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Interaction Between Freedom of Expression and Data Protection: *Journalism Exemption* and the *Right to be Forgotten* under the GDPR

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1 Chapter 1: Introduction

1.1 Background and Contextual Information

It has always been of utmost importance for people to keep their lives and personal information safe and private. There have always been locks in houses, banks, and workplaces. Therefore, it can be argued that data protection concerns have always been existing. But did we always need and have complex set of rules and regulations on handling of our personal information? And, if we did not, then why do we need these rules and regulations now?

Today we provide our personal information to many different enterprises while receiving services from them. In the digital age, some of these enterprises maintain personal information belonging to millions of subjects from across the world. Moreover, personal information is worth more today than it has ever been.[1] Our preferences, habits and behaviours are sources of revenue for many companies. There is immensely more interest in our personal information and therefore, there is more at stake and a significantly greater need for protection.

It is for this reason that data protection rules and regulations have been becoming more stringent and more complex all around the world. In many regards, Europe is the pioneer of legal developments in this field and the General Data Protection Regulation ('GDPR')[2] of the European Union ('EU') might be considered the most prominent legal document on data protection.

As the importance of our personal information and the threat towards such information increases in both quantity and quality, it becomes inevitable to have regulations and sanctions for protection. However, this brings tensions and complexities along with its benefits. While data protection turns into a fundamental human right in itself, it is raising questions as to whether too much emphasis of this right might jeopardize other fundamental human rights such as the freedom of expression.[3]

Personal information and data have always been an important source for journalism. As will be discussed in further detail in the later chapters of this thesis, strict rules and sanctions attached to handling of personal information might mean that the freedom of expression and press is limited to a significant extent.

[1] Steel Emily, Callum Locke, Emily Cadman and Ben Freese. "How much is your personal data worth?". *Financial Times*. June 12, 2013. https://ig.ft.com/how-much-is-your-personal-data-worth/#axzz2z2agBB6R.
[2] European Union, Regulation (EC) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), 27 April 2016
[3] See for example: Petkova, Bilyana. "Towards an Internal Hierarchy of Values in The EU Legal Order: Balancing the Freedom of Speech and Data Privacy" *Maastricht Journal of European and comparative law* 23, no. 3 (2016): 421-438. https://journals-sagepub-com.ezproxy.uio.no/doi/abs/10.1177/1023263X1602300303.

This thesis will explore the interaction between data protection and freedom of expression as two very significant human rights in the functioning of democratic societies today and attempt to provide insight into ways in which these two rights can co-exist.

1.2 Questions Addressed

In order to explore the relationship between data protection and freedom of expression, it is important to address a series of legal and practical questions. The following have been identified as the primary questions for this thesis:

- What does the freedom of expression entail?
- What does data protection entail?
- How do different human rights interact with each other?
- In which circumstances do freedom of expression and data protection interact with each other?
- Can data protection and freedom of expression co-exist?
- How to strike a balance and ensure harmony? Should we amend laws or change the ways the current laws are being implemented and enforced in practice?

1.3 Terminologies

In order to sufficiently address the questions above and to engage in a meaningful discussion on data protection and freedom of expression, it is crucial to set forth the definitions and scope clearly from the start.

1.3.1 What does freedom of expression entail?

Freedom of expression is a concept relevant for many different fields of both life and academic studies. Many social studies, studies of ethics as well as legal scholarship deal with this complex freedom in their own ways.[4] This thesis approaches freedom of expression as a human right which have been codified through numerous international treaties as well as constitutions of many countries.

The main documents of reference for this thesis in determining the definition and scope of freedom of expression are the International Covenant on Civil and Political Rights ('ICCPR') [5], European Convention on Human Rights ('ECHR')[6] and the Charter of Fundamental Rights

[4] See for example: Price, Monroe, Nicole Stremlau and Nicole Price. *Speech and Society in Turbulent Times: Freedom of Expression in Comparative Perspective.* Cambridge University Press, 2017.
Zeno-Zencovich, Vincenzo. *Freedom of expression: a critical and comparative analysis.* Routledge-Cavendish, 2008.
Golash, Deirdre. *Freedom of Expression in a Diverse World.* Dordrecht: Springer Science + Business Media, 2010.
[5] United Nations (UN), International Covenant on Civil and Political Rights (ICCPR), 23 March 1976.
[6] Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 3 September 1953.

of the European Union ('CFEU')[7]. While freedom of expression can be discussed with reference to all the different jurisdictions existing today, due to limitations in space, this thesis will engage with freedom of expression mainly within the context of Europe.

According to Article 19 of the ICCPR, right to freedom of expression entails not only the freedom to hold opinion but also includes the right to "*receive and impart information and ideas*".[8] Freedom of expression is defined in similar terms under the ECHR[9] and the CFEU. It is worth noting that the CFEU mentions the freedom and pluralism of the media as well.[10] Another important aspect to note is that the freedom of expression is not defined as an absolute right in any of these documents. There are mentions of duties and responsibilities attached to this right and all relevant documents allow for limitation of the freedom of expression in certain, legally defined circumstances.

