person and the publisher.<sup>69</sup> Although not expressly mentioned by the court, these arguments pick up on the ruling in *Ediciones Tiempo*, where the Commission held that the veracity of the reply could not be checked in any great detail.<sup>70</sup>

This might have wider implications for the right of reply on the internet.<sup>71</sup> In today's fast-moving media landscape, lengthy proceedings lead to the danger that the challenged statement will be long forgotten by the time a related trial is completed (also known as the 'fade factor'). Therefore, only the immediate realisation of an 'equal fighting chance' can effectively fulfil this right's normative purpose. Ultimately, this again strengthens the position of the affected person who wants a reply. Additionally, it confirms that the procedural bar for interfering with the discretionary 'editorial' power of a publisher is rather low in the context of a right of reply.

#### ***4.5 Extending the scope?***

Reiterating *Ediciones Tiempo*,<sup>72</sup> the court emphasised that a right of reply is not only intended to enable any individual to protect himself against factual statements, but also against opinions disseminated by means of mass communication.<sup>73</sup> The ECtHR justified the extension to opinions by referring to the need to protect the individual's rights guaranteed under Article 8.<sup>74</sup>

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<sup>69</sup> Right of reply proceedings are, like in *Eker*, often only of summary nature. For example, see s 926 German Code of Civil Procedure (*ZPO*).

<sup>70</sup> *Ediciones Tiempo* (n 31) p 254.

<sup>71</sup> See Section 4.6.3 below.

<sup>72</sup> *Ediciones Tiempo* (n 31), p 247.

<sup>73</sup> *Eker* (n 1) para 47.

<sup>74</sup> *ibid.*

Ultimately, this aspect of the ruling is remarkable for several reasons and it provides another example why the court's decision to also derive the right of reply from Article 8 is significant. First, these findings contradict the recommendation made by the Council of Europe Committee of Ministers in 2004, which recommended to leave 'the dissemination of opinions and ideas [...] outside the scope' of a right of reply.<sup>75</sup> Second, whereas in some ECHR jurisdictions a right of reply against an opinion has been around for a while,<sup>76</sup> other member states have expressly limited the scope of this remedy to factual statements.<sup>77</sup> On the one hand, extending the right of reply to value judgements could possibly lead to 'flooding' the press with replies. This could result not only in a limitation on the freedom of the press, but also in the right of reply becoming 'a dull and overused' remedy.<sup>78</sup> Additionally, it could create a cost burden for the publisher and possibly a loss of profits.<sup>79</sup> On the other hand, a wider scope could enhance the shaping of public opinion rather than holding it back and guarantee an efficient and comprehensive protection of personal rights.<sup>80</sup> So far, there has been no application claiming a violation of the ECHR due to a too-narrow scope of a right of reply provision. However, it

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<sup>75</sup> Recommendation Rec(2004)16 of the Committee of Ministers to Member States on the Right of Reply in the New Media Environment (Adopted by the Committee of Ministers on 15 December 2004 at the 909th meeting of the Ministers' Deputies).

<sup>76</sup> See, for example, France, where the scope of right of reply in the press includes factual statements and opinions (1881 Press Act, art 13).

<sup>77</sup> See, for example, Germany, where the right of reply in the press deriving from the law of the Federal States (*Bundesländer*) is limited to 'assertions of facts', Press Law for the Free and Hanseatic City of Hamburg, s 11(1).

<sup>78</sup> For the debate of whether the German right of reply should be extended to opinions see: Walter Seitz, *Der Gegendarstellungsanspruch* (C.H. Beck 2016) 127–161.

<sup>79</sup> Kyu Ho Youm, 'The Right of Reply and Freedom of the Press: An International and Comparative Perspective' (2008) 76 *George Washington Law Review* 1048.

<sup>80</sup> Walter Seitz (n 78).

would be interesting to see how the ECtHR deals with an applicant who alleges a violation of his convention rights because the domestic right of reply excluded opinions and was limited to assertions of facts. Considering the findings in *Eker*, this claim is likely to be successful.

#### ***4.6 A positive obligation on the United Kingdom to provide a right of reply?***

##### *4.6.1 In the printed press?*

Whether there is a positive obligation on states to provide a right of reply for a person affected by statements in the press has been subject to academic debate.<sup>81</sup> Ultimately, there is support for the view that the ECtHR conceded that this obligation exists in *Melnychuk*.<sup>82</sup> In *Eker*, the court does not make any specific remarks on the subject. This is only logical, as the case was not concerned with the question of whether the refusal to publish a reply violated convention rights. Moreover, the case dealt with a reply that had already been published.

