Overview of the recent ECHR case-law related to data protection

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Structure of the presentation.

1. General overview of Article 8 guarantees in relation to personal data protection.

2. Analysis of the most crucial developments in the Court’s case law in the sphere of personal data protection in recent years.
Part 1

General overview of Article 8 guarantees in relation to personal data protection.
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**Article 8 of the European Convention on Human Rights**

“1. Everyone has the right to respect for his private ... life ...
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society ... for the prevention of disorder or crime ...”
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Analysis of compliance of data processing operations with Article 8 of the Convention

1. Does the matter falls within the scope of Article 8 of the Convention?
2. Has there been an interference with the applicant’s right to respect for his private life (Friedl v. Austria, 31 January 1995, Series A no. 305-B, opinion of the Commission, p. 20)?

Further analysis depends on whether the case concerns positive or negative obligations of a State
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Analysis of compliance of data processing operations with Article 8 of the Convention

Negative obligation of the State: to protect the individual against arbitrary interference by the public authorities.

If the case concerns negative undertakings of the State the Court proceeds by answering the following three questions:

1. Was the interference “in accordance with the law”?
2. Did the interference pursue one or more legitimate aims referred to in para. 2 of Article 8?
3. Was it “necessary in democratic society”?
Analysis of compliance of data processing operations with Article 8 of the Convention

Positive obligations involve “the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”.

In this context regard must be had to the fair balance that has to be struck between the competing interests of the individual and of the community as a whole.
Does the matter falls within the scope of Article 8 of the Convention?

Basic state of play:

*Leander v. Sweden* (26 March 1987, § 48): The storing of *data relating to the “private life”* of an individual falls within the meaning of Article 8. The subsequent use of the stored information has no bearing on that finding.

What data relates to the “private life”?

*Amann v. Switzerland* [GC] (no. 27798/95, § 65): „respect for private life comprises 1) the right to live privately, away from unwanted attention, and 2) the rights to establish and develop relationships with other human beings“.
Does the matter falls within the scope of Article 8 of the Convention?

Recent developments: What if data relating to individual is already in public domain?

*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC]* (no. 931/13, §§ 133 - 138, 27 June 2017): Publishing by a journal of an information about individuals’ taxable incomes and assets. Such information is public under domestic law.

“Where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned *in a manner or degree beyond that normally foreseeable*, private life considerations arise.
Does the matter falls within the scope of Article 8 of the Convention?

Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland [GC] (no. 931/13, §§ 133 - 138, 27 June 2017): “The domestic law must afford appropriate safeguards to prevent any such use of personal data as may be inconsistent with the guarantees of Article 8.

Article 8 of the Convention thus provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged.”
Does the matter falls within the scope of Article 8 of the Convention?

Question: Should the information concern an identified individual?

According to the Court’s case law it is sufficient that the information is detailed enough to establish the applicant’s identity. (see P. and S. v. Poland, no. 57375/08, § 130, 30 October 2012).
Has there been an interference with the applicant’s right to respect for his private life?

- Transfer of **medical data** by the hospital to authority controlling the quality of health care services (*L.H. v. Latvia*); processing of documents revealing **medical data** by the court (*L.L. v. France*);
- Collecting **genetic** (DNA samples and profiles) and **biometric data** (fingerprints) by the police (*S. and Marper v. the United Kingdom*);
- Expressing opinion concerning the applicant’s **sexual life** (*Mockutė v. Lithuania*) by a treating doctor;
- Disseminating by journalists of information concerning the applicant’s **relations with his mistress and their child** (*Couderc and Hachette Filipacchi Associés v. France*);
- Holding of different types of **registers** (*Gardel v. France*; *Amann v. Switzerland* and *Leander v. Sweden*);
- **Communications** via internet instant messaging service created **in the workplace** (*Bărbolescu v. Romania* [GC], no. 61496/08, 5 September 2017) and video surveillance in the university amphitheatre (*Antović and Mirković v. Montenegro* , no. 70838/13, 28 November 2017).
Has there been an interference with the applicant’s right to respect for his private life?

