The relationship between journalism and data protection: Analysis of the General Data Protection Regulation and recent case law of the European Court of Human Rights

LLM Paper
by Louise Vannecke
Student number: 01610052

Promoter: Prof. Eva Lievens
Co-reader: Ms. Ingrida Milkaité
ACKNOWLEDGMENTS

After having obtained my master degree of law, I received the opportunity to broaden my horizon in the practice of law. The University of Ghent has thought me that, next to obtaining knowledge in law does not end here: it is also about improving your skills that certainly can come to use in the later practice.

During this academic year, I have been involved with the European and international law, in which I was interested in immersing myself on one of the hottest topics of today: ICT law in relation to human rights. Professor Eva Lievens attracted my attention in writing an LL.M. paper on the relationship between journalism and data protection. Because there is so much to tell on these two fields of law, we decided to focus on the recent developments of the journalistic exemption granted when processing personal data.

Therefore I would like to thank Professor Eva Lievens for being my promotor and for guiding me in this project, and Mrs. Ingrida Milkaité for being the co-reader of this LL.M. paper.

Furthermore, special thanks go to the director of the LL.M. papers, professor Hans De Wulf, for the general supervision, together with professor Marc De Vos, LL.M. programmes director and Svitlana Berezhna, officer of the LL.M. programmes. Without these people, this would not have been a successful year.

I am grateful that my family has supported me during this adventure, even though that was not always easy. My parents gave me the chance to end my student career by allowing me to enrol in this LL.M. program, which certainly has helped me in developing to a promising lawyer. They have been by my side for my entire life and are a true inspiration for me not letting anything down and basically go for it in any way. Last but not least, thank you Arnaud, for being my rescuer during the last hour of this project – for the second time.

Louise Vannecke
Ghent, 12 May 2017
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**List of legislation, soft law and preparatory documents**

|   | Council of Europe |   | European Union |   | Belgium |   | The Netherlands |   | The United Kingdom |   | France |   | Finland |   |
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Ghent University, Faculty of Law – International Relations Office
Universiteistraat 4, B-9000 Gent, Belgium

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INTRODUCTION

1 Definition of the problem

1. Today, all over the world and, in particular, in the European Union¹ and Council of Europe², there exists the right to have your privacy respected. However it is not always an absolute guarantee that this right will be protected in any circumstance. The chance exists that this right may conflict with certain other rights that have the same position in the legal hierarchic pyramid: the right to collect and impart information as a part of the freedom of expression. It is exactly this tension³ between the right to privacy and the freedom of expression that will form the focus of this LL.M. paper. To draw an even clearer picture, the paper will pay attention to the conflict between the right to personal data protection of data subjects and the freedom of expression for journalists whose task exists in informing the public on matters of general interest.

2. To what extent is it allowed for journalists to disclose personal data? A more specific question relates to the extent citizen journalists, i.e. bloggers, are able to rely on the freedom of expression to disseminate personal data when engaging in journalism. Moreover, as the journalistic industry wants to respond to the needs of its consumers and the evolution towards electronic news-sharing, journalists expand the ability of processing big data, which refers to data journalism. As this has implications on the right to privacy of others, it is interesting to analyse how this conflict can be solved.

3. The institutions of the European Union and Council of Europe make efforts to give clear answers to such questions. It is nevertheless a difficult task to balance both rights. Therefore, special attention should be given to the interpretation of the legal provisions that foresee the balance between the right to have personal data protected and the rights of journalists to inform the public on matters in the general interest.

A very interesting judgment of the European Court of the Human Rights (hereinafter: ECtHR) – the Satamedia case – has shed some light on the balance between the right to privacy and freedom of expression relating to the processing of big data.


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Ghent University, Faculty of Law – International Relations Office
Universiteitstraat 4, B-9000 Gent, Belgium

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4. In this light, it is also interesting to analyse how national jurisdictions approach the processing of personal data for the purpose of journalism as a result of transposing the Data Protection Directive 95/46/EC through an analysis of the national legislation, case-law and self-regulation within media industries. Besides that, the relevant judgments of the ECtHR in this respect add additional value as well.

2 Research questions

5. The main question in this LL.M. Paper is how to interpret journalism in order to fall within the scope of the journalistic exception. In fact, the European Union has provided the Member States with the Data Protection Directive 95/46/EC which foresees a provision on the balancing between the personal data protection and the right of others to receive and impart information. This provision has been taken over in the Data Protection Regulation 2016/679/EU repealing the Directive.

The author of the LL.M. paper wants to ascertain which activities and content fall under the scope of the so-called journalistic exemption. Therefore, account will be taken to the quantity of the processed data, the medium used to disseminate personal information the identity of the journalist and its purpose to publish personal data. This will be examined at the level of the European Union and Member States.

Besides the study of the materials of the European Union and Member Stets, the ECtHR - the highest court of the Council of Europe – has provided an interesting judgment on the balancing between the right to privacy and freedom of expression regarding the processing of personal data by journalists. This judgment will form subject of a thorough analysis.
3 Methodology

6. This LL.M. paper consists of a legal analysis of the balancing exercise between data protection and the right to receive and impart information.

The purpose of this LL.M. paper is to ascertain to what extent the journalistic activity is protected when it brings the right to privacy of others at risk in the event where journalists collect, process and publish personal data. In particular, special attention will be given to the processing of big data – i.e. data journalism – and the legal approach on citizen journalists.

First, the relevant legislation, related documents and case-law – in particular the Satamedia case - at the level of the Council of Europe and the European Union will be analysed.

Second, because the current applicable Directive had to be transposed into national legislation of the Member States, it is interesting to look into detail at four national jurisdictions, which will be subject to a comparative analysis. This analysis will be divided into two sub-parts. The first part concerns the implementation of the Directive into national legislation and to what extent the provision on the journalistic exception has become subject of case-law in the State courts. The second part consists of a study of the mechanism of self-regulation within media industries where press councils have drafted codes of ethics for journalists and are allowed to take decisions and formulate advices on the ethics of journalism. How do these bodies contribute to the protection of personal data without ignoring the journalists’ freedom of expression?

The Member States that are interesting to compare are Belgium, the Netherlands, France and the United Kingdom. There are several reasons for choosing these countries.

First of all, the author has taken into account the fact that the analysed countries are member of both the European Union and the Council of Europe.

Second, after a preliminary research a selection was made of those countries that approach the Data Protection Directive differently when it comes to the journalistic exemption. Although Belgium, the Netherlands, France and the United Kingdom geographically situate close to each other, it is interesting examining them and analyse how they interpret the journalistic exception – either conservative of more progressive.

Lastly, it must be practically able to study all available documents in its original language. Dutch is the author’s native language with skills in reading French and English. Therefore it is possible to analyse Belgium, the Netherlands, France and the United Kingdom.
CHAPTER I. THE COUNCIL OF EUROPE – THE RIGHT TO DATA PROTECTION AS PART OF THE RIGHT TO PRIVACY VS. FREEDOM OF EXPRESSION

1 General

7. Throughout the community at the level of the Council of Europe, there exists an ongoing struggle between two of the most fundamental rights: the right to privacy and the freedom of expression. On the one hand there exists the protection of everyone’s private life, whatever content it may be. On the other hand, it belongs to the main task of journalists, when acting under their right to freedom of expression, to inform the community on matters of general interest, which serves the quality of the democratic society because they act as public watchdog.4 It is even the community’s right to be informed on such matters, which makes the journalist’s task of publishing information not only a right, but also a duty.5

8. What is to be understood by matters of general interest cannot be defined. It depends on a continuous case-by-case analysis, where other purposes such as personal considerations do not count. There must exist a pressing social need to keep the community informed on matters they could actually talk about. In the UK, the Joint Committee on Privacy and Injunctions concluded there should not be a statutory definition of the public interest, as “the decision of where the public interest lies in a particular case is a matter of judgment, and is best taken by the courts in privacy cases”.6

9. It belongs to the competence of the ECtHR to reconcile both rights by applying the three-step test7.

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5 ECtHR 23 April 2015, no. 29369/10, Morice v. France, §122; ECtHR 8 July 1986, no. 9815/82, Lingens v. Austria, §41; P. KELLER, European and international media law : liberal democracy, trade and the new media, OUP Oxford, 2011, 301.
6 Joint Committee on Privacy and Injunctions, Privacy and Injunctions, House of Lords Paper No 273, House of Commons Paper No 1443, Session 2010–12, 19.
7 Prescription by law, presence of a legitimate aim and proportionality.
The Council of Europe has provided two interesting legislative documents in order to make an appropriate balance between the right to data protection and the freedom of expression: the European Convention on Human Rights (hereinafter: ECHR) and the Convention 108.

2 The right to data protection as part of the right to privacy

10. Information and communication technologies have entered the personal sphere of citizens for a long time already. The collecting, storing and processing of personal data characterises most activities today and inevitably comes into conflict with other rights. A thorough protection of what is being recognised as personal data is imposing itself.

2.1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS – ARTICLE 8

11. Respect for private life is ensured in article 8 of the ECHR of 1950. However, the wordings of private life in this provision do not give much guidance on how to interpret it. Therefore, we have to rely on the case-law of the ECtHR.

Before further analysing, it is worth mentioning that article 8 ECHR includes a right to protection against the collection and use of personal data. The Right to data protection thus is part of the right to respect for private and family life, home and correspondence.

The ECtHR has been confronted with issues on personal data several times for which the circumstances are various.

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8 Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, CETS No. 108, 1981.
11 Infra nos. 19-23.
2.2 THE CONVENTION 108 – ARTICLE 1

12. Another useful instrument is the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (Convention 108), adopted in 1981. This Convention is the first legally binding international instrument adopted in the field of data protection. Its purpose is “to secure (…) for every individual (…) respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data.”

It sets out minimum standards aimed at protecting individuals against the processing of personal data. Besides protecting personal data, the Convention takes into account other fundamental rights as well, such as the freedom of expression.

3 Balancing data protection with the press freedom as part of the freedom of expression

13. It belongs to a journalist’s right and duty to inform the public on matters of general interest. Sometimes this includes disseminating personal data. In those cases, it depends on the specific circumstances which right prevails.

14. The freedom of expression today should not be underestimated. First, you have citizens who want to stay informed about matters that trigger their interest and, second, the personal scope of who can be considered journalist and consequently could invoke the freedom of the press as part of the freedom of expression is broadening. Natalie Fenton, professor at the University of London, states that “the Internet has given rise to the interactive and participative characteristics of the web that opens up the potential for everyone with the right tools to play the role of a journalist through the sharing of news and information.”

12 Article 1 Convention 108.
13
3.1 THE EUROPEAN CONVENTION ON HUMAN RIGHTS – ARTICLE 10

15. The freedom of expression is fixed in article 10.1 ECHR: “This right includes the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.”

The first paragraph explicitly grants the right to everyone to receive and impart information. The second paragraph of the same article foresees the possibility to restrict this right when three conditions are fulfilled: “must be prescribed by law, pursue a legitimate aim and be necessary in a democratic society for the protection (...) of the reputation or rights of others.” This concept covers the right to data protection.14

16. The media, on its own, enjoys the freedom to collect, process and impart information on topics of general interest. These acts are protected under article 10 ECHR, the so-called freedom of the press.15

Although it is not explicitly mentioned in this article, the ECtHR expressed the view that it forms an integral part of the freedom of expression of article 10 ECHR.16

"In this connection, the Court has to recall that freedom of expression, as secured in paragraph 1 of Article 10, constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to paragraph 2, it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of that pluralism, tolerance and broadmindedness without which there is no "democratic society"... These principles are of particular importance as far as the press is concerned."

3.2 CONVENTION 108 – ARTICLE 9

17. Despite the purpose of Convention 108, namely to guarantee a complete and effective protection of a data subject’s personal data, it is noteworthy that special attention has to be given to other fundamental rights and freedoms which might compete with the right to data protection. Article 9.2 of Convention 108 namely says:

14 P. BOILLAT and M. KJAERUM, Handbook on European data protection law, 23.
15 See for example ECtHR 11 July 2002, no. 28957/95, Goodwin v. the United Kingdom.
16 ECtHR 8 July 1986, no. 9815/82, Lingens v. Austria, §41-42.
17 ECtHR 26 April 1979, no. 6538/74, Sunday Times Newspaper v. the United Kingdom, §65.
“2. Derogations (...) shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:
   a. (…)
   b. protecting the data subject or the rights and freedoms of others.”

Although the freedom of expression is not explicitly mentioned, the explanatory report on the Convention includes the freedom of expression as one of the rights and freedoms of others that can derogate from the basic data protection principles.  

3.3 APPLICATION BY THE ECTHR

18. In practice, the ECtHR has been confronted with several issues regarding the conflict between this right to data protection and freedom of expression.

Its case law is still maintaining high standards of freedom of expression, such as the protection of journalists.  

19. For the purpose of this LL.M. paper, no detailed analysis will be made of all relevant case law. Only a thorough analysis of the Satamedia judgment is at place, because of the impact the judgment has had on the journalistic exception in national jurisdictions.

It suffices to briefly mention a number of important judgments regarding investigative journalism, public figures, sensitive information and so on. This case law namely will have impact on the national case law of State courts and tribunals, as will become clear in a later part.

20. In investigative journalism, where journalists disseminate personal information but that is in the general interest of the public, sanctions imposed on journalists is regarded by the ECtHR as the danger of a chilling effect.

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20 Infra nos. 40-65.
21. The ECtHR has also received the opportunity to judge on issues relating to the publication of personal information of public figures. This was, for example, the case in Axel Springer AG v. Germany\textsuperscript{22}, Von Hannover v. Germany (No. 2)\textsuperscript{23} and Mosley v. the United Kingdom\textsuperscript{24}. The ECtHR pays attention to the fact that the publication of information relating to a person who can be regarded as a public figure is an argument to give journalists more freedom in the dissemination of information to the public insofar the circumstances as described in the articles concerned information of general interest\textsuperscript{25} and the information was reliable. Also, it is important for the ECtHR to examine how the information was obtained.\textsuperscript{26}

22. The ECtHR acknowledges the existence of sensitive information and consequently treats the freedom of expression differently. A number of examples are the case of Egeland v. Norway, where the ECtHR held that there had not been a violation of article 10 ECHR for prohibiting the publishing of three photographs of a woman who was convicted and sentenced to 21 years of imprisonment and showed extreme emotions.\textsuperscript{27} In Biriuk v. Lithuania\textsuperscript{28}, where a newspaper published the test results of a woman confirming the presence of HIV, the ECtHR here as well gave priority to the right to data protection of the data subject. To compare these cases to the judgments regarding public figures, the fact that the disseminated information regards unknown persons, results in a different outcome. The ECtHR in the latter cases is more reluctant in giving priority to the journalists’ freedom of expression, because it triggers less the general interest of the public when the news regards unknown persons.
4 Conclusion

23. Both the ECHR and the Convention 108 acknowledge the right to data protection as part of the right to privacy and the press freedom of journalists. None of these fundamental rights enjoy a larger protection, for which a case-by-case assessment is necessary.