It is not possible to discuss freedom of expression without referring to the freedom of press as well. The relevance of the freedom of expression to the freedom of the press has been highlighted on many occasions by the case law of the European Court of Human Rights ('ECtHR'). In *Axel Springer AG v Germany*, the court emphasized that the press has an essential role in democratic societies and without the freedom to receive and impart information and opinions, the press would be unable to perform its duties as the '*public watchdog*'.[11]

In light of the foregoing, freedom of expression entails the right to receive and impart information and opinions for the purposes of this thesis. Moreover, the importance of freedom of expression in ensuring free press and accountability in democratic society is an important element for the discussions in further chapters.

1.3.2 What does data protection entail?

The right to data protection is a relatively new legal concept. Many scholars, such as Erdos, agree that "the idea of ensuring a comprehensive safeguarding of information or data relating to individual natural persons (…) was unknown to any legal system prior to the 1970s"[12]. It is, however, worth noting here that right to data protection had been treated as a "a subset of the right to privacy"[13] in international law.

[7] European Union, Charter of Fundamental Rights of the European Union (CFEU), 14 December 2007.
[8] ICCPR Art. 19
[9] ECHR Art. 10
[10] CFEU Art. 11/2
[11] European Court of Human Rights, *Axel Springer AG v. Germany*, no. 39954/08 (7 February 2012) § 79 [emphasis added]
[12] Erdos, David. *European Data Protection Regulation, Journalism, and Traditional Publishers: Balancing on a Tightrope?*. Oxford University Press, 2020. 36.
[13] Lynskey, Orla. "Deconstructing Data Protection: The 'Added-Value' of a Right to Data Protection in the EU Legal Order." *International & Comparative Law Quarterly* 63, no. 3 (2014): 569-597. https://doi.org/10.1017/S0020589314000244. 570.

Unlike other international documents, such as the ECHR, the CFEU included the right to data protection as an independent right in 2000[14]. Article 8 of the CFEU states that everyone has the right to the protection of personal data concerning him or her[15], and that "such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law"[16].

Lynskey argues that the EU has failed to provide reasons for including right to data protection as an individual right in the CFEU and that has led scholars to suggest justifications[17]. For example, some suggested that the "right to data protection was introduced in order to bolster the legitimacy of EU data protection law by emphasizing the fundamental rights dimension of the Data Protection Directive"[18].

To summarise, the right to data protection entails the right of every individual to protect their personal data as well as the duty to process personal data of individuals in accordance with laws. In this sense, the right to data protection is wider as a concept than the specific data protection rules set out to ensure realisation of the right to data protection rights.

Data protection rules entail "*rules relating to the protection of natural persons with regard to the processing of personal data and rules relating to the free movement of personal data*".[19] In scholarship, data protection rules have also been defined as "a set of measures (legal and/or non-legal) aimed at safeguarding persons from detriment resulting from the processing of information on them and embodying all or most of the groups of principles on processing of personal information".[20] As for scope, this thesis will refer mainly to the European data protection framework. Accordingly, data protection rules will be defined with reference to the GDPR.

Personal data includes *"any information relating to an identified or identifiable natural person".*[21] To elaborate, any information which may lead to the identification of a particular individual, in itself or in combination with other information would be deemed personal data.[22] For example, name, an identification number, location data[23] , address[24] and Internet Protocol

[14] CFEU Art. 8, Lynskey, "Deconstructing Data Protection," 569.
[15] CFEU Art. 8/1
[16] CFEU Art. 8/2
[17] Lynskey, "Deconstructing Data Protection," 570.
[18] Lynskey, "Deconstructing Data Protection," 570.
[19] GDPR Art. 1/1
[20] Bygrave, Lee A. "An international data protection stocktake @2000 Part 1: regulatory trends." *Privacy Law and Policy Reporter* 7, no. 6(8) (2000). https://www8.austlii.edu.au/cgi-bin/viewdoc/au/journals/PLPR/2000/7.html. Footnote 1.
[21] GDPR Art. 4/1
[22] European Commission. "What is personal data?". Accessed December 1, 2021. https://ec.europa.eu/info/law/law-topic/data-protection/reform/what-personal-data_en.
[23] GDPR Art. 4/1
[24] Court of Justice of the European Union, College van burgemeester en wethouders van Rotterdam v. M.E.E. Rijkeboer, C-553/07, (7 May 2009). §42

(IP) address[25] can all be personal data. Moreover, the Court of Justice of the European Union ("CJEU") has established in its case law that date and place of birth, nationality, marital status and sex are also personal data[26].