- Collecting **banking data** by the Prosecutor’s Office (*M.N. and Others v. San Marino*);
- Disseminating **video footage recorded by the CCTV camera showing the applicant after attempted suicide** (*Peck v. the United Kingdom*);
- Publishing by a journal of an **information about individuals’ taxable incomes and assets** (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*);
- Publishing the **applicant’s images** by the newspaper (*Von Hannover v. Germany* (no. 2));
- Publication of **information concerning the applicant’s past service as the KGB driver** (*Sõro v. Estonia*);
- Collecting and storing of **voice samples** by the police (*P.G. and J.H. v. the United Kingdom*, no. 44787/98, ECHR 2001-IX).
1. Does the matter fall within the scope of Article 8 of the Convention?
2. Has there been an interference with the applicant’s right to respect for his private life?

Remaining questions (if the case concerns negative obligations):

1. Was the interference “in accordance with the law”?
2. Did the interference pursue one or more legitimate aims referred to in paragraph 2 of Article 8?
3. Was it “necessary in democratic society”? 
Was the interference “in accordance with the law”? The wording “in accordance with the law” requires the impugned measure both:

1. to have some basis in domestic law; and
2. to be compatible with the rule of law, that is to say to be:
   - accessible;
   - foreseeable; and
   - accompanied by necessary procedural safeguards affording adequate legal protection against arbitrary application of the relevant legal provisions.
Was the interference “in accordance with the law”?

The wording “in accordance with the law” requires the impugned measure:

1. to have some basis in domestic law (Mockutė v. Lithuania, no. 66490/09, §§ 101 - 106, 27 February 2018);

Note! The Court applies autonomous concept of the notion of a “law”, i.e. “law” in its substantive sense which includes written and unwritten, including lower ranking statutes and regulatory measures taken by professional regulatory bodies.
Was the interference “in accordance with the law”?

The wording “in accordance with the law” requires the impugned measure:
2. to be compatible with the rule of law, that is to say to be:

- **accessible** (*Shimovolos v. Russia*, no. 30194/09, 21 June 2011);
- **foreseeable** (*Rotaru v. Romania* [GC], no. 28341/95, §§ 55 - 58, ECHR 2000-V); and
- **accompanied by necessary procedural safeguards** affording adequate legal protection against arbitrary application of the relevant legal provisions (*Rotaru v. Romania* [GC], §§ 59 - 61).
Did the interference pursue one or more legitimate aims referred to in paragraph 2 of Article 8?

- national security;
- public safety;
- the economic well-being of the country;
- for the prevention of disorder or crime;
- for the protection of health or morals; or
- for the protection of the rights and freedoms of others.
Did the interference pursue one or more legitimate aims referred to in paragraph 2 of Article 8?

The aims listed in Article 8 of the Convention are broadly drawn. Therefore, the Court rarely finds that an interference did not comply with at least one of the aforementioned aims.

One of rare relevant examples is the case of P. and S. v. Poland (no. 57375/08, § 133, 30 October 2012): disclosure of the information about the applicant’s unwanted pregnancy and hospital's refusal to carry out an abortion did not pursue any legitimate aim (see also similar findings in the case of L.H. v. Latvia (no. 52019/07, §§ 50 - 55, 29 April 2014).
Was the interference “necessary in a democratic society”?

Under this head the Court uses different wordings:

• whether “the reasons adduced to justify the interference were relevant and sufficient”;
• whether the interference was “proportionate to the legitimate aim pursued”;
• any unavoidable interference should be limited as far as possible to that which is rendered strictly necessary;
• Whether there existed sufficient guarantees against arbitrariness;
• Whether there was the possibility of an effective control of the measure at issue;
• Were the alternative measures that are less restrictive taken into consideration?
Was the interference “necessary in a democratic society”?