The ECtHR has been confronted with issues regarding the publication of information relating to a person for what a journalist is responsible. This information can be anything, as long as it is related to a person.

Depending on the circumstances – is the person at issue a public figure, is the information sensitive, does the publication amount to investigative journalism, and so on – the ECtHR makes effort to create clear criteria for weighing and balancing the right to privacy and freedom of expression.
CHAPTER II. THE EUROPEAN UNION – BALANCING DATA PROTECTION AND JOURNALISM

1 General

24. The protection of fundamental rights has not only made its introduction in the domain of the Council of Europe. The European Union as well wants to guarantee its citizens an effective protection of a series of rights and freedoms.29 Although the Treaty establishing the European Economic Community (1957) has long been silent on the protection of fundamental rights and only contained reference to the ECHR and the constitutional traditions of Member States30, the Treaty of Lisbon brought difference to that in 2009.

25. In 2000, the European Union had drafted a Charter of Fundamental Rights but that was non-binding at that time. The Lisbon Treaty has given more value to the Charter as it had become a binding instrument and further reference to the European Convention on Human Rights was no longer necessary. These fundamental rights consequently became part of the primary sources of EU law.31

26. One of the fundamental rights recognised by the European Union is the one on privacy. The European Union became aware of the importance of drafting a comprehensive framework on the collecting, processing and publishing of personal data at this level, and giving at the same time freedom to the Member States. That is why in 1995 the Directive on Data Protection32 (hereinafter: Directive) was introduced. This Directive will be the starting point for the analysis to what extent the European Union enables the balancing between the right to data protection and the right that journalists enjoy to receive and impart information to the public as part of their freedom of expression.

27. Interesting to mention is that the Directive will be replaced by the General Data Protection Regulation of 2016 and shall apply from 25 May 2018. This means that the Directive, which still gave some leeway to the Member States to regulate specific aspects, will clear space for a Regulation that in its entirety

30 Ibid.
32 Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data, L 281.

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will apply to all Member States. To what extent does this create consequences on the approach of data protection versus journalism, will be analysed below.\textsuperscript{33}

2 The Charter of Fundamental Rights of the European Union – right to private life and data protection vs. freedom of expression

28. The European Union in 2000 proclaimed the Charter of Fundamental Rights. Its content is in some way similar to the ECHR at the level of the Council of Europe, as it contains civil, political, economic and social rights for European citizens.\textsuperscript{34}

29. The Charter guarantees the respect of both the right to private life and family and the right to data protection through article 7 and 8, respectively. Maria Tzanou, lecturer at the University of Keele, explains that until recently the right to protection of personal data was considered an aspect of the right to privacy. Because privacy and data protection are not identical, the protection of personal data at the EU level is now conceived of as featuring an autonomous fundamental right, distinct from the right to respect for the private and family life.\textsuperscript{35}

Article 8 of the Charter is based on article 286 of the Treaty establishing the European Community – which is now article 16 of the Treaty on the Functioning of the European Union and article 39 of the Treaty on the European Union – and the Directive - that will be analysed below – as well as on article 8 ECHR.\textsuperscript{36}

30. At the same time, the Charter foresees a provision on the freedom of expression in article 11, which has the same meaning and scope as the right to freedom of expression as laid down in the ECHR.

The European Union and its Member States will have to make sure that equal protection is granted to both the right to data protection and freedom of expression. The one right does not deserve a better treatment than the other. It is a matter of weighing and balancing as soon as both rights come into conflict.

\textsuperscript{33} Infra no. 38.
\textsuperscript{35} M. TZANOU, “Can the balancing of fundamental rights affect fundamental freedoms? Some reflections on recent ECJ case-law on data protection”, https://www.pravo.unizg.hr/ download/repository/Maria_Tzanou.pdf , 3;
3 The journalistic exception in the Data Protection Directive 95/46/EC and General Data Protection Regulation 2016/679/EU

31. In 1995, the first legislative instrument on data protection of individuals at the level of the EU was adopted: the Data Protection Directive. The Directive aims to harmonise the rules on personal data protection, by ensuring at the same time the free movement of such data.\(^{37}\)

32. At the time of the drafting, the recently analysed EU Charter on Fundamental Rights did not exist yet. How could the European Union possibly set up a Directive where the protection of personal data is concerned? The drafters of the Directive could still rely on the ECHR at the level of the Council of Europe.

33. Although the primary objective of the Directive is to guarantee data subjects’ right to have their personal data protected against the processing activities for which others are responsible, the Directive does take into account other rights: the freedom of expression. Here as well, the right to data protection is not absolute and must be balanced against the freedom of expression.\(^{38}\)

34. The requirement of balancing the right to data protection and freedom of expression is written down in article 9 of the Directive. It is one of the provisions in the Directive that gives Member States the right, when transposing the Directive into national legislation, to derogate from the obligation to protect personal data, the so-called journalistic exception:

> “Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.”

Recital 37 of the Directive states that all Member States should reconcile the right to privacy with the freedom of expression when the processing of personal data is for purposes of, in particular, journalism, and in so far as this is necessary for the fundamental right to receive and impart information. Such provisions

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\(^{37}\) M. TZANOU, “Can the balancing of fundamental rights affect fundamental freedoms? Some reflections on recent ECJ case-law on data protection”, [https://www.pravo.unizg.hr/_download/repository/Maria_Tzanou.pdf](https://www.pravo.unizg.hr/_download/repository/Maria_Tzanou.pdf), 4; P. BOILLAT and M. KJAERUM, *Handbook on European data protection law*, 18.

\(^{38}\) Case C-468/10 and C-469/10 24 November 2011, Asociacion Nacional de establecimientos Financieros de Crédito (ASNEF) and Federacion de Comercio Electronico y Marketing Directo (FECEMD) v. Administracion del Estado, § 48; Case C-275/06 29 January 2008, Productores de Musica de Espana (Promusicae) v. Telefonica de Espana SAU, §68.
must be applied in accordance with law and must respect the proportionality principle in a democratic society.

35. This provision really contributes to the possibility for weighing and balancing conflicting rights. The Directive namely provides in itself multiple mechanisms ensuring a balancing of the different fundamental rights to be carried out. One reason can be found in the formulation of the provision. Terms like *for purposes of journalism* and *necessity* give rise to interpretation issues.

36. Although the Directive pursues a complete harmonisation, Member States enjoy a margin of appreciation that authorises them to maintain or introduce in particular rules for specific situations. The right to privacy and data protection, and the freedom of expression and freedom to seek, receive and impart information are fundamental rights that are strongly protected in the constitutional laws of many Member States. Often, the precise limits on freedom of expression or the right to privacy are very specific to a particular Member State. One need only mention holocaust denial, blasphemy, incitement to religious or racial hatred, support terrorist organisations or causes, pornography, publication of details of the private of sexual life of public figures and so on.

37. The Article 29 Working Party attempted to give guidelines to the selected issue of “Data Protection and the Media”. The Working Party did not say much more than noting that the data protection law in principle applies to the media and derogations and exemptions on the basis of article 9 are only allowed if it fulfils the condition of proportionality. The Court of Justice of the European Union (hereinafter: CJEU) in the Lindqvist case, together with the Recommendation 1/97 of the Work Group 29, stress the discretion that the Directive grants to national authorities in the Member States to find a balance between the right to privacy and freedom of expression. In this regard, the principle of proportionality always comes into play to assess the necessity for journalistic purposes.


44 Case C-101/01 6 November 2003, Lindqvist.
38. The European Commission recently has had the opportunity to do something about the general provision on the journalistic exception in article 9 of the Directive. From May 2018, the General Data Protection Regulation (hereinafter: GDPR) will apply.

The journalistic exception is also included in the GDPR. Article 85 reads as follows:

“Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from (...) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

3. (...)”

The first sentence of the provision already indicates that the European Parliament and Council again leave it to the Member States to interpret the provision. The Regulation confirms the Member States’ margin of appreciation, because it has due regard for the different approaches on journalism across the EU.

The author of this LL.M. paper had hoped that the Regulation would bring more clarity to the long existing uncertainty about the interpretation of the journalistic exception. Inconsistencies in application between Member States, however, will remain.

The only certainty the GDPR has given is written down in recital 153 of the GDPR, which in fact is not entirely new in comparison with the Directive:

“This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries.” and “(...) it is necessary to interpret notions relating to that freedom, such as journalism, broadly. ”

No manifest changes are recognized between the GDPR and Directive. Though, Wouter Hins, professor at the University of Leiden and researcher at the University of Amsterdam, remarks a slight difference in the light of the necessity to only publish for journalistic purposes. While the Directive refers to “(...) in so far

45 It opens the door for other other types of journalism. Could this mean that the so-called citizen journalists, i.e. bloggers, fall within the scope of the journalistic exception? It could be interpreted in this way, even more when you take into account what has been written about citizen journalists already. For example, the European Parliament stressed the importance of the journalistic exception in its Resolution of 6 July 2011 and wants to “ensure that these exemptions are maintained and that every effort is made to evaluate the need for developing these exceptions further in the light of any new provisions in order to protect freedom of the press. See Resolution of the European Parliament of 6 July 2011 (2011/2025(INI)).
as this is necessary to reconcile the fundamental rights of individuals with freedom of information and notably the right to receive and impart information.

This means another progressive step in favor of the freedom of expression, because this could lower the threshold for journalists to reconcile their actions with the right of privacy.

4 Conclusion

39. A lack of legal certainty remains; there is no consistent interpretation of the journalistic exception both in the Directive and Regulation on personal data protection. The European Union is aware of the fragmentation among Member States on the approach of privacy and journalism and consequently grants a large margin of appreciation. Overmore, it would allow the Member States’ jurisprudence to interpret the concept of journalistic exception in the light of the changing media environment.

Notwithstanding the lack of effective guidance on the interpretation of the journalistic exception, in 2008, the CJEU was confronted for the first time with a question on how to interpret the exception provision. This judgment will be analysed below.

CHAPTER III. CASE STUDY - SATAMEDIA

1 General

40. The abovementioned was a starting point for the analysis of an interesting case that enables to create more insight on the framework of data protection of data subjects when conflicting with the press freedom. The judgment in this regard is the Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland judgment of the ECtHR 47 (hereinafter: the Satamedia case of the ECtHR).

It is a very interesting case, because it concerns an issue on the processing of personal data on the Finnish territory for which the national court did not know how to interpret the journalistic exception and requested for a preliminary ruling by the CJEU for the interpretation of the Directive and where later the highest domestic judgment has been challenged before the ECtHR.

Thus, on the same facts there are two leading judgments: one by the CJEU on the interpretation of the journalistic exception as laid down in article 9 of the Data Protection Directive and one by the ECtHR on the question how to reconcile the freedom of expression with the right to privacy.

2 Facts

41. The issue started when Satakunnan, a media company publishing a magazine since 1994 which publishes yearly information about natural persons’ taxable income and assets. In 2002 the magazine appeared 17 times and each issue concentrated on a certain geographical area of the country. Data on 1.2 million persons’ taxable income and assets was published.48 According to Finnish domestic law, information of that kind is accessible for everyone.

For this, Satakunnan had been cooperating with Satamedia. Both companies are owned by the same persons. Satamedia provided an SMS service where citizens were able to have access to tax information when typing in a specific name.49

As a result, the question had arisen whether this practice is in compliance with the national data protection legislation.

47 ECtHR 21 July 2015, no. 931/13, Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland (hereinafter: ECtHR Satakunnan v. Finland).
48 ECtHR Satakunnan v. Finland, §6-7.
49 ECtHR Satakunnan v. Finland, §8.
3 Domestic proceedings and preliminary ruling before the CJEU

42. The Data Protection Ombudsman (DPO) requested Satakunnan and Satamedia to stop their activity because, according to the DPO, they had no right to establish such an activity, because it was an illegal processing of personal data. Satakunnan and Satamedia decided not to go into that request, which resulted in a request by the DPO to the Data Protection Board (DPB) to enforce its request. Again, this request was rejected. The DPO did not stop seeking for justice, so he appealed to the Helsinki Administrative Court and failed again. The reason for refusal by the Helsinki Administrative Court was because the activity fell within the scope of the journalistic exemption as provided in Section 2(5) of the Personal Data Act\textsuperscript{50}, which was the result of the transposition of the Directive 95/46/EC.

The DPO further appealed to the Supreme Administrative Court. At this level, there was no consent on the correct interpretation of the applicable provisions of the national legislation on protection of processing of personal data. The Finnish Supreme Court stayed the proceedings for a preliminary ruling before the European Court of Justice. More specific, it concerned the interpretation of the journalistic exception as laid down in the Finnish Personal Data Act.

43. In its judgment of 16 December 2008 the CJEU\textsuperscript{51} has concluded that journalism is all about the disclosure to the public of information, opinions or ideas\textsuperscript{52} irrespective of the medium used to transmit them.\textsuperscript{53} They are not limited to media undertakings but also to every person engaged in journalism\textsuperscript{54} and may be undertaken for profit-making purposes.\textsuperscript{55}

44. This is one of the first judgments that bring forward what was behind the provision on the journalistic exception in the Directive.

45. Although this judgment seemed to be very advantageous for Satamedia and Satakunnan, the Supreme Administrative Court decided that, after balancing the freedom of expression and the right to privacy, the publication of this large amount of information and the SMS-services were not of public interest (§17):

“The publication of the whole database collected for journalistic purposes could not be regarded as journalistic activity. The public interest did not require such publication of personal data to the extent seen in the present case, in particular as the derogation in the Personal Data Act was to be interpreted strictly.”

\textsuperscript{50} Finnish Personal Data Act 523/1999.
\textsuperscript{51} Case C-73/07, 16 December 2008, Satakunnan Markkinapörssi and Satamedia (hereinafter: Case C-73/07, Satakunnan).
\textsuperscript{52} Case C-73/07, Satakunnan, §61.
\textsuperscript{53} Case C-73/07, Satakunnan, §60.
\textsuperscript{54} Case C-73/07, Satakunnan, §58.
\textsuperscript{55} Case C-73/07, Satakunnan, §59.
Would this mean, if the dissemination of this kind of information would have been limited in amount, the journalistic exception would have been accepted by the Supreme Administrative Court and no problem with the right to privacy of others would have occurred? This will be the discussion below.\textsuperscript{56}

4 Reasoning by the ECtHR

46. Satamedia and Satakunnan (hereinafter: applicants) decided to appeal to the ECtHR against the Finnish Government on several grounds. Next to claim that there had been a breach of article 6 and 14 ECHR, the applicants had invoked article 10 ECHR, stating that their press freedom has been violated. First, the ECtHR recognized the existence of an interference with the applicants’ right to impart information pursuant to article 10. However, the interference was a restriction that was prescribed by law – the transposition of the Directive – and pursued a legitimate aim of protecting the reputation and rights of others. The ECtHR then had to examine whether the decision by the Supreme Administrative Court had passed the proportionality test.