Nevertheless, this question has the potential to cause upset in the United Kingdom ('UK'). With the press primarily being subject to self-regulation, there is no statutory right of reply regarding the press in the UK.<sup>83</sup> Thus, it would be interesting to see how the ECtHR would decide an application claiming that the *status quo* violates convention rights.

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<sup>81</sup> Ronan Ó Fathaigh (n 34) 325.

<sup>82</sup> *Melnychuk* (n 37) para 2; see also, ECtHR, 'Positive obligations on member States under Article 10 to protect journalists and prevent impunity', p 5 (*Research Report*, December 2011) <<http://bit.ly/1hRsAOK>> accessed 20 March 2018.

<sup>83</sup> For a critical analysis of statutory underpinning, see Eric Barendt, 'Statutory Underpinning: A Threat to Press Freedom?' [2013] 5(2) *Journal of Media Law* 189–201.

To date, two self-regulatory bodies, the ‘Independent Press Standards Organisation (IPSO), and the Independent Monitor of the Press (IMPRESS), have been established. Whereas IMPRESS has been recognised as an ‘approved regulator’ by the ‘Press Recognition Panel’, under powers granted by Royal Charter,<sup>84</sup> IPSO has not sought approval and is unlikely to do so in the future. This objection is based on its members ‘theological objection to the Royal Charter’,<sup>85</sup> and its aim of not having any formal link with the state or the government.<sup>86</sup>

Most importantly for the purpose of this article, IMPRESS has made a deliberate decision against requiring publishers to give individuals a ‘so-called right of reply’.<sup>87</sup> In contrast, IPSO enforces the Editors’ Code of Practice,<sup>88</sup> which includes an ‘opportunity to reply’ in Clause 1(iii) ‘when reasonably called for’. This is a post-publication right of reply, which means that publishers are not under a duty to contact affected individuals prior to publication.<sup>89</sup> Ultimately, the ECtHR may have to determine whether fulfilling the positive obligation requires a new statutory remedy or whether the existing remedies are sufficient.<sup>90</sup>

#### 4.6.2 For television content?

So far, all applications under the ECHR have concerned the right of reply in the ‘tradi-

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<sup>84</sup> Royal Charter on Self-Regulation of the Press 2014, s 4.

<sup>85</sup> House of Lords Select Committee on Communications, *Press Regulation: where are we now?* (2014-15), p 92 <<http://bit.ly/2oaGofD>> accessed 20 March 2018.

<sup>86</sup> John Lloyd, ‘Regulate yourself’ (2015) 86(3) *The Political Quarterly* 393.

<sup>87</sup> IMPRESS, ‘Guidance on the IMPRESS Standards Code’ (2017), p 11 <<http://bit.ly/2sFnpyh>> accessed 20 March 2018.

<sup>88</sup> Niall Duffy, ‘IPSO one year on’ (2016) 7(2) *Journal of Media Law* 119.

<sup>89</sup> Editors’ Code of Practice Committee, *The Editors’ Codebook–The Handbook to the Editors’ Code of Practice* (2018), p 15, 26 <<http://bit.ly/2Gq6z8C>> accessed 20 March 2018.

<sup>90</sup> Some elements of the right of reply also exist in other remedies.

tional print media'. Thus, it is uncertain whether the ECtHR would extend the positive obligation upon member states to provide this remedy to other sectors such as broadcast television.<sup>91</sup>

However, from the perspective of the UK, such a duty is already provided by European Union ('EU') legislation. Article 28 of EU Directive 2010/13/EU, the Audio-visual Media Services (AVMS) Directive,<sup>92</sup> requires member states to give 'any natural or legal person, regardless of nationality, whose legitimate interests, in particular reputation and good name, have been damaged by an assertion of incorrect facts in a *television programme*' a right of reply or an 'equivalent' remedy. Here, too, the obligation falls short of requiring an individual right of response.

In the UK, the 'Office for Communications' (Ofcom), the regulatory body for broadcast television and radio,<sup>93</sup> has statutory powers under the Communications Act 2003.<sup>94</sup> The act imposes on Ofcom the duty to draw up a code for broadcast television and radio, the 'Ofcom Broadcasting Code',<sup>95</sup> which covers standards in programmes, sponsorship, product placement in television programmes, fairness and privacy.<sup>96</sup> In this context, it is crucial to note that, as of 3 April 2017, Ofcom also became the BBC's first independent external regulator.<sup>97</sup> As a result, BBC programmes are also regulated by the rules in Ofcom's Broadcasting Code.<sup>98</sup>

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<sup>91</sup> David Björgvinsson (n 8) 175.