The Court considers whether “the reasons adduced to justify the interference were relevant and sufficient” and whether it was “proportionate to the legitimate aim pursued”.

*S. and Marper v. the United Kingdom* [GC] (nos. 30562/04 and 30566/04, ECHR 2008):

Under UK legislation fingerprints and DNA samples taken from a person suspected of a criminal offence might be retained without limit of time, even if the subsequent criminal proceedings end in that person's acquittal or discharge.

As regards the existence of relevant and sufficient reasons the Court found that neither the statistics nor the examples provided by the Government established that the successful identification and prosecution of offenders could not have been achieved without the permanent and indiscriminate retention of the fingerprint and DNA records of all persons in the applicants’ position.
Was the interference “necessary in a democratic society”?

S. and Marper v. the United Kingdom [GC] (nos. 30562/04 and 30566/04, ECHR 2008):

The Court proceeded with examination of whether domestic authorities managed to strike a fair balance between the competing public and private interests:
- blanket and indiscriminate nature of the power of retention;
- retention was not time-limited;
- risk of stigmatisation;
- the retention of the unconvicted persons’ data may be especially harmful in the case of minors.

Conclusion: the retention at issue constitutes a disproportionate interference with the applicants’ right to respect for private life
Was the interference “necessary in a democratic society”?

*L.L. v. France* (no. 7508/02, § 45, ECHR 2006-XI): any *unavoidable interference* should be limited as far as possible to that which is rendered *strictly necessary* by the specific features of the proceedings and by the facts of the case”.

*L.L. v. France* (ibid., § 45): “it was only on an alternative and secondary basis that the domestic courts used the disputed medical document in justifying their decisions, and it thus appears that they could have declared it inadmissible and still reached the same conclusion”.

Was the interference “necessary in a democratic society”? 

Existence of appropriate and adequate safeguards against arbitrariness:

Whether there was the possibility of an effective control of the measure at issue (*M.N. and Others v. San Marino*, no. 28005/12, 7 July 2015).
Was the interference “necessary in a democratic society”?

Were the alternative measures that are less restrictive taken into consideration?

*Surikov v. Ukraine* (no. 42788/06, § 92, 26 January 2017): refusal by the applicant’s employer to promote him in 2000 on the basis of the certificate obtained from the military enlistment and confirming that he had been declared unfit for military service in 1981, due to mental health-related issues.

It was not clear why the employer did not refer the applicant for a medical examination with the view to determining his fitness for the position he sought to occupy instead of storing sensitive but irrelevant information about the applicant’s health.
Positive obligations

I. v. Finland (no. 20511/03, 17 July 2008): The applicant worked as a nurse in a public hospital. At the same hospital she underwent anti-HIV treatment. Early in 1992 she began to suspect that her colleagues were aware of her illness.

She lodged a complaint with the County Administrative Board with a view to establishing who had accessed her confidential patient records, but the hospital administration advised that it was not possible to obtain that information since at the time all hospital staff had free access to the patient register.

A claim for damages by the applicant in the civil courts was dismissed because of a lack of firm evidence that her patient records had been unlawfully consulted.
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Positive obligations

I. v. Finland (no. 20511/03, 17 July 2008): State’s obligation to ensure effective protection of the personal data. The State had to ensure effective control over access to the applicant’s medical file either:
- by restricting access to health professionals directly involved in the applicant’s treatment or
- by maintaining a log of all persons who had accessed the applicant’s medical file.

Additional general inference: measures should be taken to document personal data processing operations.
Positive obligations

*K.U. v. Finland* (no. 2872/02, ECHR 2008): Unidentified person/s placed detailed information about the applicant who was a minor on the dating internet site. As the result the applicant was made the target for approaches by paedophiles. The police failed to identify the person who used the applicant’s data since there was no explicit legal provision authorising the court to order the service provider to disclose telecommunications identification.