47. Although the ECtHR recognises this taxation information was a matter of public interest and the applicants had acted in accordance with the applicable national legislation when obtaining the tax information of Finnish citizens, it concluded, after applying the case law of the CJEU and examining the reasoning of the Supreme Administrative Court, that the dissemination of tax information on such a large scale was not justified by a public interest. Publication of tax information on 1.2 million citizens went way beyond what could still be considered as solely for journalistic purposes.

48. Contrary to the conclusion of the European Court of Justice on the interpretation of the journalistic exception, the ECtHR here decided to interpret Section 2(5) of the Personal Data Act strictly, as concluding otherwise would restrict too much the right to privacy of the Finnish citizens whose tax information was made public.

49. Lastly, the ECtHR clarified that the prohibition imposed on the applicants was not general - meaning that it only accounted for the extent of the disseminated information – and was not a severe sanction. Therefore, the ECtHR voted six against one the national court struck a fair balance between article 8 and 10 ECHR and concluded there had been no violation of the freedom of expression of the applicants when prohibiting the publishing of tax information on 1.2 million Finnish citizens.

\textsuperscript{56} infra nos. 57-64.
5 Critical comments on the Satamedia judgment of the CJEU and ECtHR

50. It is interesting to have a judgment by the CJEU and the ECtHR based on the same facts and relating to the difficult relationship between the right to data protection and freedom of expression.

To what extent have both judgments contributed to the interpretation of the provision on the journalistic exception? Are there still issues remaining on this interpretation? Are both judgments revolutionary or rather restrictive for the freedom of expression?

Both judgments now will be the subject of a critical analysis.

5.1 SATAMEDIA BEFORE THE CJEU

5.1.1 Broad or narrow interpretation of journalistic exception?

51. The CJEU’s task was to reconcile the right to privacy and the freedom of expression for which derogations from the same Directive must only apply as strictly necessary. The Satamedia judgment of the CJEU has highly contributed to the interpretation of article 9 of the Directive. As Oliver has stated, the definition of journalism in this regard was “tantamount to declaring that all expression must be classified as such” by which it was meant to argue that the exception as described in article 9 of the Directive would be much broader – by applying it to everyone when making use of their freedom of expression – rather than applying the exception only to the processing for journalistic, artistic and literary purposes.

52. Such an optimistic conclusion indeed would be in place when reading the actual judgment. The Court argued “in order to take account of the importance of the right to expression in every democratic society, it is necessary (...) to interpret notions relating to that freedom, such as journalism, broadly.” and “relating to data from documents which are in the public domain under national legislation”, processing of personal data must be considered to be “solely for journalistic purposes (...) if the sole object of those activities is the disclosure to the public of information, opinions or ideas.”


58 P. OLIVER, “The protection of privacy in the economic sphere before the European Court of Justice”, CML Rev. 2009, 1443-1483; D. ERDOS, “From the scylla of restriction to the charydbis of license? Exploring the scope of the ‘special purposes’ freedom of expression shield in European data protection”, https://www.repository.cam.ac.uk/bitstream/handle/1810/247247/Erdos2015%20Common%20Market%20Law%20Review.pdf?sequence=1, 2 (hereinafter: D. ERDOS, “From the scylla of restriction to the charydbis of license?”).

59 Case C-73/07 Satakunnan §56.

60 Case C-73/07 Satakunnan §62.

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53. However, according to some authors, the assumption of considering the judgment to be groundbreaking and advantageous for the freedom of expression in its entirety is doubtful.

David Erdos, lecturer in law at the University of Cambridge, has written on this conflicting issue between data protection and journalism in the field of the European Union framework.

Although the CJEU seems to give broader interpretation to the journalistic exception than could ever have been expected, Erdos remarks the reasons why Member States, in particular the Finnish Highest Administrative Court in the Satamedia case, apply a strict interpretation.

54. A first reason relates to the wordings by the Court: “The sole object (…) (relates to) the disclosure to the public of information, opinion or ideas.” Oliver describes this phrase as ‘enigmatic’. On the one hand, Oliver argues this sentence could be interpreted as protecting the dissemination of information to an indefinite number of people, even if this is for an essentially privatised purpose. On the other hand, if the term to the public would refer to political bodies collectively, then only dissemination oriented to contributing to a collective, public debate would be protected. It is not sure how to interpret this sole object.

Even more remarkable is the fact that if the sole object should be interpreted literally and narrowly, this would mean that those responsible for processing personal data could not pursue another objective that would also be subject to the European data protection legislation. Such a requirement, as Erdos states, “would deny protection through the provision on journalistic exception to activities such as scholarly publication. Although this would be a form of literary expression, it may also fall within other purposes, wherefore it could not be regarded as ‘for the sole objective of journalism’ any longer.”

There clearly does not exist uniformity on the interpretation of this phrase. For instance, some authors have interpreted the meaning of this sentence broadly, while other case law of the CJEU on data protection and journalism seem to approach the journalistic exception in a more narrow sense. If the Satamedia judgment would have to be compared to other case law, the scope of the journalism in those other cases is less attractive for the freedom of expression.

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61 See the chapter on the comparative country-analysis.
63 D. ERDOS, “From the scylla of restriction to the charybdis of license?”, 11.
65 Ibid, 9.
66 D. ERDOS “From the scylla of restriction to the charybdis of license?”, 11.
Reference has to be made to the case of Lindqvist and Google Spain, with the question whether the activities of a natural person posting personal data on a personal website and search engine operators making available websites containing personal data in a result list could be understood as acting with ‘journalistic purposes’. In both cases, the CJEU held that no processing for journalistic purposes was present. It is confusing that the CJEU in the Satamedia case would give a much broader interpretation to journalism while it refused to do so in Google Spain and Lindqvist. This would in no way be regarded as consistent case law.

Is it possible that the doctrine, commenting the Satamedia judgment, gives a more progressive interpretation to journalism than it was the CJEU’s intention?

55. A second reason regards the limitation of the journalistic exception to data from documents which are in the public domain under national legislation. Would this mean that all dissemination of information relating to personal data in the Web 2.0 environment would not be regarded as journalist within the meaning of article 9 of the Directive?

56. Because of these remaining issues resulting from the Satamedia judgment, it seems reasonable that Member States interpret the scope of the journalistic exception narrowly. This is what the Finnish Highest Administrative Court in the Satamedia case has done. As the Advocate-General Kokott suggested in the opinion in the Satamedia case, it would be more appropriate if the CJEU had taken a more cautious approach that would allow Member States a broader discretion under its own implementation of the article 9 derogations.

5.2 SATAMEDIA BEFORE THE ECTHR

5.2.1 General

57. Many authors state that the judgment has created a strict application of the law on data protection and a narrow interpretation of the journalistic activity – in particular in Finland.

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69 Case C-101/01, Lindqvist.
70 Case C-131/12, 13 May 2014, Google Spain.
71 Case C-73/07, Satamedia, §66; D. ERDOS, “From the scylla of restriction to the charybdis of license?”, 24.
72 A Web 2.0 environment is a website-like social networking sites and social media sites, blogs, videosharing sites and so on - that allows users to communicate and collaborate with each other and create user-generated content throughout the internet. In contrast to the traditional journalists publishing in a newspaper (either on paper or on the internet), those being active on a Web 2.0 website do publish information relating to data subjects as well. Should these categories of persons also regarded as journalists and fall within the scope of article 9 of the Data Protection Directive?
73 Case C-73/07 Satamedia, Opinion of Advocate General Kokott, §53-54.
58. In this part, it should be reiterated that the ECtHR has held that special safeguards are guaranteed to the press for its key role in imparting ideas and information\textsuperscript{75} and its role as public watchdog.\textsuperscript{76} However, because of the margin of appreciation that is granted to the States in balancing the right to freedom of expression with other rights and freedoms, the case law of the ECtHR is not always consistent.\textsuperscript{77} This margin of appreciation goes hand in hand with the interests of democratic society.\textsuperscript{78} This differs from State to State and therefore the extent of press freedom is fragmented.

That is why the ECtHR establishes in its case law criteria in order to enable consistent balancing between conflicting rights when being confronted with such issues.

59. One of the most important criteria to ascertain whether a violation of a fundamental right has taken place, is the examination of the necessity, namely whether the interference with the fundamental right was necessary in order to achieve the pursued aim. Was there a pressing social need and proportionate aim?

5.2.2 Necessity test: Quantity of disseminated information

60. The information disseminated regarded tax information of 1,2 million Finnish citizens. According to the domestic courts, this activity could not be considered journalism, but rather the processing of personal data which Satamedia and Satakunnan had no right to. The Court left the Finnish courts a margin of appreciation and concluded there had not been a violation of the freedom of expression of Satamedia and Satakunnan. The journalistic exception, provided in the Finnish Personal Data Act, had to be interpreted strictly. That is why the Finnish court found that dissemination of tax information at such a large extent did not fall within the scope of the exception, on which the ECtHR agreed.\textsuperscript{79}

\textit{Mediaforum} 2016, afl. 1, 16-21 (hereinafter: W. HINS, “Noot onder EHRM 21 juli 2015”). The Bulgarian Access to Information Programme has submitted an amicus curiae brief to the Grand Chamber of the ECtHR, regarding the case, stating that the Court is represented with an important opportunity to examine: 1. The evolving nature of journalistic activities, 2. The importance of protecting the right to receive and impart information and the implications of EU legislation on the re-use of public sector information, and 3. The proper approach to be taken by the Court to the balancing of data privacy rights with article 10 rights in the context of international, regional and national legislation. See therefore Bulgarian Access to Information Programme and Hungarian Civil Liberties Union, Amicus curiae brief, https://www.article19.org/resources.php/resource/38335/en/ecthr-free-expression-and-data-protection-must-be-balanced .

\textsuperscript{75} ECtHR, Lingens v. Austria, §41.

\textsuperscript{76} For example, see ECtHR 26 November 1991, no. 13585/88, Observer and The Guardian v. the United Kingdom.


\textsuperscript{78} ECtHR 15 December 2009, no. 821/03, Financial Times et. al. v. the United Kingdom.

\textsuperscript{79} ECtHR Satakunnan, §70.
5.2.3 Critical findings to this reasoning

5.2.3.1 Contribution to public debate?

61. The Finnish courts had argued before the ECtHR that the determining factor for considering the application of the journalistic exception is whether the publication contributes to the public debate or only is limited to triggering the public’s curiosity. At first sight, it would only seem to be sensational and triggering the curiosity to consult the tax information of citizens. However, would the conclusion be different when taking account of the Finnish legislation obliging the disclosure of tax information at the place of the competent authorities? What is the purpose of granting the right to access to tax information in Finland? One of the reasons found, in particular relating to commercial businesses, is to promote free and fair competition. Relating to the Finnish citizens, it would be to promote openness and transparency among them. This would mean that the dissemination of tax information does contribute to the general interest of the public.

5.2.3.2 No secret information – already disclosed information

62. Not much attention is spent in the judgment on the fact that Satamedia and Satakunnan did not disseminate secret information. To the contrary, this information was not secret, due to the fact that the tax administration had already disclosed the information before the applicants did something with it. This is what has also been argued by other authors, for instance by Dirk Voorhoof, professor at the University of Ghent: “What is the pressing social need behind the prohibition of data from public record that are subject of public interest in Finland? There is no indication that the publication of these data caused harm or damage to individual persons or to society. The open policy on taxation in Finland is precisely a good example of transparency on matters of public interest.” Moreover, Professor Voorhoof correctly refers to earlier case law where the Court held that interfering with the publication of information which was already made public there does not exist a legitimate reason.

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80 ECtHR Satakunnan, §17.
82 Own reasoning by the author.
84 See for example R. BATRA and D. SMITH, “Right to privacy vs freedom of expression”, Lexology, http://www.lexology.com/library/detail.aspx?g=483211b7-6942-47ec3-854d-ea35f0dbf77. These lawyers argue the acts by Satamedia and Satakunnan were to make the dissemination of the tax information more client-friendly.
85 D. VOORHOOF, “ECtHR accepts strict application”.

According to Hins, in the Satamedia case account should be taken of the first and second processing, respectively referring to the disclosure of information by the tax administration and the publication of the information by the applicants. Although it would seem clear that the first processing is less restrictive for the right to privacy than the second processing – the dissemination of tax information through newspapers reaches more persons than just making the tax information accessible at a tax administration – the argumentation that the disclosure of tax information and thus later disclosure through publication is allowed under national legislation seems convincing to state that the applicants were allowed to publish the tax information, irrespective of the quantity.\(^{87}\)

### 5.2.3.3 No negative effect or harm identified and no reasons for the breach of the right to privacy

63. To what extent did the activities by the applicants breach the right to privacy of others? There is no justification for the existence of concrete damage, which is a condition to have a case before the ECtHR. In fact, no negative effect or harm had been identified throughout the Finnish society.\(^{88}\)

64. The ECtHR in this regard only concluded that dissemination of tax information as such is not prohibited, but serious issues have arisen regarding the amount of the information disseminated.\(^{89}\) Unluckily, nowhere in the judgment a justification is found why the quantity of the information breaches the right to privacy.

### 5.2.4 There is still hope: referral to the Grand Chamber

65. There is a chance that all of the criticism expressed across the doctrine could serve to the benefit for those supporting the freedom of expression, because the judgment of the Court is not final yet. A request for referral to the Grand Chamber was made by the applicants in the case, taking into account the serious impact the judgment may have on interpreting notions of journalistic activity and public interest in the context of guaranteeing the right to freedom of expression in the world of data journalism, digital media and journalistic (big) data processing.\(^{90}\) On 14 September 2016, the Grand Chamber has heard the parties in the case. For now, the Grand Chamber has not come to a conclusion.

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88. ECtHR Satamedia, Dissenting Opinion Judge Tsotsoria, §8.
89. ECtHR Satakunnan; §68.
90. D. VOORHOOF, “ECtHR accepts strict application”.

Ghent University, Faculty of Law – International Relations Office
Universiteitstraat 4, B-9000 Gent, Belgium

www.UGent.be
5.2.5 Consequences for citizen journalists

66. The popularity of websites for (news) content that is generated by citizens - i.e. content-users - is increasing, out of which results the expansion from professional journalism to citizen journalism, such as bloggers and social network users. Although the concept of citizen journalism is recognised at the level of the European Union\(^9\), no specific rights and obligations are reached to them. The only thing to be sure of is the lack of legal clarity.

5.2.6 Consequences for (big) data-driven journalism

67. With the foregoing analysis of Satamedia in mind, what consequences does the theory, drawn from the CJEU and ECtHR judgments have on the recently appeared phenomenon of the so-called data-driven journalism (DDJ)? As mass data are the new materials of the present media, the methods of news-gathering and publishing formats have been changing.