It is important to note that although data protection is often referred also as data privacy, data protection is not the same as right to respect for private and family life as defined, for example, in Article 8 of the ECHR. The right to respect for private and family life essentially aims to protect individuals from unlawful interference by the state.[27] In other words, the right to private life imposes obligations directly on the state[28].

For accuracy, it is important to note here that *the subject* of the obligations under the right to respect for private and family life under international conventions is the state. However, within the scope of these obligations, the state might impose obligations on individuals in that state to refrain from interfering with the private and family life of others in the society. These obligations are imposed by the state on the individuals and not directly by the international conventions on the individuals.

Data protection, on the other hand, entails set of rules which clearly regulate what public or private legal entities may or may not do in relation to the personal data of individuals. Therefore, unlike the right to respect for private and family life, which directly addresses the states, data protection rules are addressing the public and private legal entities which during the course of their operations deal with personal data.

The difference between the substance of the right to data protection and right to privacy can perhaps be demonstrated best by looking at the CFEU. As explained above, CFEU is a unique international legal document because it includes the right to data protection as an individual and independent right from the right to privacy. Article 7 of the CFEU states that "everyone has the right to respect for his or her private and family life, home and communications"[29]. This article is protecting the right to privacy which entails respect for an individual's private life and home.

Article 8 of the CFEU, on the other hand, is on the right to data protection. This article states that "everyone has the right to the protection of personal data concerning him or her"[30]. In its substance, Article 8 on the right to data protection is narrower and it addresses specifically the protection of individuals' personal data.

In the absence of an independent right to data protection, protection of one's personal data can be argued to fall within the scope of one's private life. Therefore, it is possible to say that the

[25] Court of Justice of the European Union, Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM), C-70/10, (24 November 2011). §51
[26] Court of Justice of the European Union, Heinz Huber v. Bundesrepublik Deutschland, C-524/06, (16 December 2008). §31, 43
[27] ECHR Art. 8
[28] ECHR Art. 8, ICCPR Art. 17
[29] CFEU Art. 7
[30] CFEU Art. 8/1

right to privacy is a wider right which might encompass protection of personal data. However, the right to data protection is a narrower right and refers only to the protection of personal data and not to the other aspects of an individual's private and family life.

1.4 Methodology and Sources

The primary sources of this thesis will be legal materials such as legislation and cases as well as work of legal scholars. Drawing upon these sources, the laws will be addressed both as they currently stand (*lex lata*) and as they arguably should be (*de lege ferenda*). Gaps and inconsistencies in the current laws will be discussed.

Special attention will be paid to legal developments within Europe and the European Union. Yet references will be made to other jurisdictions as well, both to provide examples and to display the universality of the interaction between data privacy and freedom of expression and its practical consequences.

As this thesis is aiming to explore the interaction between these legal concepts in practice as well as in theory, statistical data will be used. Statistical data from online service providers regarding removal requests based on data privacy laws will help assess the current trends and shine a light on the real-life impact of the interaction between the relevant concepts.

1.5 Structure of the Thesis

This thesis consists of four chapters including this introduction and a conclusion.

In the second chapter, I will be looking at the interaction between data privacy and freedom of expression both from the wider human rights perspective and based on the special circumstances in which these two legal concepts interact with each other. Arguments around whether data privacy and freedom of expression can co-exist will be elaborated in this chapter, with special attention to the *journalism exemption* and *right to be forgotten* in the GDPR.

The third chapter will focus on striking a balance and ensuring harmony between these two legal concepts. In doing so, I will be focusing on the development of privacy laws over time and the ways in which these developments might have impacted the relationship between data privacy and freedom of expression. Moreover, this chapter will pay attention to the applications of the current laws in an attempt to explore whether a change in practice could help striking a better, more fair balance between data privacy and freedom of expression.

At last, I will conclude the thesis with my observations and recommendations.

2 Chapter 2: Interaction between Data Privacy and Freedom of Expression

2.1 Interaction Between Human Rights

The interaction and relationship between different human rights have always been an important aspect of international human rights law. There are different ways to approach this interaction and define the relationship between different rights.

Here, I would like to focus on the concept of the indivisibility of human rights. The United Nations ("UN") defines the relationship and interaction between different human rights based on this concept.[31] *"Indivisibility is the idea that no human right can be fully realized without fully realizing all other human rights"*.[32]One obvious consequence of this concept is that states may not pick and choose which human rights they will implement. Ideally, for full realisation of the rights, all human rights should be effectively implemented.

To explain the concept with an example, one might argue that human rights do not exist in isolation, and they become meaningful through interacting with each other. A good example of this might be the interaction between the right to life under the ICCPR[33] and the right to work and right to health under the International Covenant on Economic, Social and Cultural Rights ("ICESCR")[34]. While the right to life ensures that individuals are protected against being deprived of their life, right to work and right to health ensure that individuals can live healthy, meaningful lives.