According to the Court in the above case the State failed to make available a remedy enabling the actual offender to be identified and brought to justice, although the acts of itself amounted to an offence.
Positive obligations

Opposite situation in the case of Söderman v. Sweden [GC] (no. 5786/08, ECHR 2013). The applicant’s stepfather covertly attempted to film the applicant naked in their bathroom for a sexual purpose. In spite of the applicant’s mother’s complaint he was not held liable since at that time there was no general prohibition against covert filming under the Swedish law.

The Court found that “The act in question violated the applicant’s integrity; it was aggravated by the fact that she was a minor, that the incident took place in her home, where she was supposed to feel safe, and that the offender was her stepfather, a person whom she was entitled and expected to trust”.

Nonetheless, the stepfather could not be held liable for the above actions. Therefore, the State failed to ensure effective protection of the applicant against the said violation of her personal integrity.
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Positive obligations

*K.H. and Others v. Slovakia* (no. 32881/04, ECHR 2009 (extracts)). The applicants were permitted to consult their medical records and to make handwritten extracts thereof but *prohibited from photocopying the medical documents*. The courts reasoned that such a restriction was justified with a view to preventing their abuse.

According to the Court it is for the file holder to determine the arrangements for copying personal data files. However, data subjects should not be obliged to specifically justify a request to be provided with a copy of their personal data files. It is rather for the authorities to show that there are compelling reasons for refusing this facility.

The Court did not discern how the applicants, who had in any event been given access to the entirety of their medical files, could abuse information concerning their own persons by making photocopies of the relevant documents.
To sum up the State should take if necessary measures capable of ensuring:

- Effective protection of personal data from unsanctioned disclosure ("I. v. Finland");
- Documenting data processing operations ("I. v. Finland");
- Identification of individuals responsible for data breaches ("K.U. v. Finland");
- Such individuals are held liable for data breaches (depending on the seriousness of interference under criminal, civil or disciplinary) ("Söderman v. Sweden");
- Effective and unrestricted access of an individual to his personal data ("K.H. and Others v. Slovakia").
Part 2.

Analysis of the most crucial developments in the Court’s case law in the sphere of personal data protection in recent years.
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*Bărbulescu v. Romania* (no. 61496/08, 12 January 2016).

Monitoring of an employee’s use of the Internet at his place of work and use of data collected to justify his dismissal.
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Bărbulescu v. Romania (no. 61496/08, 12 January 2016).

The applicant was dismissed by his employer, a private company, for using the company’s internet network during working hours in breach of the internal regulations, which prohibited personal use of company computers. The employer had monitored his communications on a Yahoo Messenger account set up for the purpose of responding to customers’ enquiries. The records produced during the domestic proceedings showed that he had exchanged messages of a strictly private nature with other people.
According to the Court the domestic authorities should provide the following safeguards against the abuse (”Bărbulescu criteria”):

- whether the employee had been notified of the possibility that the employer might take measures to monitor correspondence and other communications, and of the implementation of such measures;

- the extent of the monitoring by the employer and the degree of intrusion into the employee’s privacy;
• whether the employer had provided reasons to justify monitoring the employee’s communications;

• whether it would have been possible to establish a monitoring system based on less intrusive methods and measures than directly accessing the content of the employee’s communications;

• the consequences of the monitoring for the employee subjected to it;
• whether the employee had been provided with adequate safeguards.

Last but not least

Employees whose communications had been monitored should have access to a remedy before a judicial body with jurisdiction to determine, at least in substance, how the criteria outlined above had been observed and whether the impugned measures had been lawful.
Bărbulescu v. Romania (no. 61496/08, 12 January 2016):

The domestic authorities had not afforded adequate protection of the applicant’s right to respect for his private life and correspondence.
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Article 10 of the European Convention on Human Rights

“1. Everyone has the right to freedom of expression. This right shall include freedom to ... receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms ... 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 ...”
**Von Hannover v. Germany (no. 2) ([GC], nos. 40660/08 and 60641/08)**

The applicant was Princess Caroline von Hannover, daughter of the late Prince Rainier III of Monaco.