5.2.6.1 What is (big) data-driven journalism?

68. According to Martha Stone, former research associate at the Reuters Institute for the Study of Journalism at the University of Oxford, “big data is an umbrella term for a variety of strategies and tactics that involve massive data sets, and technologies that make sense out of these mindboggling reams of data. The big data trend has impact on all industries, including the media industry, as new technologies are being developed to automate and simplify the process of data analysis.”\(^9\)

69. Data-driven journalism, founded in 2010 is dedicated to accelerating the diffusion and improving the quality of data journalism around the world.\(^9\) The European Journalism Centre is one of the main actors promoting data journalism internationally. With this in mind, the European Journalism Centre has created www>DataDrivenJournalism.net, the first website dedicated to data journalism.\(^9\)

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\(^9\) M. STONE, Big data for media, Reuters Institute for the Study of Journalism at the University of Oxford, 2014, 1 (hereinafter: M. STONE, Big data for media).

\(^9\) http://datadrivenjournalism.net/about .

Data journalism breaks through the linear approach of traditional forms of publishing by making use of the typical possibilities of the Internet. At the same time, this will allow the so-called citizen journalists – i.e. amateur journalists, such as bloggers – to step in the field of journalism.

70. As the European Commission is aware of the importance of big data for increasing the reporting on European issues by making it easier for media companies and journalists to publish on these issues, it has called for proposals that aim to exploit the opportunity to support data-driven reporting.

5.2.6.2 Addressing the conflict between (big) data-driven journalism and data protection

71. Because the concept of data-driven journalism is relatively new – it dates from 2010 - it is interesting to analyse to what extent the conflict between data journalism and data protection is being solved.

72. The European Journalism Centre is aware of the struggle that exists for new technologies provided for journalism and the risks it has brought for data protection. One of the examples in this field is the disclosure by Edward Snowden of details of global surveillance programs.

73. Available today are the tools that encourage big data research for the later processing activity. Notwithstanding the presence of these instruments allowing the processing of big data for the sake of informing the public on matters that are not published by the traditional media, such as newspaper and broadcasting companies, no specific rules are provided to give guidance for the balancing exercise with the right to data protection.

74. This means a call for those specialised in the field of DDJ to build the foundations for the structured and systematic use of the tools and methods for news-gathering. No one is be better in doing so than the media institutions, networks, and journalistic associations themselves. They should take on a central role in the promotion of data driven research by supporting journalists to advance their skills in area like data mining, analysis and visualisation. One of the focuses shall be on addressing the impact of digital technologies on human rights, such as privacy and data protection. The only way to cope with this is through binding and enforceable ethical journalism guidelines and practices.

97 http://datadrivenjournalism.net/about .
CHAPTER IV. COMPARATIVE COUNTRY-ANALYSIS – HARMONISATION OF FRAGMENTATION?

1 General

75. The previous chapters were devoted to the convergence of freedom of expression and the right to data protection at the level of the Council of Europe and the European Union.
As, first, the European legislator decided to leave it to the margin of appreciation of the Member States to define the journalistic exception of article 9 of the Directive and, second, the case-law of the European Court of Justice until today has not given that much guidance on how to interpret this provision, it is interesting to analyse the national approach of the journalistic exception of a number of Member States.98

76. In what follows, attention will be given to the interpretation of the journalistic exception by defining who is to be considered journalist and what could be regarded as for journalistic purposes.
As analysed in the previous chapters, it is interesting to ascertain to what extent the Member States include citizen journalists, i.e. bloggers, and data-driven journalism within the scope of the journalistic exception.

77. The chapter will be divided into two parts. The national implementation of the journalistic exception from the Directive is twofold. First, you have the transposing of the Directive into national legislation and the application in national case law of the State courts. Second, in the Member States, specific bodies responsible for monitoring the activities of journalists were established, the so-called press councils.

2 National implementation – Two approaches

2.1 NATIONAL LEGISLATION AND CASE-LAW

2.1.1 Relevant legislative provisions

78. As already mentioned, every Member State99 has transposed the Data Protection Directive into national legislation. What does the national legislation say on the journalistic exemption when taking into account that the Directive gave the Member States a great margin of appreciation?

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98 The Member States subject to the comparative analysis are Belgium, the Netherlands, France and the United Kingdom. The reasons for choosing these Member States are to be found in the introduction of this LL.M. paper.
99 With this, reference is made to Belgium, France, the Netherlands and the United Kingdom.
2.1.1.1 Belgium

79. Although Belgium already had a law on data protection since 1992, the law had to be revised in order to comply with the Directive. With the law of 11 December 1998\(^{100}\), Belgium had included the provision on the journalistic exemption in article 3 §3, saying that specific provisions in the Belgian law on data protection are excluded from “processing of personal data for the sole purpose of journalism”\(^{101}\).

2.1.1.2 The Netherlands

80. The Netherlands was relatively late in transposing the Directive into national legislation. On 6 July 2000, the law on protection of personal data\(^{102}\) came to existence. This is the only Member State in this analysis that did not have any legislation on personal data protection before the Directive.

81. The wording of the journalistic exception in article 3 of the Dutch law on protection of personal data is as follows:

“I. This law does not apply to the processing of personal data for the sole purpose of journalism (…).”

2. The prohibition to process personal data within the meaning of article 16 does not apply as long as this is necessary for the purposes as mentioned in the first paragraph of this provision.”\(^{103}\)

82. Article 16 should be mentioned in order to understand article 3.2:

“The processing of personal data relating to one’s religion or belief, race, political preference, health, sexual life, and personal data regarding membership of a trade union is prohibited except as for what is provided in this paragraph. The same applies to criminal personal data and personal data relating to unlawful or annoying conduct in connection with a prohibition imposed on that behaviour.”\(^{104}\)

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\(^{100}\) Wet van 8 december 1992 tot bescherming van de persoonlijke levensfeer ten opzichte van de verwerking van persoonsgegevens, BS 18 maart 1993.

\(^{101}\) Unofficial translation by the author: “verwerkingen van persoonsgegevens voor uitsluitend journalistieke doeleinden”.

\(^{102}\) Wet van 6 juli 2000 houdende regels inzake de bescherming van de persoonsgegevens, Stb. 2000, 302.

\(^{103}\) Unofficial translation by the author: “1. Deze wet is niet van toepassing op de verwerking van persoonsgegevens voor uitsluitend journalistieke, artistieke of literaire doeleinden, behoudens de overige bepalingen van dit hoofdstuk, alsmede de artikelen 6 tot en met 11, 13 tot en met 15, 25 en 49.
2. Het verbod om persoonsgegevens als bedoeld in artikel 16 te verwerken is niet van toepassing voor zover dit noodzakelijk is voor de doeleinden als bedoeld in het eerste lid.”

\(^{104}\) Unofficial translation by the author: “De verwerking van persoonsgegevens betreffende iemands godsdienst of levensovertuiging, ras, politieke gezindheid, gezondheid, seksuele leven, alsmede persoonsgegevens betreffende het lidmaatschap van een vakvereniging is verboden behoudens het bepaalde in deze paragraaf. Hetzelfde geldt voor strafrechtelijke persoonsgegevens en persoonsgegevens over onrechtmatig of hinderlijk gedrag in verband met een opgelegd verbod naar aanleiding van dat gedrag.”
2.1.1.3 The United Kingdom

83. The United Kingdom has adopted the Data Protection Act in 1984. Because the Act in its initial form differed from the Directive, a thorough revision was necessary.

Section 32 of the revised Data Protection Act (1998) contains the exemption for journalistic purposes from the obligations on personal data protection:

“Personal data which are processed only for the special purposes are exempt from any provision to which this subsection relates if—
(a) the processing is undertaken with a view to the publication by any person of any journalistic, literary or artistic material,
(b) the data controller reasonably believes that, having regard in particular to the special importance of the public interest in freedom of expression, publication would be in the public interest, and
(c) the data controller reasonably believes that, in all the circumstances, compliance with that provision is incompatible with the special purposes.”

2.1.1.4 France

84. France was one of the first countries in Europe to adopt a data protection law, which was the Law on Informatics, Files and Freedoms, which came into force in 1978. Al. Already in this early stage, the French legislators were aware of the aim it had, namely to protect human rights in order to ensure that technical developments do not undermine human rights.

In 2004, France has amended this law of 1978, in order to comply with the Directive. The relevant provision of the law of 1978 is article 67, 2°, which states:

The obligations of the French law on data protection « do not apply to the processing of personal data for the sole purpose of the professional exercise of the journalistic activity, taking into account the deontological rules of that profession. »

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107 Ibid.
108 Unofficial translation by the author: “(…) ne s'appliquent pas aux traitements de données à caractère personnel mis en oeuvre aux seules fins ;”
85. The underlying meaning of the journalistic exception in all Member States will be analysed below.

2.1.2 Who is journalist?

86. Because the Directive does not define journalism and leave a large margin of appreciation to the Member States, it is up to the latter to give an interpretation of who is journalist. Because of the difficulties attached to this interpretation process, for instance Belgium argues it should be the CJEU to give a definition. 109

2.1.2.1 Belgium

87. Defining journalist is less important in the Belgian legal practice, as the Belgian legislator rather gives preference to determining the purpose of the activities that should be taken into account to ascertain whether someone falls within the scope of the journalistic exception. 110 This means that having the statute of journalist does not mean that the journalistic exception provision is automatically applicable. 111 For example, a professional journalist who publishes an article about his annoying neighbour is unlikely to pursue the aim of informing the public on a matter of general interest, which is a condition to enable someone to invoke the journalistic exception. 112

2.1.2.2 The Netherlands

88. Before the law on the protection of personal data, there existed a law of 1 July 1989 on the registration of personal data. This is important to mention, because according to this law, the definition of journalist was limited to the press, radio and television. Taking the Directive into account, the Dutch legislators were aware they should broaden the personal scope and enlarge the definition and go beyond the initial definition. The explanatory memorandum of the revised law explicitly says that also others than the press, radio and television are able to process personal data for the purpose of journalism. 113

109 (...) ;
2° D'exercice, à titre professionnel, de l'activité de journaliste, dans le respect des règles déontologiques de cette profession."
111 Infra nos. 96-121.
112 Infra Tweede Kamer der Staten-Generaal, 1997-98, 25.892, nr. 3.

Ghent University, Faculty of Law – International Relations Office
Universiteitsstraat 4, B-9000 Gent, Belgium
www.UGent.be
Despite of that, the legislators decided not to define the concept of journalist as such, but to attach more attention to the purposes of journalism.\textsuperscript{114}

2.1.2.3 The United Kingdom

89. Unlike Belgium and the Netherlands, the UK does attempt to give a definition of journalist. Therefore, the Information Commissioner’s Office (ICO) has drafted a comprehensive guide for the media to understand the Data Protection Act (DPA).\textsuperscript{115} The ICO upholds information rights in the public interest. They can examine complaints and have the power to take enforcement actions for serious breaches, although their powers are more restricted in cases affecting the media. They always consider the impact on freedom of expression carefully before deciding to take any action.\textsuperscript{116} This guide has no legal status and cannot be enforced. It only clarifies the existing data protection legislation in order not to cause any misunderstandings in case of interpretation.

90. Because the guide is trustworthy, the author of the LL.M. paper will make reference to this document in order to make a clear analysis of the regulatory framework on UK data protection and press freedom.

91. The guide, in its introductory part, states very briefly to whom the guidelines are addressed:

- Media organisations involved in journalism, such as the press, broadcast media and online news websites\textsuperscript{117};
- Senior editors or other staff;
- Freelance journalists;
- Non-media organisations.\textsuperscript{118} 119

The ICO implicitly refers to these four groups, but that is only an indication. The guidelines say there does not exist a definition of journalism, but in order to get an understanding of it, it should be interpreted in its

\textsuperscript{114} Ibid, 74.
\textsuperscript{116} ICO, “Data protection and journalism: a guide for the media”, 46.
\textsuperscript{117} Later it will become clear that, next to media organisations, the ICO accepts individuals who post information, opinions and ideas for public consumption online, even if they are not professional journalists and not paid to do so. This category of publishers are the so-called citizen journalists. See ICO, “Data protection and journalism: a guide for the media”, 30.
\textsuperscript{118} ICO, “Data protection and journalism: a guide for the media”, 4-5.
\textsuperscript{119} The ICO has concluded for the first time that an organisation, in particular an NGO, can rely on the journalistic exception; https://www.globalwitness.org/sites/default/files/141215%20letter%20from%20ICO%20to%20GW%20(2)%20(1).pdf.
everyday meaning, i.e. broadly. Therefore, the ICO refers to the Satamedia judgment of the CJEU for justifying a broad interpretation of journalism.

An example of the broad interpretation is the Sugar v BBC case of 2012, where the Supreme Court has concluded that journalism, art and literature cover the whole output of the BBC to inform, educate or entertain the public.

The Supreme Court has built an alternative, saying that when the format changes, it “moved from the pigeonhole of journalism to that of art and literature.”

2.1.2.4 France

A relatively specific definition journalist is to be found in the French legislation, in particular in article 67 of the law of 6 January 1978.

Article 67 clarifies that some provisions in that same law are exempt from application for the sole purpose of the exercise of the profession of journalist, taking into account the code of ethics of that specific profession.

In other words, the personal scope of article 67 extends to those who practice journalism as their profession in daily life (1) and who are bound to the rules, laid down in the industry’s code of conduct (2).

a. First condition: professional journalism

The explanatory memorandum explicitly limits the exercise of journalism to the written press and the audiovisual media. Other French legislation even provides with definitions of journalist in order to circumscribe the personal scope of the law 1978.


See for example article L.7111-3 Code du travail, article L.7111-5 Code du travail and the law of 4 January 2010 for recognition of journalist’s right to protect their sources. In France, journalists are the subject of an imprecise legal definition, essentially based on the fact that an individual exercises this activity which itself is determined very badly. See E. DERIEUX, “Droit de déontologie de l’information. Le cas français”, in D. GIROUX and P. TRUDEL, La régulation du travail journalistique dans dix pays, dont le Canada, Centre d’études sur les médias, 2014, 209.
b. Second condition: the media industries’ code of conduct

94. France is the only analysed Member State that has set up the condition for journalists to comply with their own media industry’s codes of conducts in order to be considered journalist within the meaning of article 67 of the French law on data protection.\(^\text{124}\)

95. A terminological delineation of the concept of journalist creates legal certainty. As long as there is a code of conduct that the publisher of personal data has to comply with, there exists the certainty that the publisher in question is regarded as journalist. Because of the more detailed conditions available in article 67, the less jurisprudence there is needed for interpreting the concept of journalism. The downside to it is that the more details and conditions are present, the less leeway there is given to the jurisprudence to interpret ‘journalist’ in a more revolutionary, progressive way when the need occurs. Overmore, the exemption for journalism only applies to professional journalists and not to others exercising their right to freedom of expression and engaging in journalism, even though that right is certainly not limited to professionals.\(^\text{125}\)

2.1.3 For journalistic purposes

2.1.3.1 Belgium

96. The only thing the Belgian legislators have done is taking over the wordings of the provision in article 9 of the Directive. The main focus to ascertain whether a journalistic purpose is present, regards the question whether the publication serves the general interest.