<sup>92</sup> Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 [2010] OJ 2 95/1, Art 28.

<sup>93</sup> Office of Communications Act 2002, s 1.

<sup>94</sup> Communications Act 2003, s 1.

<sup>95</sup> The current version is the Ofcom Broadcasting Code April 2017, see Ofcom, 'Ofcom Broadcasting Code April 2017' (April 2017) <<http://bit.ly/2zx0Yys>> accessed 20 March 2018.

<sup>96</sup> Broadcasting Act 1996, s 107, in connection with Communications Act 2003 ss 319–328.

<sup>97</sup> Royal Charter for the continuance of the British Broadcasting Corporation 2017, s 44.; see

Section 7.11 of the Code requires that ‘If a programme alleges wrongdoing or incompetence or makes other significant allegations, those concerned should normally be given an appropriate and timely opportunity to respond.’<sup>99</sup> In practice, this provision results in a duty for television broadcasters to contact an individual or organisation that might be affected by any significant allegation prior to the broadcast in order to allow them to respond properly in the programme.<sup>100</sup> In case this opportunity is not provided, Ofcom has the statutory power to sanction the broadcaster.<sup>101</sup> Further, the regulator may direct the broadcaster to broadcast a summary of its findings, a correction or both in such form as Ofcom may determine.<sup>102</sup> The Code thus complies with the general requirement in the AVMS Directive to provide a right of reply ‘or equivalent remedy’ but, as with the press codes in the UK, falls short of affording individuals a general right to have a response published in their own terms. It remains to be determined whether provision of this type would fulfil the positive obligation to provide a right of reply under Articles 8 and 10 of the ECHR.

#### *4.6.3 For online content?*

Nor is it clear whether the ECtHR would extend the positive obligation upon member

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also Ofcom, 'Holding the BBC to account for delivering for audiences' (October 2017)

<<http://bit.ly/2ExWha8>> accessed 20 March 2018.

<sup>98</sup> Ofcom, 'Introduction to Ofcom's Operating Framework for the BBC' (2017), s 3.5

<<http://bit.ly/2ELjGUP>> accessed 20 March 2018.

<sup>99</sup> The Ofcom Broadcasting Code, s 7.11.

<sup>100</sup> Ofcom, 'Guidance Notes Section 7' (December 2009), p 2 <<http://bit.ly/2EBDhr6>> accessed 20 March 2018.

<sup>101</sup> Communications Act 2003, s 236.

<sup>102</sup> Communications Act 2003, s 236(2), (3). For an example of how the ‘opportunity to respond’ works in practice, see Eric Barendt, Jason Bosland, Rachael Craufurd-Smith and Lesley Hitchens, *Media Law: Text, Cases and Materials* (Pearson 2013) 160.

states to provide a right of reply (or equivalent remedy) to online content. Such proposals have been countered with the concern that if the remedy is too broad it could ‘shoehorn’ the internet into a bureaucratic model of statement and counterstatement more appropriate to a ‘set of litigation pleadings than to a vibrant discussion medium.’<sup>103</sup>

The still ongoing process of revising the AVMS Directive illustrates how reluctant law makers are to extend a right of reply to online content.<sup>104</sup> Although the current Directive extends to both traditional linear ‘television broadcasts’ and non-linear ‘on-demand audiovisual media services’,<sup>105</sup> different rules apply to linear and non-linear audiovisual media content, including Article 28. As mentioned above, this provision requires a right of reply or an equivalent remedy for statements made in a broadcast television programme, but does not apply to on-demand content.<sup>106</sup>

On 25 May 2016, the European Commission published a proposal for an amended directive,<sup>107</sup> and, in a working paper accompanying the proposal, the Commission evaluated the stakeholder responses it had received, including in relation to the scope of the right of reply.<sup>108</sup> The majority of respondents across stakeholder categories consid-

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<sup>103</sup> Graham Smith, *Internet Law and Regulation* (Sweet and Maxwell 2007) 345.

<sup>104</sup> For an analysis of certain disagreements between the EU and the Council of Europe over their respective roles in developing media law and policy, see Daithi Mac Sithigh, ‘Death of a Convention: Competition between the Council of Europe and European Union in the Regulation of Broadcasting’ [2013] 5(1) *Journal of Media Law* 133–155.