Although UN adopts the concept of indivisibility, this is not to say that the interaction between different rights is always smooth and without problems in practice. There have been many occasions where different rights such as the right to education and freedom of religion[35] came head-to-head. In such instances, the courts have been asked to balance the rights and reach a fair outcome.

This thesis is focusing on the interaction between two specific rights: data protection and freedom of expression. The aim is to discuss the ways in which these two rights strengthen each other and conflict with one another, keeping in mind the indivisibility of human rights. What makes this interaction very interesting is the fact that both data protection and freedom of expression do not offer absolute protection to individuals and both of these rights are subject to limitations.

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[31] United Nations (UN), Proclamation of Teheran, Final Act of the International Conference on Human Rights, April 22-May 13, 1968. §13

[32] Nickel, James W. "Rethinking Indivisibility: Towards A Theory of Supporting Relations between Human Rights." *Human Rights Quarterly* 30, no. 4 (2008): 984-1001. Project MUSE. 984. https://doi.org/10.1353/hrq.0.0046.

[33] ICCPR Art. 6

[34] United Nations (UN), International Covenant on Economic, Social and Cultural Rights (ICESCR), 3 January 1976. Art. 6, 12

[35] European Court of Human Rights, *Osmanoglu and Kocabas v. Switzerland*, no. 29086/12 (10 January 2017)

2.2 Interaction Between Data Protection and Freedom of Expression

It is clear that today's world revolves around the internet. 4.66 billion people on earth are using internet actively.[36] More than 8 out of 10 people in the United States access news online through their mobile devices or computers.[37] An average person spends 145 minutes every single day on social media platforms.[38] This shows that we rely on internet for our social needs such as being informed about the news and expressing ourselves socially.

Freedom of expression and data protection are closely related with the internet and our interaction with it. Freedom of expression enables us to express ourselves freely online. It also enables journalists to impart information. Data protection, on the other hand, makes sure that our information online is protected. While both of these rights are crucial for our presence on the internet, in certain circumstances they clash with one another.

One good example is the data protection claims against the media. Glanville terms this "*as a new form of reputation management*".[39] In other words, protections offered under the data protection regulations like the GDPR, has the potential to limit freedom of expression and press.[40] Scholars argue that data protection claims are more likely to succeed, compared to traditional libel claims, as data protection claims are not subject to time limitation, there is no requirement to demonstrate harm and the authors cannot defend themselves based on truth or honest opinion.[41]

However, it is equally important to note that freedom of expression and data protection can interact to make each other stronger as well. Therefore, their interaction does not always present itself as a clash, but it also gives rise to stronger protection and aid the realization of human rights. For example, protection of journalists' personal data might play a critical role in enabling them to exercise their freedom of expression. In that respect, data protection should be protected and promoted both as an important right in itself and as "*fundamental prerequisite to free expression, thought and information*".[42] This will be explained in detail below.

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[36] Statista. "Global digital population as of January 2021" Accessed December 1, 2021. https://www.statista.com/statistics/617136/digital-population-worldwide/.
[37] Shearer Elisa. "More than eight-in-ten Americans get news from digital devices". *Pew Research Centre*. January 12, 2021. https://www.pewresearch.org/fact-tank/2021/01/12/more-than-eight-in-ten-americans-get-news-from-digital-devices/.
[38] Statista. "Daily time spent on social networking by internet users worldwide from 2012 to 2020" Accessed December 1, 2021. https://www.statista.com/statistics/433871/daily-social-media-usage-worldwide/.
[39] Glanville, Jo. "The Journalistic Exemption." *London Review of Books* 40, no. 13 (2018). https://www.lrb.co.uk/the-paper/v40/n13/jo-glanville/the-journalistic-exemption.
[40] Glanville, "The Journalistic Exemption".
[41] Glanville, "The Journalistic Exemption"., Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.
[42] Nyst, Carly. "Two sides of the same coin – the right to privacy and freedom of expression". *Privacy International*. February 2, 2018. https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression.

In light of the foregoing, I will now take a closer look at the interaction between these two rights and present arguments for the different potential consequences of that interaction. This section will attempt to provide answers to the question of whether freedom of expression and privacy can co-exist.

2.2.1 Co-Existence

2.2.1.1 Journalism Exemption

The European lawmakers seem to be well aware of the importance of the interaction between freedom of expression and data protection. This becomes clear upon reading the recitals and Article 85 of the GDPR.

Recital 153 calls upon member states to "*reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data*".[43] Moreover, lawmakers refer to the importance of freedom of expression in democratic societies and urge member states to "interpret notions relating to" the right to freedom of expression, "such as journalism, broadly".[44]

This interaction has been addressed in the binding sections of the GDPR as well. Article 85 of the GDPR explicitly allows exemptions or derogations from its provisions when they are necessary for the reconciliation for data protection with the freedom of expression.[45] This exemption includes journalistic, academic, artistic and or literary expression, but I will refer to it as the "*journalistic exemption*" in the upcoming sections, for ease of reference.