97. An example is the judgment by the Tribunal of Brussels of 11 December 2007\(^\text{126}\) where a journalist did not breach the right to data protection of the applicant when disseminating the fact that she was pregnant. The Tribunal concluded that the dissemination of this specific information clearly was in the public interest because of at that time she was playing the role of pregnant woman in a movie. The tribunal acknowledged the need to balance the right to privacy against the freedom of expression of the media, but also indicated

\(^{124}\text{Exposé des motifs - LOI n° 2004-801 du 6 août 2004 relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel et modifiant la loi n° 78-17 du 6 janvier 1978 relative à l'informatique, aux fichiers et aux libertés.}\)

\(^{125}\text{D. KORFF, Comparative study on different approaches to new privacy challenges, in particular in the light of technological developments – France, 2010, 6.}\)

\(^{126}\text{Rb. Brussel (14\textsuperscript{th} k.) 11 december 2007, AM 2008, afl. 4, 323.}\)
that privacy rights are diminished when individuals can be considered public figures. These considerations are linked to specific case law of the ECtHR.  

98. In the end, the general interest is all what matters. The processing of personal data for the sake of sensation is not done. This is what one of the Belgian judges in interlocutory proceedings had concluded in a judgment of 30 April 2003.

2.1.3.2 The Netherlands

99. For the Dutch law practitioners, it is important to assess the applicability of the journalistic exception through the necessity test. In every situation, the Dutch case law assesses whether there exists a necessity of informing the public on matters in the general interest.

100. Initially, important case law established the basic factors for making an appropriate balance between the freedom of expression and the right to data protection. These criteria have been created in the Gemeenteraadslid case of 24 June 1983. Although the press was not involved in these proceedings and at that time there was no legislation on the protection of personal data, these criteria are formulated generally and were able to be applied in case of processing by journalists. The determining factors are:

- The nature of the publication;
- The seriousness of the possible consequences;
- The degree to which the claims are founded;
- Whether the purpose could have been reached in another, less damaging, manner.

101. In the current approach relating to the Internet publications, the author has developed a one or two-step test for examining the necessity.

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127 See ECtHR 7 February 2012, no. 39954/08, Axel Springer AG v. Germany; ECtHR Von Hannover (no. 2) v. Germany; ECtHR 10 May 2011, no. 48009/08, Mosley v. the United Kingdom.

128 Kort Geding Rb. Gent 30 april 2003, AM 2003, afl. 1, 74, noot F. DE BOCK.


130 Ibid.

a. **One or two-step test**

102. Depending on the specific circumstances, Dutch tribunals and courts will apply a one or two step test\(^{132}\) to ascertain whether the journalistic exemption is applicable.

I. **The general interest test**

103. Dutch case law, when being confronted with the question whether the processor in question can invoke article 3.1 of the law on the protection of personal data, assesses to what extent the specific personal data contributes to the community’s general interest. Unfortunately, there does no exist a consistent definition of the general interest. It will always be a matter of case-by-case assessment where the specific circumstances and facts are of great importance.

Some examples of recent case law give a notion on what could be understood by the concept of the journalistic purpose of informing the community on matters in the public interest.

104. A first example is one of the first cases where it has given guidance to the journalistic purposes in the context of Internet publications: the judgment by the Court of Appeal of Arnhem on 15 March 2005. Journalism also counts for those who inform the public about specific topics on a therefore established website with the purpose to reach a public that is interested in the content (articles, opinions and pictures) of the website.\(^{133}\)

105. A second example concerns a judgment of the Council of State on 8 September 2010.\(^{134}\) The applicant in the case had contributed to a publication of an article at the University of Groningen. Some years later, the applicant requested the board of the University to remove his personal data from the article that was put online. By putting the article – and his personal information – online, the applicant argued there had been a breach of the Dutch legislation on the protection of personal data. The University argued in another sense, by stating that the applicant voluntarily cooperated with the University in writing this article. The extent of personal information disclosed is not so large that it would justify the undermining of the freedom of expression and the importance of informing the community and the discussion throughout the community. The Council of State had followed the arguments formulated by the University. The importance of having the small amount of information being removed from the article for the sake of the privacy of the

\(^{132}\) At first glance, a two or three-step test is appropriate when you also want to ascertain the existence of a journalistic profession. In fact, because of the revolutionary and progressive interpretation of journalist and the importance of assessing the presence or absence of journalistic purposes, only attention will be given to the latter.


\(^{134}\) ABRvS 8 September 2010, ECLI:NL:RVS:2010:BN6172.
applicant is not that significant to undermine the freedom of expression by the University that had put the article online.

Furthermore, the Council of State confirmed the applicability of article 3.1 to the processing of personal data in libraries and archives, where the exploitation serves a journalistic purpose. This was clearly the case, because the online archive contained the articles that were already published in the newspaper.\footnote{Ibid.}

106. A third interesting example concerns a website with a register of defaulters that could not rely on the journalistic exception of article 3.1 of the law. The tribunal of Amsterdam, in interlocutory proceedings, held on 12 September 2014\footnote{Kort geding Rechtbank Amsterdam 12 september 2014, ECLI:NL:RBAMS:2014:5938.} that default of payment as such is a subject that triggers public debate. However, the activities by the processor responsible for setting up the registers do not contribute to the public interest. It rather concerns the warning of others for concrete defaulters. There is also no presence of normal journalistic activities, such as the collecting, analysing and processing of information, the combining of different sources for presenting a finalized text with own conclusions with the aim to contribute to the public debate. As a result, the tribunal held the information on the defaulters should be removed from the public registers.

II. The necessity test for processing sensitive personal data

107. A second test needs to be made when article 3.2 of the law on the protection of personal data comes into play, where it refers to article 16 of the same law. It concerns the possibility for journalists to process sensitive personal data, but only if it is necessary for meeting the journalistic purposes. These provisions are important when there is a presence of processing of personal data relating to someone’s religion, race, political preferences, health, sexuality, association rights and criminal data and illegal behaviour.

The threshold for allowing the freedom of expression to prevail on the right to privacy in such circumstances is higher than when no sensitive personal data is present.\footnote{See Gerechtshof Den Haag 26 juli 2016; Rechtbank Eerste Aanleg Rotterdam 29 maart 2016, ECLI:NL:RBROT:2016:2395. Some authors oppose this theory by arguing that the law on Data protection provides a journalistic exception for a reason. Irrespective of whether the information is sensitive, as long as it is in the public Interest, it should be allowed to publish personal data. See A. ENGELFRIET, “Noot bij gerechtshof Den Haag 26 juli 2016 (opdracht tot huurmoord)”, ICT-recht 2016, afl. 3 (30) 31. Note: although the title refers to a case of 27 July 2016, the right data of the judgment is 26 july 2016.} Here it is important to provide for a large amount of facts that could serve as proof. This immediately explains the length of the judgments in such cases.
108. The approach will be different if a convicted person whose sensitive information is published is a public figure. This is what was concluded on 8 November 2016 by the Court of Appeal of ‘s-Hertogenbosch in interlocutory proceedings between JT as applicant and Hearst Magazines Netherlands BV as defendant in the case. Whether there is a necessity depends on the assessment of the different interests in this case by examining all relevant circumstances:

- The interest of Hearst is not limited to an economic interest, but also includes the general interest, in particular informing the public. The fact that the applicant did not make objections to this argument by Hearst that it informs on matters of public interest, makes his argument fail;
- The applicant is to be considered a public person. Firstly, the applicant had swindled several Dutch celebrities and close family members, out of which a lot of media attention was being generated. Secondly, the applicant himself has drawn the attention of the media by for example showing up in the public with one of his victims.
- The applicant did not proof which information was incorrect, nor did he state in what manner the disclosure of this full name and his picture would harm his resocialisation or his private life.

For these reasons, the Court held that the interest of the applicant to have his personal data protected is not important enough to outweigh the freedom of expression of Hearst.

b. Data protection guidelines for journalists on the Internet

109. The just mentioned analysed Dutch case-law relates mostly to issues regarding publications of personal information on the Internet. The Internet now has become a new location for disclosing personal data as part of the journalists’ duty to inform the public on matters of public interest. As a result, the need for drafting appropriate guidelines emerged in order to guide journalists through the Internet environment when processing personal data.

110. In 2007, the Dutch Data Protection Authority made an attempt to address this issue by drafting Data Protection Guidelines for publication of personal data on the Internet. When the journalist is being confronted with a conflict between his right to freedom of expression on the one hand and someone’s right to privacy on the other hand, he should place the processing within its context and make a balance between those two rights for which four criteria are used:

- Does the activity aim at collecting and sharing objective information?
- Does the journalist publish on a regular basis?
- Does the processing of personal data relate to informing the public on matters in the public interest?
- Does the data subject have a right or chance to reply or rectify?\textsuperscript{138}

111. The normal rule states that these four conditions have to be met cumulatively. Nonetheless, the guideline also says that: \textit{“Only if the publication complies with these four conditions, the journalistic exemption, in any event, will apply.”} Wouter Hins argues this sentence is important. Although all conditions have to be complied with in order to invoke the journalistic exemption, \textit{in any event} would give space to ignore one of these conditions. According to the explanatory part of the guidelines, the only conditions that should not be underestimated is the last one, namely the obligation to grant the possibility to the person whose personal data is being processed and published to reply or rectify.\textsuperscript{139} A perfect example of case law where you clearly see the application of the guidelines is the already analysed judgment relating to the claim by a former student to have his personal information removed from an article that has been put online.\textsuperscript{140}

The Netherlands are very straightforward and progressive in addressing issues deriving from the continuously changing media environment.

2.1.3.3 The United Kingdom

112. When looking back at section 32 of the DPA, there exists a limitative list of conditions that have to be complied with in order for journalists to fall back on the journalistic exception. Some of these conditions are not even present in other jurisdictions, which make the approach of the journalistic exception different.

The ICO guidelines present an explanation to these conditions.\textsuperscript{141}

a. With a view to the publication of journalistic material

113. The journalistic exception extends itself to all information that has been collected, used, created or retained as part of a journalist’s day-to-day activities, both before and after the publication. It is not even an obligation to actually publish or broadcast the information, as long as it had the ultimate purpose to publish it. The data must be held in connection with a story the processor intends to publish.

\textsuperscript{138} College Bescherming Persoonsgegevens, “Publicatie van persoonsgegevens op internet”, https://autoriteitpersoonsgegevens.nl/sites/default/files/downloads/rs/rs_20071211_persoonsgegevens_op_internet_definitief.pdf, 43-45 ; the right to reply and rectify receives a big value at the self-regulatory level as well (infra).

\textsuperscript{139} W. HINS, “De journalistieke exceptie en de bescherming van persoonsgegevens: laveren tussen twee grondrechten”, Mediaforum 2013, afl. 4, (98) 100. See also Recommendation Rec(2004) 161 of the Committee of the Council of Europe to member states on the right to reply in the new media environment.

\textsuperscript{140} Supra no. 105.

\textsuperscript{141} ICO, “Data protection and journalism: a guide for the media”, 31-38.
b. The data processor needs to reasonably believe that the publication is in the public interest

114. What has to be considered ‘in the public interest’ differs from case to case. The reason for that is because the possible effect on the right to privacy in the one situation is always different in the other situation. It depends on following factors:
   - The role and profile of the individual;
   - The extent to which they have courted publicity or held themselves out as a role model;
   - The significance of the story to organisation’s audience;
   - How intrusive or damaging the story is likely to be to the subject or to any other individuals associated with the story. \(^{142}\)

115. A case-by-case assessment this is always necessary. Similar to Belgium and the Netherlands, the presence or absence of sensitive information has consequences for the assessment.
Worth mentioning is the recent judgment by the Queen’s Bench Division on 4 November 2016 \(^{143}\), where it made an end to the discussion whether an arrest of an individual will usually give rise to a reasonable expectation of privacy. This was the first time that such a wide injunction has been granted regarding a police investigation into an individual and this claimant-friendly decision is likely to have a far-reaching impact on how the press reports police investigations. \(^{144}\)

116. It is up to the journalist to prove there was an appropriate decision-making process to consider the public interest of a publication. \(^{145}\) This has not been mentioned in the provisions of other national jurisdictions,
The exemption requires only a reasonable belief. This gives much more leeway. The reason for that exists in the respect the DPA has for the media’s independent decisions on the public interest.
Another example that shows the respect for the media’s independence it the fact the DPA refers to the relevant industry codes of practice that grant further guidance in meeting this condition. \(^{146}\)

\(^{142}\) ICO, “Data protection and journalism: a guide for the media”, 34.
\(^{143}\) ERY v Associated Newspapers Ltd (2016) EWHC 2760 (QB).
\(^{145}\) ICO, “Data protection and journalism: a guide for the media”, 35.
\(^{146}\) In the part on self-regulation in the UK media sector, we will see a slightly different approach compared to the other jurisdictions. First of all, there does not exist only one code of conduct journalists have to comply with, but every media industry (press, television, radio,…) has its very own code of good practice. Secondly, the DPA explicitly refers to these various codes of conduct as one of the touchstones for assessing the presence of the public interest for a specific publication.
c. Compliance is incompatible with the special purposes

117. There must be a clear argument that the provision in question presents an obstacle to responsible journalism. The journalist should be able to prove it was impossible to both comply with a particular provision and to fulfil the journalistic purpose. Alternatively, it is allowed to show it was unreasonable in the given circumstances to comply with a particular provision, by virtue of it being impractical or inappropriate.147 148

2.1.3.4 France: legislation and self-regulation going hand in hand

118. In order to give an answer to the question whether, in a particular situation, a journalist has processed personal data for the sole purpose of journalism, there is no touchstone provided in article 67. This article redirects us explicitly to the relevant code of ethics every professional journalist is bound to – which refers to the self-regulatory aspect of due journalism.149

The institution competent for these codes is the National Union of Journalists. This institution was founded already in 1918 and had drafted the Charter of journalist’s obligations in that same year150, defining the deontological principles of this profession. The institution is responsible for actualising the statute and ethical rules of the profession.

Besides the Charter, different journalist’s unions refer to the Declaration of journalist’s obligations and rights that was adopted in 1971 in Munich, also called the Munich Charter. In 2008, the Charter of qualitative information came to existence.

Furthermore, every written press, radio and television company has to establish their own codes of ethics, which most of them have done so. Overmore, almost all codes of ethics – explicitly or implicitly151 – oblige professional journalists to act with respect for everyone’s right to privacy.

119. Even more remarkable is the following. Every media company should establish a specific organ, specialised in following up the behaviour of their journalists when exercising their profession and, in particular, when processing personal data in accordance with the deontological rules of that company.