<sup>105</sup> Article 1.1 Directive 2010/13/EU.

<sup>106</sup> Article 28 Directive 2010/13/EU.

<sup>107</sup> European Commission, ‘Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU’ (*Eur-Lex*, 25 May 2016) <<http://bit.ly/2fEjR3H>> accessed 20 March 2018.

<sup>108</sup> European Commission Staff Working Document (May 2015) <<http://bit.ly/2F4soLw>> accessed 20 March 2018.

ered the existing rules to be still ‘relevant, effective and fair’.<sup>109</sup> Eight member states, including the UK,<sup>110</sup> and nine regulators were in favour of maintaining the *status quo*, whereas two member states and six regulators called for an extension to the scope of the right to on-demand audiovisual media services and online intermediaries.<sup>111</sup>

Consequently, the European Commission did not propose an extension to the scope of the remedy to non-linear on-demand content.<sup>112</sup> However, on 25 April 2017, the European Parliament’s Committee on Culture and Education (‘CULT’) voted to amend the proposal for an updated EU AVMS Directive.<sup>113</sup> As the CULT has also voted to open interinstitutional ‘Trilogue talks’ with a view to adopting the directive as soon as possible,<sup>114</sup> it cannot be foreseen whether the final version of the Directive will extend the scope of the right of reply. Nevertheless, given the stakeholders’ responses and the content of the Council of the European Union’s general approach on the revised version of the AVMS directive,<sup>115</sup> it seems more likely that the status quo will prevail.

So, should this distinction between linear and non-linear content be upheld? A comprehensive discussion of all arguments put forward goes beyond the scope of this article.<sup>116</sup> Primarily, the EU justifies the somewhat lighter regulation of on-demand

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<sup>109</sup> *ibid*, section 6.6.

<sup>110</sup> UK Government, ‘UK Government response to the European Commission Consultation on the Review of the AVMSD’, p 40 (*HM Government*, 2015) <<http://bit.ly/2C1bZJc>> accessed 20 March 2018.

<sup>111</sup> European Commission Staff Working Document (n 108) section 6.6.

<sup>112</sup> AVMSD Proposal (n 107).

<sup>113</sup> European Parliament, ‘Briefing – EU Legislation in Progress – The Audiovisual Media Services Directive’ (June 2017), p 1 <<http://bit.ly/2oDWYSI>> accessed 20 March 2018.

<sup>114</sup> *ibid*.

<sup>115</sup> Briefing – EU Legislation in Progress (n 113) 15.

<sup>116</sup> For an overview of the rationales to this discussion, see Rachael Craufurd Smith, ‘Media Convergence and the Regulation of Audiovisual Content: Is the European Community’s Audio-

content by reference to the user's degree of control. The law-maker claims that users of linear services are more likely to be confronted, unexpectedly, with potentially disturbing material than viewers of on-demand services,<sup>117</sup> the latter requiring an additional two or three clicks of a remote control or computer mouse to access.<sup>118</sup> However, this position has been questioned in the light of the ongoing convergence between both types of content,<sup>119</sup> as well as the increasing popularity of on-demand services.<sup>120</sup> Nor is it clear how this distinction relates to the right of reply.

It is suggested that a right of reply or equivalent remedy should at least be available in relation to on-demand services offered by television broadcasters that primarily recycle previously broadcast content online.<sup>121</sup> In the case where a 'traditional broadcaster' offers viewers the opportunity to watch the same programmes on demand, there do not appear to be strong arguments for regulating the two services differently, in particular, because of the mode of delivery.<sup>122</sup>

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visual Media Services Directive Fit for Purpose?' [2007] 68(1) *Current Legal Problems* 238–277; Daithi Mac Sithigh, 'Co Regulation, Video-on-demand and the legal status of audio visual media' [2011] 2(1) *International Journal of Digital Television* 49–66.

<sup>117</sup> European Parliament, 'Briefing – The AVMSD: state of play' (2015) <<http://bit.ly/2o2fq9I>> accessed 20 March 2018.

<sup>118</sup> Rachael Craufurd Smith (n 116) 252.

<sup>119</sup> For an analysis of how 'Smart-TVs' impact this distinction, see Alexander Scheuer, 'Convergent Devices, Platforms and Services for Audiovisual Media Challenges Set by Connected Television for the EU Legislative Framework', in Susanne Nikoltchev (ed), *Converged Media: Same Content, Different Laws?* (Iris Plus 2013) 7–22.