Since the early 1990s Princess Caroline had sought, often through the courts, to prevent the publication of photographs of her private life in the press.
Von Hannover v. Germany (no. 2) (continuation):

In 2004 the applicant brought proceedings in the domestic courts for an injunction restraining further publication of a photograph which had been taken without her consent during skiing holidays and had already appeared in German magazine.

The photograph showed the applicants taking a walk during a skiing holiday in St Moritz and was accompanied by an article reporting on, among other issues, Prince Rainier’s poor health.
The courts refused an injunction in respect of the above photograph.

They found that the reigning prince’s poor health was a subject of general interest and that the press had been entitled to report on the manner in which his children reconciled their obligations of family solidarity with the legitimate needs of their private life, among which was the desire to go on holiday. They also noted that the photograph had a sufficiently close link with the event described in the article.
Axel Springer AG v. Germany ([GC], no. 39954/08, 7 February 2012):

The applicant company is the publisher of a national daily newspaper with a large-circulation.

In September 2004 it published a front-page article about the star of a popular television series who had been arrested at the Munich beer festival for possession of cocaine. The article was supplemented by a more detailed article on another page and was illustrated by three pictures of the actor in question.
Axel Springer AG v. Germany (continuation):

In July 2005, the newspaper published a second article, reporting that the actor had been convicted of unlawful possession of drugs following a full confession and had been fined.

Immediately after the articles appeared, the actor obtained an injunction restraining any further publication of the articles or photographs and the applicant company was ordered to pay penalty payments of EUR 6,000.
When it is called upon to adjudicate on a conflict between two rights which enjoy equal protection under the Convention, the Court must weigh up the competing interests.

The outcome of the application should not, in principle, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the offending article or under Article 10 of the Convention by the author of that article, because these two rights deserve, in principle, equal respect.
The Court identified a number of criteria in the context of balancing the competing rights under Articles 8 and 10 of the Convention:

- Contribution to a debate on a matter of general interest;
- How well known was the person concerned and what was the subject of the report? (see *Flinkkilä and Others v. Finland* (no. 25576/04, 6 April 2010);
- Prior conduct of the person concerned;
• Means by which the information was obtained and its veracity (MGN Limited v. the United Kingdom, no. 39401/04, 18 January 2011);

• Content, form and consequences of the impugned article (see Alkaya v. Turkey, no. 42811/06, 9 October 2012; Egeland and Hanseid v. Norway, no. 34438/04, 16 April 2009);

• The severity of the penalty.
Afterwards the above criteria were summarised and specified by the Court in the case of *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015.
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*Bédat v. Switzerland [GC]* (no. 56925/08, 29 March 2016)

Weighting up the rights secured under *Article 6* (the right to impartial tribunal / presumption of innocence / effectiveness of the investigation) and *Article 10* (the applicant’s right to inform the public / the public’s right to receive information) of the Convention.

Criteria for balancing the above interests:

• How the applicant came into possession of the information at issue?;
• Content of the impugned article (sensationalism / satisfaction of unhealthy curiosity / voyeurism. Bias / mocking tone);

• Contribution of the impugned article to a public interest debate;

• Influence of the impugned article on the criminal proceedings (opinion-forming and decision-making process / anticipating risks of collusion / presumption of innocence);
• Infringement of the accused’s private life;

• Proportionality of the penalty imposed (person’s conviction may in some cases be more important than the minor nature of the penalty imposed).
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*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC ] no. 931/13, 27 June 2017)

The first applicant company published a newspaper providing information on the taxable income and assets of Finnish taxpayers. The information was, by law, public. The second applicant company offered a service supplying taxation information by SMS text message. 

The Ombudsman requested the Data Protection Board to forbid the applicant companies to process personal data in the manner and to the extent they did and from passing such data to an SMS-service. The Data Protection Board refused since in its opinion the applicant companies were engaged in journalist activities. 