148 For example, see Stunt v Associated Newspapers Ltd (2017) EWHC 695 (QB).
149 In the chapter on self-regulation, regarding France, we will not go in further detail whereas the relevant information on this will be discussed in this part.
150 Reviewed in 1938 and 2011.
151 For example, the Charter of journalist’s obligations does not explicitly mention the obligation to respect someone’s right to privacy when publishing on paper or on a website. The only relevant provision you find that could possibly refer to the respect the right to privacy is respect for everyone’s dignity. And even that is not a pure reference to the right to privacy. Fortunately, other charters and declarations do refer to this obligation, for example the Charter of Munich, the Charter of qualitative information and the Project for a deontological code for journalists.
However, the usefulness of such deontological organs is in fact non-existing. For example, Newspaper agency Le Monde expresses in its code of ethics that the committee of ethics and deontology have the objective to monitor compliance with the Charter of journalist’s obligations. Among other things, the code explicitly states the journalists are obliged to respect the right to privacy. But in that same code, the power of this committee is limited and takes away every importance of its existence. They are not competent to state their point of view on the content of a publication, nor do they have the power to impose sanctions on journalists when disobeying the ethical and deontological rules.

120. The only solution is to fall back on the French jurisprudence. After research the conclusion is that there does not exist much case-law on the journalistic exception. Normally, tribunals and courts should apply the professional ethical rules, but the requirements of those rules are far from precise. Here was well, a general interest test is at place.

121. A judgment by the Court of Appeal of Versailles shows that the public interest plays a crucial role when examining the presence of the journalistic purpose for personal data processing. Due to a flood that had caused damage to several Asian countries, a lot of people were missing, including French tourists. French journalists consequently published pictures of the missing French citizens, on which criticism came by the families of the missing persons. The Court of Appeal however held that such a natural disaster touches the worldwide community, on which we all want to be informed. The fact that a lot of Frenchmen were involved justifies the dissemination of the victims’ identity. Here, the general interest was clearly present according to the Court.

2.1.4 The approach on citizen journalists

122. Until approximately two decades ago, it was easy to distinguish journalists from non-journalists. There was no grey zone. Today, interconnectedness with the rest of the community through computer, tablets and smartphones has become indispensable for the dissemination of information – either for sensation or to serve the general interest. Consequently, the question has arisen whether the concept of journalism should be expanded to others than professional journalists; those who want to engage in journalism but not necessarily on a regular basis or for compensation.

152 D. KORFF, Comparative study on different approaches to new privacy challenges, in particular in the light of technological developments – France, 2010, 6.
In this part it will become clear there does not exist a uniform answer to the question among Member States. Some jurisdictions are ready to move towards a modern, technological approach of journalists, others are more reluctant.

2.1.4.1 Belgium

123. The Belgian legislation up till now has no provision on how to approach citizen journalists. What does exist is a judgment that did not accept the concept of citizen journalism.

It regards a case that unfortunately cannot be found on the online databases, but in the opinion of the author is trustworthy to use as a source. The case relates to Mr. Didier Eeckhout, who made a small movie of a real life situation where a fight had taken place in a café in Bruges with immigrants involved. The people involved were aware of the fact they were being filmed and had not made any objections to that. The video was called *Racism in Bruges*, was posted online and became a real hit. However, the police involved in the video claimed immediate removal of the video through interlocutory proceedings in which they had succeeded. Later, Mr. Eeckhout was found guilty before the Tribunal of First Instance on 2 March 2016 for disobeying the legislation on personal data protection. The tribunal held that Mr. Eeckhout could not be considered journalist to invoke the exemption from article 3 §3 of the Belgian law on the protection of personal data. Mr. Eeckhout did not agree with this judgment, arguing that journalism is a free activity and everyone simply should be allowed to practice such profession. Moreover, he argues that one does not even need to be a journalist to invoke your right to freedom of expression, as article 10 ECHR grants this right to everyone.154

What should be taken into consideration when looking at the facts and making an assessment similar to the ECtHR case law, is the extent of the movies’ contribution to the public interest. To put it in other words: is it necessary for the community to be informed about matters that were subject to this movie in order to let the freedom of expression prevail instead of the right to privacy of the complaining police men? The amount of reactions to this video was unexpectedly high, which subsequently could form an argument in favour of Mr. Eeckhout that the video clearly was in the public interest. Did the judges in both the interlocutory and criminal proceeding jump to conclusions? In the opinion of the author, the judges did.

124. Are citizen journalists to be considered journalists and, if so, do they enjoy the journalistic exception?\textsuperscript{155} For now, this is not the case. Although this judgment in the daily legal practice takes away legal uncertainty, it is far from progressive.

In the opinion of the author, it will take a relatively long period until – at least the majority of - the national case-law generally accepts the application of the journalistic exception provision as laid down in article 3 §3 of the law on personal data protection.

2.1.4.2 The Netherlands

125. Similar to the Belgian system, there is no legislation referring to the concept of citizen journalism. Despite of that, the case-law shows implicit recognition of citizen journalists relying on the journalistic exception.

126. One of the first cases in this regard is Van Gasteren against Hemelrijk before the Court of Appeal of Amsterdam in 2006. An open letter posted on a personal website can be considered press publication, although the publication was not done by a professional journalist. With this judgment, scope of the press and journalism has been broadened: internet publications by private persons are the same as publications by the press,\textsuperscript{156} but only in the case where the publication has the purpose to reach the public and the publication is in the public interest. This has been confirmed by the Dutch Supreme Court in 2008.\textsuperscript{157}

127. Another example is the judgment of the Court of Appeal of Den Haag in interlocutory proceedings of 26 July 2016.\textsuperscript{158} Taking into account the objective facts forming the basis of a blog and the personal data that was not only processed by the blogger, but also by others, makes the Court come to the conclusion that the applicant, who appeared in an amateur movie regarding a conversation for performing a murder and was later put on the blog, indeed was suffering reputation damage, but nevertheless is responsible because it is a result of its own behavior. Overmore, the time period between the facts and the actual judgment was very small, which proofs the significance in the public interest and public debate.

128. This theory has been confirmed by the Tribunal of Amsterdam in interlocutory proceedings on 6 October 2016\textsuperscript{159}, where it has concluded it should stay possible for bloggers, due to lack of options to verify

\textsuperscript{156} Gerechtshof Amsterdam 9 maart 2005, LJN AT0895.
\textsuperscript{159} Rechtbank Amsterdam 6 oktober 2016, ECLI:NL:RBAMS:2016:6282.
the truthfulness of the facts, to publish about criminal proceedings. Concluding in the opposite sense would limit the freedom of expression and the freedom to inform the public on matters in the public interest.

2.1.4.3 The United Kingdom

129. The UK accepts individuals invoking the journalistic exception from the Data Protection Act if they are posting information or ideas for public consumption online, even if they are not professional journalists and are not paid to do so.\footnote{ICO, “Data protection and journalism: a guide for the media”, 30.} Anyone with access to the Internet can engage in journalism at no cost under the sole condition the disseminated information to the public had the necessary public interest.\footnote{The Law Society and others v Kordowksi (2011) EWHC 3182 (QB); ICO, “Data protection and journalism: a guide for the media”, 30.} If their only purpose is to publish personal messages, opinions and comments, they do not fall within the scope of article 32 of the DPA, but rather the one relating to the exception solely for personal and household purposes.

2.1.4.4 France

130. France may be clear in defining journalism in its legislation on personal data protection, this approach has been the same for a few decades now and has not really evolved over the years, which results in a very conservative attitude vis-à-vis citizen journalists.\footnote{D. KORFF, Comparative study on different approaches to new privacy challenges, in particular in the light of technological developments – France, 2010, 6.} Although most Member States undertake action in applying the journalistic exception provision to citizen journalists, France neglects in doing so.

131. A number of authors have promoted citizen journalists, by arguing that with the increasing digitalisation of information dissemination, citizen journalists engage more in the different strategies on informing the public in matters of general interest.\footnote{C. NEFF, “Blogueurs vs journalistes: qui est le plus influent à l’heure du web 2.0 ?”, Markentive, https://www.markentive.fr/blog/blogueurs-vs-journalistes-qui-est-le-plus-influent-a-l-heure-du-web-2-0/#.} The opponents of this innovative idea firmly adhere to the condition of professional journalism and therefore exclude citizen journalism from the scope of article 67. Although French case-law acknowledges the existence of bloggers in the media environment in several other circumstances\footnote{For example, see Cour d’Appel de Paris 5 février 2014; Tribunal de Grande Instance de Paris, 27 juin 2012; Cour d’Appel d’Orléans, 22 mars 2010.}, it seems not to be ready yet to treat bloggers as journalists in the context of the journalistic exception provision.
2.1.5 The approach on (big) data-driven journalism

132. The use of big data is becoming more important every day. Journalists use big data to distinguish themselves and to provide the reader with the most accurate and trustworthy information. The downside is that this will have negative implications for the privacy.

The European Journalism Centre has called upon national legislators and the journalistic community to react to this new phenomenon. To what extent have the national legislation and case-law reacted to this recommendation?

2.1.5.1 Belgium

133. A number of prominent persons in the field of media law, for example Rob Heymand, researcher at the University of Brussels VUB, and Andy Demeulenaere, coordinator of Mediawijs, are satisfied with the fact that journalists become aware of the usefulness of big data. The concept of data journalism is even becoming so popular, the Flemish Media Academy for Written Press organises educational programs on data journalism.

At the same time, the question raises on the methods used to collect such big data. Which data is accessible and allowed to be used and which is not? Does the collection and dissemination of big data violate the right to data protection? These are concerns expressed by Rob Heyman. Mr. Heyman acknowledges the absence of legislation and stresses the importance of receiving answers to these questions. Until this legal gap is filled, there are no specific rules whatsoever. Applying the Satamedia judgment of the ECtHR would be a gap gilling solution, as this case does say something about the processing of large amounts of data. Unfortunately, it is doubtful whether this is reassuring for the sake of data journalism.

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2.1.5.2 The Netherlands

134. Similar to Belgium, the Netherlands acknowledges the existence of the growing impact of data journalism. The concept even receives so much attention that a number of Dutch universities have started to establish study programs on data journalism. Henk van Ess even provides journalists with a Handbook on data journalism.

135. Although the Dutch legislation does not provide any rules on this particular issue there does exist a case, which has already been analysed in this LL.M. paper: the judgment of the Dutch Council of State of 8 September 2010 where it concluded that the importance of having the small amount of information, relating to the applicant, removed from an article for the sake of his privacy is not that significant to undermine the freedom of expression by a University that had put the article online.

136. Dutch legal practitioners and specialists in the field of data journalism also stress the importance of finding a balance between processing of big data among journalists and the right to data protection. A book that has received much attention recently is the one written by data journalists for the Correspondent B.V, Maurits Martijn and Dimitri Tokmetzis: You dó have something to hide: about the importance of privacy. The authors of the book argue that the right to privacy is at danger due to this big data trend. The objective of this book is strongly in line with the Satamedia judgment of the ECtHR, as both give preference to protecting of personal data.

2.1.5.3 The United Kingdom

137. Together with the US, the UK is pioneer in encouraging and taking data journalism to the next level. Simon Rogers says that, “Before 2010, people asked the question if getting stories from data was really journalism. Once these people were confronted with Wikileaks and the disclosure of sensitive information of NASA by Edward Snowden the concept of data journalism became clear.”

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168 For example, the University of Groningen and Tilburg: https://www.svdj.nl/nieuws/datajournalistieke-opleidingen-in-nederland-in/.
In 2009, the British newspaper company The Guardian launched the Datablog. The Datablog obtains, formats and publishes data that is interesting for journalism. It researches the data they have obtained and use it for the purposes of journalism, to inform the public on matters in the general interest.\textsuperscript{174}

The same happens at for example the Financial Times and British Broadcasting Corporation, where their main goal is

“To build customer signatures of each customer’s digital consumption and use the information to understand customer content preferences, increase the relevance of their communications, personalise their offers, and deploy intelligence to customer touchpoints.”\textsuperscript{175}

“To provide insightful, personally meaningful and shareable visual explanations on the BBC’s biggest and most significant stories.”\textsuperscript{176}

It is almost unimaginable what amount of data is being produced within these large media companies, all for the sake of journalism.\textsuperscript{177}

Although there is no legislation available for these media companies on how to produce big data with respect for other’s fundamental rights, such as the right to privacy, these companies have engaged in large studies, which were produced in 2014. The media companies responsible explore what they should take account of. For example, big data companies had examined how consumers perceive and respond to rising privacy issues.\textsuperscript{178}

Martha Stone, publisher of the report on Big Data for Media, stresses that every country has different regulations applying to data collection and the use of these data. Consequently, it will be up to the corporate policy making to address the use of these data.\textsuperscript{179}

The studies of the World Newsmedia Network 2014 show surprising results in favour of the right to data protection of data subjects. Not less than 81% of the media companies’ executives agree that significant breaches of personal data security would do great harm to customer relationships. In fact, the larger the company, the more likely they perceived the risk of damage to reputation and customer relationships if there was a breach of privacy regarding personal data.\textsuperscript{180}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{175} M. STONE, \textit{Big data for media}, 4.
\item \textsuperscript{176} \textit{Ibid}.
\item \textsuperscript{177} M. STONE, \textit{Big data for media}; 33p.
\item \textsuperscript{178} \textit{Ibid}, 17.
\item \textsuperscript{179} \textit{Ibid}, 19.
\item \textsuperscript{180} \textit{Ibid}, 19.
\end{itemize}
\end{footnotesize}
141. Big data companies need to continue doing data journalism as long as it is disseminating information at a level of general interest. The media should not forget this main focus.

An interesting article on this is the one written by Samantha Sunne of the American Press Institute\textsuperscript{181}. Although this is an American article, interesting insight is given to the conduct of data journalism which could also be applied in Europe. Steve Doig, professor at the Arizona State University stresses that "data is just another source and does not absolve of the same kind of ethical considerations that you are supposed to be taking."\textsuperscript{182}

142. In order not to lose the main focus, it is important not to immediately jump to conclusions. Big data journalism is much more than just disclosing data. Journalists need to stay sceptical, set aside the numbers after having collected the data, and look at the conclusions critically. Only after that, reporting to the public is at place. Still, even at that particular moment, it is for the sake of the journalist’s findings and the public to be informed in a proper way to clearly explain the data.\textsuperscript{183}

If journalists would maintain complying with their own ethical standards, it is manageable to process personal data in a way it would respect the right to data protection of data subjects at a high standard.

2.1.5.4 France

143. In France, the mechanism of data journalism has appeared as well. Alice Antheaume describes the role of a data journalist to find pertinent data that can be processed for the purpose of constructing interesting theories and statistics.\textsuperscript{184}

Similar to Belgium and the Netherlands, France does not have any legal provisions on data journalism, nor does there exist relevant case-law in this regard.