While the EU's intentions for the co-existence is clear from the wording of the mentioned parts of the GDPR, it is helpful to make a comparison with the previous Directive 95/46/EC[46] ("EU Directive") to understand the direction EU is moving towards.

The predecessor of the GDPR, the EU Directive also included a provision on exemptions or derogations from data protection rules for processing activities carried out solely for journalistic purposes or the purpose of artistic or literary expression.[47] The Directive's wording was narrow and restrictive.[48]

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[43] GDPR Rec. 153 [emphasis added]
[44] GDPR Rec. 153
[45] GDPR Art. 85
[46] European Union, Directive 95/46/EC of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (EU Directive), 24 October 1995
[47] EU Directive Art. 9
[48] Erdos, David "From the Scylla of restriction to the Charybdis of licence? Exploring the scope of the "special purposes" freedom of expression shield in European data protection." *Common Market Law Review* 52, no. 1 (2015): 119-153, https://kluwerlawonline.com/journalarticle/Common+Market+Law+Review/52.1/COLA2015005. 144.

First of all, since the EU Directive refers only to journalistic, artistic, and literary purposes, the protection has been limited almost exclusively to the activities of journalists, artists, and writers.[49] Moreover, the EU Directive's use of the word "solely" takes the restrictive approach even further as it could "*easily be read as requiring a strict exclusivity of purpose*"[50] which has impacted the EU data protection authorities' interpretation and application of the provision.

David Erdos demonstrates this impact on EU data protection authorities with reference to a survey[51]. The survey included a question regarding "a website freely available on the Internet allowing individuals to 'rate' and add comments about their teachers"[52]. The aim of the question was to assess the data protection authorities' interpretation as to the application of data protection rules to this website. "Of the thirty standardized responses to this particular question, none considered the special purposes provision applicable"[53]. In other words, none of the data protection authorities responding to the survey considered the protection offered under the EU Directive for freedom of expression to be applicable to this website. Half of the data protection authorities stated that data protection rules apply to the website, but the data protection rules must be interpreted by taking into account other fundamental rights, including freedom of expression. Fourteen data protection authorities which took part in the survey, amounting to 47% of all participants, did not even mention freedom of expression and stated that the data protection rules would apply to the website in full[54].

What this survey shows is that while the exemption under data protection law for freedom of expression might apply to activities which are solely and obviously for journalistic, artistic, and literary purposes, its application to other activities which may also be considered within the scope of freedom of expression is not as clear. The way data protection rules phrase the freedom of expression exemption might result in a very limited application of the exemption[55] and consequently, might mean that the exemption does not, in fact, provide the protection that it is aiming to provide.

While the EU Directive includes the term "solely", the GDPR does not have this term and allows for the exemptions to apply "for processing carried out for journalistic purposes or the purpose of academic artistic or literary expression".[56] Legal scholars agree that the wording of the GDPR means that the exemption is broader in scope.[57]

However, it is important to note here that the amendments to the freedom of expression exemption under the GDPR does not go as far as some scholars suggested during the drafting process. For example, Erdos suggested that ""journalistic purposes" should be replaced with

[49] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 144.
[50] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 144.
[51] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 144.
[52] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 134-135.
[53] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 134-135.
[54] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 134-135.
[55] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 144.
[56] GDPR Art. 85
[57] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 32.

the broader concept of "all activities which aim at or instantiate disclosure to the public of information, opinions or ideas"".[58] GDPR's wording is significantly narrower than Erdos's suggestion.

2.2.1.2 Positive Impact of Data Protection on the Exercise of Freedom of Expression

The journalism exemption in the GDPR is not the only way in which data protection and freedom of expression co-exists in a harmonic manner. Some experts argue that protecting the right to data protection is a fundamental prerequisite to realize other human rights including the freedom of expression.[59]

Calderon focuses on the measures taken by the authorities during the Covid-19 pandemic.[60] For example, in Peru, due to a number of measures taken by the Executive Branch, a significant amount of personal data has been collected from individuals. Moreover, databases including personal data which were originally set for limited purposes, have been made accessible to hundreds of public workers. It was clear that both during the collection of data from individuals and access by public workers to large quantities of personal data, the level of protection was low, and these processing activities have been subject to "very few and insufficient regulatory provisions".[61]

More interestingly for our purposes, these measures resulted in the government having a comprehensive list of all journalists in the country.[62] This was due to the rules that required journalists to fill out forms with their personal data in order to obtain a pass to continue doing their work during the pandemic.[63] As explained above, there were few or no protections regarding processing of their personal data fairly and duly. Calderon rightly notes that processing of the journalists' personal data in that manner can be detrimental for investigative journalism[64], and it can also prove to have serious negative consequences for media personnel when their data is accessible to all government agencies, including the police and the military.[65]

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[58] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 148.
[59] Nyst, Carly. "Two sides of the same coin – the right to privacy and freedom of expression". *Privacy International*. February 2, 2018. https://privacyinternational.org/blog/1111/two-sides-same-coin-right-privacy-and-freedom-expression.
[60] Calderon, Andres, Susana Gonzales and Alejandra Ruiz. "Privacy, personal data protection, and freedom of expression under quarantine? The Peruvian experience." *International Data Privacy Law* 11, no. 1 (2021): 48-62. https://doi.org/10.1093/idpl/ipab003.
[61] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 54-59.
[62] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.
[63] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.
[64] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.
[65] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.