<sup>120</sup> Francisco Javier Cabrera Blázquez et.al., 'On-demand services and the material scope of the AVMSD' (*Iris*, January 2016) <<http://bit.ly/2sGuYVw>> accessed 20 March 2018.

<sup>121</sup> See for example 'All 4', available at <<http://bit.ly/2d5DwMu>> accessed 20 March 2018.

<sup>122</sup> Stephen Ridgway, 'The Audiovisual Media Services Directive - what does it mean, is it necessary and what are the challenges to its implementation?' [2008] 1(1) *Computer and Telecommunications Law Review* 110.

In fact, this approach can already be seen to be partially applied in practice. In the UK, the scope of Ofcom's 'opportunity to respond' extends to the 'BBC UK On Demand Programme Services funded by the licence fee ('BBC ODPS')'.<sup>123</sup> However, there is at present no right of reply or equivalent for on-demand content provided by an on-demand service provider other than the BBC.<sup>124</sup>

On a different note, extending the positive obligation to 'press-like' online content seems a logical conclusion as the internet is not a legal vacuum and is able to reach more people than traditional newspapers.<sup>125</sup> One option, in line with the more limited proposals relating to television programme content above, would be to limit the scope of the right to 'press-like' websites focusing completely, or partially on reproducing texts or visual content of existing print media.<sup>126</sup> This is not unheard of as, for example, IPSO also regulates websites and apps, including text, pictures, video, audio/visual, and interactive content produced by its members with a print footprint. But IPSO in fact goes even further and regulates editorial content on electronic services operated by members where there is no print presence. Including such content within the scope of the remedy would conform to the recommendation made by the Council of Europe Committee of Ministers in 2004.<sup>127</sup> In this recommendation, the Council called for a right of reply extending to 'any means of communication for the periodic dissemination

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<sup>123</sup> The Ofcom Broadcasting Code, p 3.

<sup>124</sup> Ofcom, 'Complain about a video-on-demand-service' (April 2017) <<http://bit.ly/2EyK6yC>> accessed 20 March 2018.

<sup>125</sup> See Reuters Institute for the Study of Journalism, 'Reuters Institute Digital News Report 2017' (*Reuters Institute*, June 2017) <<http://bit.ly/2sYqyrW>> accessed 20 March 2018.

<sup>126</sup> For a discussion of whether 'press-like' content should fall within the scope of AVMS, see Irini Katsirea, 'Electronic press: 'Press-like' or 'television-like'?' [2015] 23(2) *International Journal of Law and IT* 134–156.

<sup>127</sup> Council of Europe Committee of Ministers (n 75).

to the public of edited information, whether on-line or off-line, such as newspapers, periodicals, radio, television and web-based news services.’<sup>128</sup> The emphasis on the editorial aspect and focus on news could be one way of keeping the right within manageable bounds.

Ultimately, the judges in *Eker* have stressed the importance of this remedy for protecting personality rights and enhancing public discourse on several occasions. Therefore, it seems likely that the court would apply its jurisprudence to other media content too, potentially going beyond repurposed content to online only content falling within the scope of the 2004 recommendation.

## **5. Who should be able to exercise a right of reply?**

The findings in *Eker* raise the question of whether a right of reply should also be available to those who are not referred to in a statement but nevertheless wish to contribute to the debate. Given that the judges found the remedy’s normative foundation to rest both in Article 8 and Article 10 ECHR,<sup>129</sup> different answers may be given to this question. From an Article 8 point of view, it seems logical to only allow individuals to file a reply if they are affected and referred to by a statement.<sup>130</sup> This is (partly) underpinned by the judgment. Indeed, when discussing Article 8, the court solely referred to the person that the ‘information or opinions disseminated by the means of mass communication’ are directed at.<sup>131</sup>

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<sup>128</sup> For a brief display of the rationales to this discussion, see Graham Smith (n 103) 345–347.

<sup>129</sup> See Section 4.2.

<sup>130</sup> For the admissibility of individual applications, see Article 34 ECHR. See also ECtHR, 'Practical Guide on Admissibility Criteria', p 14 (*Admissibility Guide*, 1 January 2014) <<http://bit.ly/1VSuSfY>> accessed 20 March 2018.

<sup>131</sup> *Eker* (n 1) para 47.

However, as analysed in section 4.2, the ECtHR highlighted that the right of reply is also founded on free speech in general and media pluralism in particular in order to ‘allow the challenge of false information’ and ‘ensure a plurality of opinions’.<sup>132</sup> Therefore, one could argue that based on a public interest to guarantee a reliable media coverage and enhance public discourse, civil society organisations, knowledgeable individuals or others who could increase the public debate on a specific topic should also be able to exercise the right to reply even if a statement did not refer to them. The problem is that the judges in *Eker* failed to clarify which aim is more important: achieving media pluralism or protecting individual personal rights.