In case the French tribunals and courts would be confronted with a conflict between data journalism and personal data protection, chances are high that the Satamedia judgment of the ECtHR will be applied.

\textsuperscript{181} Although the US does not belong to the research field of this LL.M. paper, some articles show interesting insight on how to manage due data journalism.

\textsuperscript{182} S. SUNNE, “The challenges and possible pitfalls of data journalism, and how you can avoid them”, American Press Institute, 2016, https://www.americanpressinstitute.org/publications/reports/strategy-studies/challenges-data-journalism/.

\textsuperscript{183} Ibíd.

2.2 SELF-REGULATION BY MEDIA INDUSTRIES THROUGH CODES OF ETHICS AND DECISIONS

2.2.1 General

144. “A number of judgments of the ECtHR prove that law and ethics of journalism are not the same and, as a result, the urge arises for a separate system of journalism in the sphere of professional ethics.”

This quote of professor Dirk Voorhoof describes the importance of a self-regulatory framework for journalists.

145. As Member State legislators regulate the behaviour of journalists within their territory, it will be exactly those journalists that have the privilege of acting as a public watchdog over the actions by the public authorities. This creates a tension among these actors.

That is a reason why it would give additional value to the conduct of journalists to let them organise in the way they in order to be able to comply with specific deontological codes they have drawn up themselves.

146. Self-regulation is based on codes of conduct for journalistic activities, which the self-regulatory bodies are supposed to enforce through proactive investigations into journalistic activities and/or through complaints brought by citizens or organisations. Journalistic codes of conducts usually contain guidelines on journalistic diligence in investigating alleged facts, self-rectification and, important for this LL.M. Paper, on the protection of fundamental rights such as privacy and private data.

2.2.2 Comparative country-analysis

2.2.2.1 Belgium

a. The Flemish and Walloon Press Council

147. The organisation of the ethical bodies in Belgium is divided into the Flemish and Walloon Press Council. Both councils exist separately and have their territorial scope.

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186 Unofficial translation by the author: “Een aantal arresten van het EHRM bewijst dat recht en journalistieke ethiek niet helemaal samenvallen en bijgevolg deze arresten juist nog meer de nood aan een eigen journalistieke invulling van de beroepsethiek legitimeren.”

187 As will become clear further in the LL.M. paper, the self-regulatory bodies do not have the power to take binding and enforceable decisions.


189 Official translation: Raad voor de Journalistiek.
148. After preliminary research it has become clear that both councils do not have manifestly different approaches on the journalistic activity – who is journalist and what are the applicable ethical obligations? Both councils have drafted a code of conduct for journalists that contain, in particular, rules on respecting the private life and human dignity.

Taking into account the maximum amount of words for this LL.M. Paper, attention will be devoted to the ethical rules from the Flemish Press Council on the rules and further guidelines relating to privacy obligations, as the rules from the Walloon Press Council have a similar approach.191

b. Who is journalist?

149. It suffices to compare the scope of journalists between the Flemish and Walloon press council.

The Flemish Press Council is competent to take decisions on all journalistic activities, i.e. everyone engaging actively in journalism, irrespective of the professional and social status.192

The Walloon Press Council is competent for all media that disseminate information, either on paper, through audiovisual media or through electronic media, irrespective whether the media is general or specialised.193

150. What does the Press Council say on citizen journalists? As mentioned before, the Belgian jurisprudence does not acknowledge citizen journalists. As a result, citizen journalists, such as bloggers, are not allowed to rely on the journalistic exception provision to be exempt from the obligations relating to the protection of processing personal data.

This is different in the field of self-regulation. The Court of Appeal of Brussels has concluded on 28 October 2014 the Press Council has the power and competence to decide on disputes arising from actions by Internet journalists. Mr. Eric Verbeeck owns a website where he publishes regularly local and regional news. Mrs. Rita Wuyts made a complaint relating to the news published on this website before the Council for Journalism. Mr. Verbeeck however wanted to object this claim by arguing before the national tribunal the Council did not have the power and competence to take a decision on this issue: according to Mr. Verbeeck, the Council cannot take decisions relating to persons who are no professional journalists or member of the ‘Vlaamse Vereniging voor Journalisten’.

190 Official translation: Conseil de déontologie.
192 See Preamble to the operating rules, www.rvdj.be/node/64.
The Court of Appeal decided not to follow these arguments and concluded it is irrelevant whether a person does or does not have a press card and is or is not a member of a journalists’ association. For the sake of the freedom of expression and the possibility for the media to self-regulate, the Court found the Council competent to decide on actions committed by non-professional journalists.\textsuperscript{194}

This judgment should not be underestimated. It is a revolutionary decision that grants the Press Council, in the light of the growing and modernising media landscape, the necessary powers to take decisions relating to citizen journalists.

c. Code of ethics - the right to privacy

151. Article 22 states that journalists should take into account the rights of anyone that is being mentioned. The journalist must balance those rights against the public interest of this information dissemination.

At first glance, this obligation does not mention anything new. Nevertheless, this provision covers much more. The Council has provided the journalists with further guidelines when taking personal data from personal websites (such as blogs) and social networking services. To be clear, this does not concern the information disseminated on personal websites and social networking services by these journalists, but rather the taking over of personal data that has already been disclosed on such websites.

In order to make use of this information, the journalist always has to make an assessment, taking into account:

- The context of the information: a journalist should ascertain the nature and purpose of the website. This is important, because the journalist is limited in using information that were disclosed for other purposes than those the journalist pursues. Furthermore, if the owner of the link/website has made the page secret, the journalist should prove the necessity for the public interest to still access the website and use the information.

- The public interest should be that important it justifies overriding the importance of the right to privacy, even though the information was already publicly available.

- Additional attention has to be paid to vulnerable persons.

- Last but not least, the journalist should always check whether the information is truthfully.

152. Article 23 mentions the obligation for journalists to respect the private life of persons and only to interfere with this right as long as it is necessary for the public interest to disseminate information.

\textsuperscript{194} Brussel (1\textsuperscript{ste} k.) 28 Oktober 2014, 2010/AR/2200; Raad voor de Journalistiek, “Hof van beroep bevestigt rol Raad voor de Journalistiek”, \url{http://www.rvdj.be/node/382}.

Ghent University, Faculty of Law – International Relations Office
Universiteitsstraat 4, B-9000 Gent, Belgium

www.UGent.be
Therefore, the journalist is extra careful for those who find themselves in a vulnerable state, such as minors, victims of crimes, disasters and accidents, and their family.

The guidelines concern those to what extent journalists are allowed to exercise their freedom of expression and press freedom in case of identification in judicial cases. The guideline divides the vulnerable persons into categories. The category determines the scope of data processing. For example, full identification and recognisable images of suspects is only allowed under specific conditions, while limited identification is possible. The guideline also distinguishes adult and minor suspects, for which different conditions apply.

153. Article 24, finally, explains the obligation for journalists to respect the human dignity and only to interfere with this right as long as it is necessary for the public interest to disseminate information. Therefore, the journalist will avoid exaggeration when disclosing certain images or details, even though when it might affect the public opinion.

2.2.2.2 The Netherlands

a. The Dutch Press Council

154. The Dutch Press Council is responsible for taking decisions regarding whether a journalist has acted carefully and/or has published with respect for the rules on ethical journalistic behaviour. Although it cannot take binding decisions, the Council can give guiding decisions based on the guidelines drafted by the Council itself.

155. In 2007, the Council had adopted the first serie of guidelines that have been changed over the years in order to meet the needs within the constantly changing media environment, such as digitalisation. The latest review of the guidelines dates from 2015.

b. Who is journalist?

156. The Dutch Council refers in article 4 of the Council’s statutes to journalistic acts. This means all acts or all failures to act:
   - When performing under his/her profession as journalist or
   - When exercising a journalistic activity who in fact does not exercise the profession of a journalist, but acts regularly as one and receives payment for it. For example, the contribution by a medical specialist in a magazine.
157. What about citizen journalists? Is the Dutch Press Council competent in taking decisions regarding disseminating personal data by citizen journalists?

In 2007, a decision by the Council proves that citizen journalists are not able to fall within the personal scope of the Council’s statutes as well. The claimant made a complaint against Mr. van der Wijk and the chief editor of the Volkskrant. An article written about the claimant by Mr. van der Wijk was on the weblog of the Volkskrant under the heading blog of the week. The comments were somewhat offensive. For example, Mr. van der Wijk described the claimant for being the new Hitler in the future (the claimant was candidate for the political elections).

The claimant has directed his complaint against Mr. van der Wijk and the Volkskrant. Both the defendants argued the Council did not have the power to take a decision, because both Mr. van der Wijk and the Volkskrant are no journalists in the sense of the statutes.

The Council concluded the following: Mr. van der Wijk did not have the power to decide on the complaint, because Mr. van der Wijk does not work as a journalist for the Volkskrant, nor does he write blogs or articles regularly. Furthermore, he did not receive any payment for writing this blog.

Regarding the Volkskrant, the Council concluded falls within the personal scope of ‘journalist’. The chief editor had to decide on whether this blog was appropriate to post on their website. The Volkskrant had a journalistic responsibility.

158. Today, the approach is different. The premise is that anyone who is engaged in journalism needs to take full responsibility for the information he/she disseminates and for the way he/she does so. The Council does not take into account the used medium or platform the publication has been made. The reason for this laid back approach relates to the awareness of the continuously changing media landscape such as the digitalisation.

However, this theory should not be automatically applied in every situation, which the Council had not done either in the case of Mr. van der Wijk. The Council uses another touchstone to ascertain whether the publication has been done by a journalist, whatever medium is being used: if the publication has a purely personal character without any purpose to inform the public, the Council declares itself unauthorized.

This has happened in a case concerning a Tweet on Twitter\textsuperscript{196} and a publication on a blog\textsuperscript{197}. In both cases, there was a fight between two persons who provoked each other by publishing these personal messages in an open digital environment.

159. In the news link of the Dutch Press Council, Mr. Hans Laroes, the Director of the Council, confirms the expansion of the power of the Dutch Press Council to take decisions on citizen journalists. Mr. Laroes confirms there is a continuous need for improvement of the rules. The birth of citizen journalists is one example for this renewal. In fact, everyone can be a journalist, even for a small period of time, as long as you are concerned with processing information.\textsuperscript{198} With that in mind, bloggers, Twitterers, Facebook users become part of the playfield for the Press Council.

c. Code of ethics - the right to privacy

160. What about the rules imposed on journalists for the sake of someone’s privacy? In comparison to the first generation of guidelines of 2007, the guidelines of 2015 do not differ significantly. Here, the Council has regard for specific circumstances in which processing of personal data might emerge and forsees in a balance between the freedom of expression and the right to privacy:

- Journalists shall only restrict someone’s privacy in so far it is reasonable necessary: it has to be balanced against the reasonable necessity of informing the public on matters in the public interest.\textsuperscript{199}

- Public figures do not enjoy the same extent of right to privacy compared to all other persons.\textsuperscript{200}

- Journalists should refrain from publishing about suspects\textsuperscript{201} and convicts, except
  
  o When the name is essential for the publication
  o In case the non-mentioning of the name raises confusion
  o In the event of search warrant notice
  o The involved is seeking for publicity.

\textsuperscript{197} Conclusie Raad voor de Journalistiek, 2012/51, A.P. Ruitenbeek tegen P. van Zoest, \url{https://www.rvdj.nl/2012/51}.
\textsuperscript{199} The Council shows great attention to anonymisation of those persons whose personal information is being published. This most of the times forms the subject of the discussion. See Conclusie Raad voor de Journalistiek, 2017/6, X tegen hoofdredacteur Volkskrant, \url{www.rvdj.nl/2017/6}; Conclusie Raad voor de Journalistiek 2017/5, X tegen L. Van Raaij en hoofdredacteur De Twentsche Courant Tubantia, \url{www.rvdj.nl/2017/5}; Conclusie Raad voor de Journalistiek, 2016/32, X tegen hoofdredacteur Ontvoerd, \url{www.rvdj.nl/2016/32}.
\textsuperscript{201} See Conclusie Raad voor de Journalistiek, 2017/7, X tegen hoofdredacteur RTV Rijnmond, \url{https://www.rvdj.nl/2017/7}.
- Disclosure of disciplinary faults by lawyers, doctors, notary or persons with a like function: this kind of information serves the public interest.\textsuperscript{202}

- Publications about crimes that might harm the victims or close family members and as long as the disclosure of the information is necessary.\textsuperscript{203}

- NEW: when approaching victims of accidents and disasters and their family, journalists should have due regard for those people’s right to be left alone.

- LEFT OUT: there is no problem in case of civil or administrative proceedings.

\subsection*{2.2.2.3 The United Kingdom}

\textbf{a. Media industries’ Press Councils}

161. The British press has long been free from State regulation, but public concern about the conduct of the press over the past 60 years led to the establishment of a series of Royal Commissions and other official inquiries. These resulted in the establishment of a series of self-regulatory bodies who have drafted their own codes of practice.\textsuperscript{204} In some situations, these codes of practice have been developed by bodies with statutory powers over the media while in others the responsible bodies have been established by the media or journalists themselves.\textsuperscript{205} These codes provide guidelines for media professionals, although these are not always clear. To give the media some space to decide for themselves how to approach difficult questions, the codes are vague which opens the door for different interpretations.\textsuperscript{206}

\textbf{b. Who is journalist?}

\textit{I. Print media}

162. The print media is entirely self-regulating in the UK and operates free of any specific statutory rules\textsuperscript{207}. The profession has established the Press Complaints Commission (PCC) that developed a code of

\begin{footnotesize}
\textsuperscript{206} \textit{Ibid}.
\textsuperscript{207} \textit{Ibid}, 2.
\end{footnotesize}
journalistic standards as a result of a large number of public complaints about perceived excesses in the British press.\footnote{208}

The PCC continuously examines the appropriateness of the existing code and reviews it when necessary – for example because of the changing media environment.

The Editors’ Code of Practice clarifies in article 3 the importance of respecting the privacy of others. Editors are obliged to justify intrusions into any individual’s private life without consent.\footnote{209} In other words, if no consent was given, it is the editor’s obligation to prove there was a general interest present to disclose the personal information.

Noteworthy is the additional clause on the public interest. The Code states that exceptions are possible to different clauses. The Code gives an indication of what is considered “of public interest”: detecting or exposing crime or serious impropiety\footnote{210}, protecting public health and safety and preventing the public from being misled by an action or statement of an individual or organisation.