Especially in countries where freedom of expression and freedom of the press are weak, journalists might become vulnerable to the authorities if sufficient and meaningful protection of their personal data is not in place. This might result in a chilling effect and would eventually render the role of the media as the public watchdog irrelevant in these societies.[66]

In Szabo and Vissy v. Hungary, the ECtHR ruled on a complaint filed by two applicants, who were staff members of a non-governmental organisation raising objections to the government in Hungary, concerning mass surveillance by police forces[67]. In this case, ECtHR highlighted the importance that the applicants were "staff members of a watchdog organisation, whose activities have previously been found similar, in some ways, to those of journalists"[68]. ECtHR has also acknowledged and accepted the applicants' claim that "any fear of being subjected to secret surveillance might have an impact on such activities"[69]. Therefore, it can be concluded that protection of personal data of journalists and all media staff in itself can be a precondition for these people to conduct their work independently and without having to bear the risk of their data being used against them.

In Peru, the national lockdown ended on 30 June 2020.[70] Therefore, the requirement for journalists to obtain passes was lifted.[71] However, how the data was handled and whether the data has been duly deleted after the end of the measures are unclear.[72]

It is worth noting that data protection carries a fundamental value for the realization of freedom of expression not only for journalists, but also for each and every one of us as individuals. Borgesius and Steenbruggen argue that the privacy of communications protects our freedom to express ourselves and impart our opinions freely.[73]

Borgesius and Steenbruggen's work on the privacy of communications focuses on the question as to whether the GDPR is sufficient in itself to protect confidentiality of communications or there is need for additional rules[74]. They conclude that having another, more specific EU legislation on privacy of communication might be necessary and justifiable.[75]

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[66] See for example: Reventlow, "Can the GDPR and Freedom of Expression Coexist," and Fazlioglu, Muge. "Forget me not: the clash of the right to be forgotten and freedom of expression on the Internet." *International Data Privacy Law* 3, no. 3 (2013): 149-157. https://doi.org/10.1093/idpl/ipt010. For discussion on a possible chilling effect.

[67] European Court of Human Rights, *Szabo and Vissy v. Hungary*, no. 37138/14 (12 January 2016) §7

[68] European Court of Human Rights, *Szabo and Vissy v. Hungary*, no. 37138/14 (12 January 2016) §38

[69] European Court of Human Rights, *Szabo and Vissy v. Hungary*, no. 37138/14 (12 January 2016) §38

[70] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.

[71] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.

[72] Calderon, Gonzales and Ruiz "Privacy, personal data protection, and freedom of expression under quarantine?," 59.

[73] Borgesius, Frederik J. Zuiderveen and Wilfred Steenbruggen. "The Right to Communications Confidentiality in Europe: Protecting Privacy, Freedom of Expression, and Trust." *Theoretical Inquiries in Law* 19, no. 2 (2018): 290-322. http://dx.doi.org/10.2139/ssrn.3152014. 298.

[74] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 291.

[75] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 321-322.

To provide a brief overview of the current EU regime on privacy of communications, the EU already has a e-Privacy Directive[76] from 2002. This directive aims to ensure "an equivalent level of protection of fundamental rights and freedoms, and in particular the right to privacy, with respect to the processing of personal data in the electronic communication sector and to ensure the free movement of such data and of electronic communication equipment and services"."[77].

In 2017, the European Commission drafted a proposal for a Regulation on e-Privacy[78].The aims for reforming the EU e-Privacy legislation have been indicated as (i) the need for keeping up «with the fast pace at which IT-based services are developing and evolving» and (ii) the need to adapt a new legislation on privacy of communications that is in line with the new data protection rules under the GDPR[79].

Borgesius and Steenbruggen's discussions come within this context. They are essentially assessing the need for a new regulation to replace the current e-Privacy Directive.

In looking at the ways in which data privacy, privacy of communications and the freedom of expression interact with each other, Borgesius and Steenbruggen recognize that the interaction may both be positive and negative.[80] For example, right to data privacy might ensure that "people can freely exchange politically sensitive information without fearing interception and prosecution by the authorities"[81]. In doing so, data protection, or more specifically the right to privacy of communications might have a positive impact on the realisation of freedom of expression.