The case was brought before the courts.

In September 2009 the Supreme Administrative Court directed the Data Protection Board to forbid the processing of taxation data in the manner and to the extent carried out by the applicant companies in 2002. It concluded that the publication of the whole database collected for journalistic purposes and the transmission of the information to the SMS service could not be regarded as journalistic activity.
• disseminating *en masse* raw tax (in fact a background file) data in *unaltered* form without any *analytical input* cannot be regarded as the processing of data for *journalistic purposes*;

• 1,200,000 natural persons were the subject of the publication. Only a very few were individuals with a high net income, public figures or well-known personalities.

• The information was obtained by way of circumvention of domestic regulations;
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• Publishing the data in a newspaper, and further disseminating that data via an SMS service, rendered them accessible in a manner and to an extent that was not intended by the legislator: **public character of data does not exclude them from the scope of data protection legislation.**

• Sanction: companies were prohibited from publishing taxation data only to the extent and manner that was contrary to DP legislation.
Roman Zakharov v. Russia [GC], no. 47143/06, ECHR 2015

Compliance of the system of secret surveillance of communications with the requirements of Article 8 of the Convention. Relevant criteria:

1. Accessibility of domestic law;
2. Scope of application of secret surveillance measures: nature of the offences and definition of the categories of people liable to have their telephones tapped;
3. The duration of secret surveillance measures;
4. Procedures to be followed for storing, accessing, examining using, communication and destroying the intercepted data;
5. Authorisation of interceptions:
   • Authorisation procedure: what authority; scope of its review (reasonable suspicion, necessity of interference; possibility to apply less restrictive measures); content of interception authorisation (specific person or a place);
   • Authorities access to communications;
6. Supervision of the implementation of secret surveillance measures;
7. Notification of interception of communications and available remedies.
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Relevant case law:

- L.H. v. Latvia, no. 52019/07, 29 April 2014;
- S. and Marper v. the United Kingdom [GC], nos. 30562/04 and 30566/04, ECHR 2008;
- L.L. v. France, no. 7508/02, ECHR 2006-XI;
- Gardel v. France, no. 16428/05, ECHR 2009;
- Couderc and Hachette Filipacchi Associés v. France [GC], no. 40454/07, ECHR 2015;
- M.N. and Others v. San Marino, no. 28005/12, 7 July 2015;
- P. and S. v. Poland, no. 57375/08, 30 October 2012;
- Surikov v. Ukraine, no. 42788/06, 26 January 2017;
- M.K. v. France, no. 19522/09, 18 April 2013;
- Satakunnan Markkinapörss Oy and Satamedia Oy v. Finland [GC], no. 931/13, 27 June 2017;
- Peck v. the United Kingdom, no. 44647/98, ECHR 2003-I;
- Von Hannover v. Germany (no. 2) [GC], nos. 40660/08 and 60641/08, ECHR 2012;
- Mockutė v. Lithuania, no./no. 66490/09, 27 February 2018;
- Leander v. Sweden, 26 March 1987, Series A no. 116;
- Amann v. Switzerland [GC], no. 27798/95, § 65, ECHR 2000-II;
- Shimovolos v. Russia, no. 30194/09, 21 June 2011;
- Rotaru v. Romania [GC], no. 28341/95, ECHR 2000-V;
- I. v. Finland, no. 20511/03, 17 July 2008;
- K.U. v. Finland, no. 2872/02, ECHR 2008;
- Söderman v. Sweden [GC], no. 5786/08, ECHR 2013;
- P.G. and J.H. v. the United Kingdom, no. 44787/98, ECHR 2001-IX;
- K.H. and Others v. Slovakia, no. 32881/04, ECHR 2009 (extracts);
- Bărbulescu v. Romania [GC], no. 61496/08, 5 September 2017;
- Roman Zakharov v. Russia [GC], no. 47143/06, ECHR 2015.
Thank you for your attention!