It is the editor’s task to fully demonstrate that they reasonably believed that publication would be in the public interest. Special attention is given to children under 16, where editors have to demonstrate an exceptional public interest to over-ride the normally paramount interest of the child.\footnote{211}

Interesting to mention is the effectiveness of the decisions taken by the PCC. Although they cannot take binding and enforceable decisions, it is possible for the PCC, if a breach of the Code of Practice is found, to adjudicate any unresolved complaint – if negotiations did not lead to a resolutions – which means it will uphold the complaint against the publication. The publication will have to publish the PCC’s decision in full on its pages.\footnote{212}

\footnote{211} Ibid.
\footnote{212} Ibid.
II. Broadcast media

163. Unlike the press, broadcasting regulation in the UK is based on statute. Private television and radio are regulated by the Independent Television Commission (ITC) and the Radio Authority (RA), respectively, both provided for in the Broadcasting Act of 1990. These bodies are required to establish codes to which licenses must conform. The British Broadcasting Corporation (BBC), a public service broadcaster, is not subject to the ITC licensing, and has instead established an internal system for processing complaints (BBC Trust).

All broadcasters – public and private, radio and television – are subject to the jurisdiction of the Broadcasting Standards Commission (BSC). In total there exist six content codes governing different aspect of the broadcasting in the UK. They regulate similar fundamental aspects.

III. Citizen journalists – a gap in the self-regulatory framework

164. Today, only in the press and broadcast world they have drafted these codes. Could press and broadcast be interpreted in such a way it would allow citizen journalists to fall within the scope?

The appearance of new media services that exists at a large scale on the Internet has raised a cause for concern in the UK. This is due to the UK Government’s hands off the Internet policy that is contained in the Communications White Paper. This policy explicitly states that the government has no plans to introduce statutory Internet content regulation and excludes Internet communications from the licensed sectors.

An exception to this conservative approach is the amendment the PCC has made, allowing citizen journalists who associate with the print media websites to fall within the PCC’s power. This is unsatisfactory because this new approach is only limited to those who contribute to a print media website.

A lot of uncertainty remains for citizen journalists who are not related to such press companies. For them, the general legislation applies. Nevertheless, some authors argue these citizen journalists today play a

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213 Across the doctrine, criticism is being expressed about the disadvantages that exist to the power the regulatory bodies have on the media. There exist a risk of undermining the journalist’s duty to act as a public watchdog by interpreting all codes of practice in such a way it serves to the advantages of the governmental bodies.


216 Ibid.
significant role as *watchdog*.\(^{217}\) Just because they are not bound to several rules on what is allowed to publish and what is not, they sometimes disclose information that cannot be read or watched on professional websites. Thanks to their meaningful contribution to the society’s right to be informed, the author follows the arguments described by the revolutionary authors stating all persons who are engaging in citizen journalism and attempt to publish information, opinions and comments that trigger the public interest should enjoy the protection of the journalistic exception.

### 2.2.2.4 France

165. The mechanism of the French self-regulatory bodies has been analysed in the part on the implementation of the Data Protection Directive into national legislation. This is because article 67 of the French law on personal data protection explicitly refers to the journalistic codes of conduct to ascertain whether a journalist can rely on the journalistic exception.

It suffices to say that the French framework is different from the Belgian and Dutch one in the sense that the latter systems have established only one central body – the Press Council – accompanied by a journalistic code of ethics. In France, and the UK as well, allowed the different media industries to establish their own body monitoring the conduct of journalists.

As already mentioned above, the self-regulatory bodies for journalism in France do not acknowledge citizen journalists, because they are no professional journalists who are bound to these professional journalistic codes of ethics.

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3 Comparative schemes

3.1 NATIONAL LEGISLATION AND CASE-LAW

<table>
<thead>
<tr>
<th>BE</th>
<th>NL</th>
<th>UK</th>
<th>FR</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. LEGAL PROVISION Article 3§3 DPA</td>
<td>Article 3 and 16 DPA</td>
<td>Section 32 DPA</td>
<td>Article 67 DPA</td>
</tr>
<tr>
<td>2. OBJECTIVE</td>
<td>Reconcile the right to data protection and freedom of expression</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

3.1 WHO IS JOURNALIST?
- Not determined
- Press, radio, television
- Others (Not determined)
- ICO guidelines:
  - Media organisations
  - Senior editors or other staff
  - Freelance journalists
  - Non-media organisations
  - Satamedia (CJEU): others
- Professional journalists (press and audio-visual media)
- Subject of Industry’s code of conduct

3.2 CITIZEN JOURNALISTS INCLUDED?
- Legislation: no
- Case-law: no
- Legislation: implicit
- Case-law: yes
- Legislation (through ICO guidelines): implicit
- Case-law: yes
- Legislation: no
- Case-law: no

4. JOURNALISTIC PURPOSES
- For the sole purpose of journalism
- For the sole purpose of journalism
- Only for special purposes:
  - With a view of publication by any person of journalistic material
  - Reasonable belief:
    - Public interest
    - In all circumstances, compliance with obligations incompatible with journalistic purpose
- For the sole purpose of professional exercise of journalistic activity

4.1 PHRASE
- General interest:
  - Sensation
  - Sensitive data: higher threshold
- General interest:
  - Necessity test: less damaging alternatives?
  - Sensitive data: higher threshold
- General interest
- General interest (apply industries’ codes of ethics)
- Sensitive data: higher threshold
- Sensitive data: higher threshold

4.2. MEANING
| Scheme 1 - Comparative country-analysis of the national implementation of provision 9 Directive 95/46/EC on the journalistic exception into national legislation and case law, LL.M. Paper, UGhent University Law Faculty 2016-2017, Louise Vanneckx |
### 3.2 SELF-REGULATION BY MEDIA INDUSTRIES THROUGH CODES OF ETHICS AND DECISIONS

<table>
<thead>
<tr>
<th>1. SELF-REGULATORY BODY</th>
<th>BE</th>
<th>NL</th>
<th>UK</th>
<th>FR</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>- Flemish Press Council (Raad voor de Journalistiek)</td>
<td>Dutch Press Council (Raad voor de Journalistiek)</td>
<td>- Print media: Press Complaints Commission</td>
<td>For every media company, proper code of conduct with own complaints body (E.g.: Le Monde)</td>
</tr>
<tr>
<td></td>
<td>- Walloon Press Council (Conseil de Déontologie journalistique)</td>
<td></td>
<td>- Broadcast media:</td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Independent Television Commission (Private television)</td>
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<td></td>
<td></td>
<td></td>
<td></td>
<td>- Radio Authority (Private radio)</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- Both submitted to Broadcasting Standards Commission</td>
</tr>
<tr>
<td></td>
<td></td>
<td></td>
<td></td>
<td>- BBC Trust (BBC)</td>
</tr>
<tr>
<td></td>
<td>Source: Code of ethics</td>
<td>Source: Code of ethics</td>
<td>Source: Code of ethics</td>
<td>Source: Code of ethics</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.1 WHO IS JOURNALIST?</th>
<th>Flemish Press Council: Everyone engaging in journalism, irrespective of the professional and legal status</th>
<th>Acts or failures to act: Performing under the profession of journalist Or not performing under the profession of journalist but nevertheless acts regularly and receives payment</th>
<th>Every editor as part of a media company that has drafted a code of practice and has its own complaint commission</th>
<th>Every editor as part of a media company that has drafted a code of practice</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Walloon Press Council: All media that disseminate information (paper, audiovisual, electronic)</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td></td>
<td>Yes, confirmed at State court level</td>
<td>Yes, confirmed in decisions by Dutch Press Council</td>
<td>No</td>
<td>No</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>2.2 CITIZEN JOURNALISTS INCLUDED?</th>
<th>General interest</th>
<th>General interest</th>
<th>General interest</th>
<th>General interest</th>
</tr>
</thead>
</table>

<table>
<thead>
<tr>
<th>3. BALANCE WITH PRIVACY (Codes of ethics refer to privacy, not data protection)</th>
<th>General interest</th>
<th>General interest</th>
<th>General interest</th>
<th>General interest</th>
</tr>
</thead>
<tbody>
<tr>
<td>Source: Code of ethics</td>
<td>Source: Code of ethics</td>
<td>Source: Code of ethics</td>
<td>Source: Code of ethics</td>
<td></td>
</tr>
</tbody>
</table>

Scheme 2 – Comparative country-analysis of the self-regulatory framework within media industries, addressing issues between the right to privacy and press freedom, LL.M. Paper, UGent Law Faculty 2016-2017, Louise Vannecke
GENERAL CONCLUSION AND RECOMMENDATIONS

1 General conclusion

The purpose of this LL.M. paper was to analyse and evaluate the extent of the journalistic activity as an exception to the obligations attached to the processing of personal data. In other words, there exists the need of reconciling the tension between the right to data protection as part of the right to privacy, and the freedom of the press as part of the freedom of expression.

In order to get a clear understanding of the approach of the journalistic exception, the concept had to be contextualised within the broader legal framework.

As the right to data protection and press freedom both are recognised by the Council of Europe and the European Union, it was valuable to first recapulate the legal basis of both rights and how the tension between them in specific circumstances are reconciled. The competent courts, being the ECtHR and the CJEU, make a balancing exercise out of which it can be concluded which right prevails over the other.

After this introductory part, the remaining chapters of the LL.M. paper were devoted to the interpretation of the journalistic exception as included in article 9 of the Data Protection Directive 95/46/EC. This legal provision imposed on the Member States to provide for exemptions or derogations from specific provisions in the Directive for the processing of personal data carried out solely for journalistic purposes only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

As the exception provision was described generally and certain parts became subject of interpretation issues, the Article 29 Working Party provided the Member States with a recommendation on how they should interpret the provision. Due to lack of satisfying guidelines, it was up to the Member States, by relying on their margin of appreciation to interpret article 9 according to their legal approach on the reconciliation between the right to data protection and press freedom. The EU namely had due regard for the different approaches on journalism across the EU.

13 years after the drafting of the Directive, a first preliminary ruling on the interpretation of article 9 of the Directive was requested before the CJEU. This request for interpretation came from the Finnish Highest Administrative Court when being confronted with two media companies, Satamedia and Satakunnan, who had disseminated tax information of 1.2 million Finnish citizens. At first sight, the CJEU gave a broad interpretation to the journalistic exception provision: “Journalism is all about the disclosure to the public of
information, opinions or ideas, irrespective of the medium used to transmit them. They are not limited to media undertakings but also to every person engaged in journalism and may be undertaken for profit-making purposes.”

After research conclusion had to be made a number of authors placed the judgment within the context of other case-law of CJEU in the light of data protection and freedom of expression and had doubts about whether the Satamedia judgment could be interpreted in such a broad way.

With this judgment, the Finnish Court in the Satamedia case decided to give a narrow interpretation to the journalistic exception in the disadvantage of the two media companies. Consequently, the case was referred to the ECtHR, where the Court concluded there had not been a violation of the freedom of expression as the amount of tax information disseminated did not have the sole purpose of journalism. Priority was given to the right to privacy of the Finnish citizens.

Although the Satamedia judgment of the CJEU and the ECtHR were groundbreaking in the sense that it has shed light on the interpretation of the journalistic exception, especially the conclusion of the ECtHR was detrimental for the freedom of expression.

Besides the abovementioned, it has created even more legal uncertainty, first, on how to approach a recently developed concept of big data journalism where journalists disseminate information of general interest to the public as a result of processing large amounts of personal data.

Fortunately, the European Commission is aware of the importance of big data for increasing the reporting on European issues by making it easier for media companies and journalists to publish on these issues, it has called for proposals that aim to exploit the opportunity to support data-driven reporting. The European Journalism Centre encourages the media industries to address the issues arising from the tension between the processing of big data and the dissemination of information in the general interest of the public through self-regulation.

Second, with the Satamedia case, more unclarity arose on the legal position of citizen journalists. As the media environment is constantly evolving and more people – others than professionals – want to engage in journalism, has become important how this category should be treated and, in particular, whether they fall within the scope of the journalistic exception provision.

Although the concept of citizen journalism is recognised at the level of the European Union, no specific rights and obligations are reached to them.
With this information, it is up to the Member States, after having transposed article 9 of the Directive into national legislation, to interpret the journalistic exception when a processing of personal data has occurred. Four national jurisdictions were submitted to a comparative analysis: Belgium, the Netherlands, France and the United Kingdom.

This national implementation has happened in two ways: through national legislation and through self-regulation within the media industry.

The first strategy concerned the implementation of the Directive into national legislation and application of it in the case law of the State courts. The second strategy consists of the monitoring by specific bodies established as a result of self-regulation, where those bodies can take decisions and formulate advices on the ethics of journalism.

Answers were trying to be sought to questions like who should be considered journalist – and whether this also includes citizen journalists, what publications are to be regarded as ‘for the sole purpose of journalism’ and whether processing of big data still allows reliance on the journalistic exception.

As can be seen from the comparative schemes, fragmentation exists among Member States, even though these Member States – almost – are neighbouring countries. The only aspect on which there exists uniformity is the fact that both in the national State jurisprudence and self-regulatory decision-making, there exists the requirement of only disseminating information that serves the general interest of the public. Publications of personal nature or for sensation are to be banned.

For the rest, fragmentation remains, certainly regarding the legal position of citizen journalists. The explanation for this is twofold: first, insufficient guidance is foreseen at the level of the European Union and, second, the Member States make use of their margin of appreciation on interpreting the journalistic exception in line with what is accepted in accordance with the national policy.

This analysis brings the author of the LL.M. paper to some recommendations.

2 Recommendations

In the opinion of the author, it is not enough to maintain the same definition of the journalistic exception since the transposing of the Directive, as it would only undermine the improvement of journalism and the freedom of expression. Member States should be able to adjust their rules and jurisprudence – though, the downside to this would be the risk for jurisprudential uncertainty - simultaneously with the continuously changing media environment. Member States should be able to react progressively on the most recent developments, such as the appearance of data journalism and citizen journalism.
To take away legal uncertainty among Member States regarding the concept of the journalistic exception, the author presents two different recommendations, which in fact cannot be adopted at the same time.

First recommendation – The European Union could use its power to move towards a maximum harmonisation of the approach on the journalistic exception and take away the margin of appreciation of Member States in this respect. There are some advantages to this. It would create an equal approach on the concept among Member States. The extent of fragmentation would diminish. It would become the European Union Institutions’ duty to provide a no nonsense definition of journalism and what conditions there would exists in ascertaining whether a journalist could rely on the journalistic exception. Member States would face less interpretation issues, as this is the case today and valuable contribution would be made to the changing media environment. The downside to this recommendation is that is would make it detrimental for the Member States to take away their freedom of balancing – margin of appreciation – two fundamental rights. The ECtHR in fact explicitly grants Member States a margin of appreciation in the balancing exercise between the right to privacy and freedom of expression.

Second recommendation – A more workable recommendation would be to leave the freedom to interpret the journalistic exception to the Member States, accompanied with more effective recommendations from the European Union, providing guidelines for the interpreting exercise. It would be useful to make it belong to the European Union’s responsibility to research what is happening in the media field and what should be clarified in order for Member States, when being confronted with situations where a processing of personal data has occurred through a publication, to make the balancing exercise. This does not take away the margin of appreciation of Member States, because they would not be bound to the recommendations of the European Union, but nevertheless triggered to adapt these guidelines in the practice.
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