Ultimately, it is suggested that a right of reply should not be unduly broadened to those who are not referred to. First, allowing a third-party to call for a reply would strengthen the potential ‘chilling effect’ on the freedom of the media. As acknowledged by the court,<sup>133</sup> a right of reply interferes with editorial independence since it dictates to the editor what to publish in his or her newspaper. In addition, it might even lead to a publisher to promote a point of view he or she does not agree with.<sup>134</sup> Thus, limiting the exercise of the right to those who are referred to ensures that this restriction on the freedom of the media is kept within proportionate bounds.

Second, enabling anyone interested in a subject to make use of a right of reply might undermine the rights of those who are referred to in the statement in question. The interest of the affected person in making a reply might differ from those of third parties such as a public pressure group. This may negate the remedy’s aim of protecting the individual’s rights under Article 8.

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<sup>132</sup> *Eker* (n 1) para 43.

<sup>133</sup> *ibid*, para 47.

<sup>134</sup> Eric Barendt, *Freedom of Speech* (OUP 2005) 95.

These arguments are underpinned by the fact that the ECtHR, so far, has not recognised a positive obligation for states to provide the right of reply for anyone but the person referred to by a statement made in the press.<sup>135</sup> Therefore, achieving media pluralism should be seen as a subordinate goal of the right of reply in comparison to protecting the individual's rights. Ultimately, limiting the exercise of a right of reply to those who are referred to is the practice in most member states.<sup>136</sup>

In the UK, for example, IPSO will not consider a third-party request for an opportunity to reply and will strike out the request if the article is not directed at the complainant.<sup>137</sup> With regard to broadcast programmes, Ofcom is 'normally' under a duty not to entertain a complaint unless it is made by the 'person affected' or by a person authorised by him or her to make the complaint on their behalf.<sup>138</sup>

## **6. Concluding remarks**

The ECtHR in *Eker* has given clear guidance on the procedural expectations it has for domestic courts, expressly exempting right of reply proceedings from the need to hold a public hearing. Perhaps even more importantly, it has now confirmed that the normative foundation of the right of reply lies both in Article 8 and Article 10 ECHR. As argued above, this outcome strengthens the position of the person seeking a reply against the media. In particular, the court has opened the door to including criticism of the publisher in the reply, which has to be published in the same forum as the statement that gave

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<sup>135</sup> See n 82.

<sup>136</sup> For a broad overview, see Kyu Ho Youm (n 79) 1027–1051.

<sup>137</sup> Decision of the Complaints Committee, 13416-16 *Versi v Express.co.uk (IPSO Rulings, 20 March 2017)* <<http://bit.ly/2Cw1vgu>> accessed 20 March 2018.

<sup>138</sup> Broadcasting Act 1996, ss 111(1), 130.

rise to the application.<sup>139</sup> This is so, even though the veracity of the content of the reply or the statements that gave rise to it do not have to be proven.

However, *Eker* failed to give clear guidance on where exactly it draws the line between admissible and inadmissible criticism. This results in a state of uncertainty for individuals, publishers and domestic courts. In particular, a right of reply without clear boundaries runs the risk of having a ‘chilling effect’ on the (editorial) freedom of the press. This may cause the press to refrain from publishing any controversial statements or, indeed, opinions, which the Court appears to accept could also trigger the right. As one of the right of reply’s main aims is to guarantee pluralism of information,<sup>140</sup> this would contradict the purpose of the remedy.

In consequence, a ‘level playing field’ between the publisher and the affected person must take into account not only the individual’s rights but also the newspaper’s interests. As argued in section 5, the right should only be available to those referred to in the statement in question in order to make it predictable and limit its potential ‘chilling effect’. On the other hand, limiting the right to a retraction by the publisher of incorrect facts would go too far, as adding the affected individual’s viewpoint is one of the key characteristics of this remedy. Further, any changes to the *status quo* that would result in an investigation into the truth or falsity of the statement complained about or the reply itself must be resisted. Such amendments could result not only in lengthy proceedings but also endanger the remedy’s prompt and timely nature, one of its most valuable characteristics.

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<sup>139</sup> If all other requirements are fulfilled.

<sup>140</sup> *Eker* (n 1) para 48.

## **Disclosure Statement**

No potential conflict of interest.