However, privacy of communications might conflict with freedom of expression[82] as well, and these two rights might have negative impact on each other. "A conflict could arise, for instance, if a journalist wanted to access telephone conversations between U.S. President Trump and Prince Mohammed bin Salman of Saudi Arabia regarding the disappearance of journalist Jamal Khashoggi".[83] In such instances, it is important to carefully assess whether there is a clash between confidentially of communications and freedom of expression and, if there is such a clash, it should also be evaluated how the clash could be resolved, by deciding which interest weighs more based on the relevant facts of each case.[84] In this complex relationship between

[76] European Union, Directive 2002/58/EC of the European Parliament and of the Council concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), 12 July 2002 ("e-Privacy Directive")
[77] e-Privacy Directive Art. 1
[78] European Union, Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications), 10 January 2017
[79] European Commission. "Proposal for an ePrivacy Regulation". Accessed December 10, 2021. https://digital-strategy.ec.europa.eu/en/policies/eprivacy-regulation.
[80] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 298.
[81] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 298-299.
[82] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 299.
[83] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 299.
[84] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 299.

right to data protection, right to privacy of communications and freedom of expression, Borgesius and Steenbruggen indicate that they expressly choose to focus on the role of privacy "as a facilitator of freedom of expression".[85]

This ties in with the general discussion herein as it is demonstrating that privacy of communications, which is closely related to the right to privacy and right to data protection, has a relationship with freedom of expression which resembles that between freedom of expression and data protection. It can have a positive impact on freedom of expression by giving people the security of imparting opinions and ideas without fearing interference with authorities. However, it might also have possible negative consequences.

UNESCO also engages in a discussion on the impact of privacy of communications on freedom of expression and argues that "respect for privacy of communications is a prerequisite for trust by those engaging in communicative activities, which is in turn a prerequisite for the exercise of the right to freedom of expression".[86]

In the example UNESCO provides, a Chinese journalist is being imposed a 10-year sentence for an e-mail about the anniversary of the 1989 Tiananmen 97 Square protests. In this case, the relevant e-mail services provider provided the Chinese government access to the journalist's email account to their upon request. Based on these e-mails, the journalist has been convicted for disclosing national secrets.[87]

2.2.2 Clash

The interaction between data protection and freedom of expression is very complex. As outlined above, there are convincing arguments as to how data protection and freedom of expression strengthen one another and co-exist with mutual benefits. For others, however, it is not easy to see how these two rights can co-exist. Post raises the question as to how we can talk about co-existence or balancing when data protection and freedom of expression "presuppose mutually exclusive social domains".[88]

In this section, I will be looking at the ways in which data protection rules might be hindering freedom of expression.

2.2.2.1 Journalism vs. Data Protection

[85] Borgesius and Steenbruggen, "The Right to Communications Confidentiality in Europe," 299.
[86] Mendel, Toby, Andrew Puddephatt, Ben Wagner, Dixie Hawtin and Natalia Torres. *Global Survey on Internet Privacy and Freedom of Expression.* Paris: UNESCO, 2017. 95.
[87] Mendel, *Global Survey on Internet Privacy and Freedom of Expression*, 96-97.
[88] Post, Robert C. "Data Privacy and Dignitary Privacy: *Google Spain*, the Right to Be Forgotten and the Construction of the Public Sphere." *Duke Law Journal* 67 (2018): 981-1071. https://scholarship.law.duke.edu/dlj/vol67/iss5/2. 1006.

Reventlow, who has written on the journalism exemption under the GDPR, and who has also praised it for offering a wider protection to freedom of expression compared to former regulations[89], also criticizes the shortcomings of that exemption.[90] She focuses specifically on the fact that the GDPR leaves it up to the member states to decide on the concrete measures to be taken in order to ensure co-existence of freedom of expression and data protection[91]. In doing so, the GDPR paves the way for a very fractured landscape for the protection of freedom of expression.[92] Therefore, even though *the inclusion of the journalism exemption* in the data protection rules might be an argument for the data protection and freedom of expression to co-exist (as discussed above), *the way the journalism exemption is formulated* may still be criticised for contributing to the hindrance of freedom of expression by data protection rules.

When the GDPR leaves it up to the states to decide concrete measures themselves, states may adopt national legislations that might or might not offer the "the same level of protection to the right to freedom of expression and freedom of the press that international law does".[93]Alternatively, they might not adopt any such measures in practice or delay significantly in adopting such measures. This in practice would mean that the journalism exemption might not be applicable or at least that the effectiveness would vary significantly between member states.[94] Writing about this issue, Monteleone refers specifically to Romania, Slovakia, and Bulgaria. For example, the implementation of the GDPR rules into Romanian law does not provide a journalistic exemption[95].

One possible result of this fractured landscape would be creation of "*havens*" within Europe.[96] Especially journalists and news agencies working in multiple jurisdictions and online might be in a difficult situation to estimate the extend and scope of the journalism exemption in different European states. This uncertainty would certainly pose difficulties for search engines as well operating across the globe.[97] Moreover, it can lead the way to forum shopping for individuals. For example, individuals or entities that would like to limit access to news about themselves might choose to bring their claims in the jurisdictions that offer a narrower scope of journalism exemption. The impact would be a chilling effect for journalists not only in these countries but across Europe.[98]

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[89] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 32.
[90] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 32.
[91] GDPR Rec. 153, Art. 85
[92] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 32.
[93] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 33.
[94] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 33.
[95] Cunha, Mario Viola de Azevedo and Shara Monteleone. "Data protection, freedom of expression, competition and media pluralism: challenges in balancing and safeguarding rights in the age of Big Data." In *Research handbook on EU media law and policy,* 235-248. Cheltenham, Glos/Northampton, Massachusetts: Edward Elgar Publishing Limited, 2021. 244.
[96] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.
[97] Singleton, Shaniqua. "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD." *Georgia Journal of International and Comparative Law* 44, no. 1 (2015): 165-194. https://digitalcommons.law.uga.edu/gjicl/vol44/iss1/6. 185.
[98] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 33.

A narrower protection of freedom of expression and press in some member states is the first problem.[99] The second problem is the weaponization of the data protection rules against journalists in many countries[100]. Information is the main source of journalism. Journalists rely on information to create news stories and to undertake their reporting activities. This information might include what is defined as personal data under data protection rules. Consequently, journalists might be subject to data protection rules, which might restrict the way they use data. Naturally, this might have a significant impact on their journalistic activities.

Moreover, journalists who rely on secret sources to investigate serious allegations, such as corruption might be particularly affected. In Slovakia, due to lack of sufficient protection for journalistic purposes, data protection regime is used against journalist who are forced to reveal their sources.[101] In Romania, the Data Protection Authority has requested journalists who worked on a very significant corruption investigation to reveal their sources. Their investigation was strategic as it involved a high-ranking politician. European Commissions issued warnings on the matter and the case is still ongoing.[102]

The third problem relates to the public's interest in accessing information when it comes in conflict with an individual's right to data protection laws. The EU data protection rules do not provide much room for general public interest to override in cases of conflict.[103] Although there are exemptions expressly provided with the purpose of protection of freedom of expression[104], the lack of protection of a general public interest means that the public's right to information is left with little or no protection. This is the case even though data protection is not an absolute right, and it may be subject to limitations and be overridden by the right of the others including the right to seek, receive and impart information and ideas.[105]

2.2.2.2 Right to be Forgotten

Under the GDPR, individuals whose personal data is being processed (referred as data subjects) have extensive rights. Considering the imbalance between the corporation processing mass amounts of data and the individuals, GDPR is creating a balance of powers by giving these extensive rights to the data subjects. However, as with everything else, these rights might also have implications on other rights.

One specific right that I would like to focus is the right to erasure regulated under Article 17 of the GDPR.[106] The right to erasure is also widely known as *the right to be forgotten*.

[99] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 33.
[100] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.
[101] Cunha and Monteleone, "Data protection, freedom of expression, competition and media pluralism," 245.
[102] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.
[103] See for example: Mendel, *Global Survey on Internet Privacy and Freedom of Expression,* 101.
[104] GDPR Art. 85
[105] Mendel, *Global Survey on Internet Privacy and Freedom of Expression,* 107.
[106] GDPR Art. 17

Pursuant to Article 17, data subjects have the right to request erasure of their personal data from the relevant entities. Right to erasure is not absolute and the entities are obliged to comply with the erasure request only where certain grounds apply. These grounds apply in situations including when (i) the data is "no longer necessary in relation to the purposes for which they were collected"[107], (ii) the individual withdraws consent and (iii) the data processing was unlawful.

In a world where our personal data is being collected by almost every legal entity we interact with as consumers, suppliers, or employees, it is of utmost significance that we, as individuals have the right to request these legal entities to remove our data in certain circumstances. On the other hand, some of these legal entities, especially journalists, online news websites or search engines indexing information on those websites would have to process personal data in order to exercise the freedom of expression. It is for these reasons I wanted to focus on the right to be forgotten among the data subjects' rights under the GDPR.

Right to be forgotten is a relatively new term. However, right to erasure has not been introduced by the GDPR. Under the EU Directive, data subjects have had the right to ask their data to be erased in certain circumstances as well.[108]

The term *right to be forgotten* made the headlines after Google Spain judgment[109]. CJEU's Google Spain judgment relates to a complaint lodged by an individual against Google Spain and Google Inc. regarding removal of his personal data from the Google search results.[110] The judgment dealt with very central questions, including the status of a search engine operator as a "data controller"[111] and the determination of whether an "establishment" exists when a foreign company is operating within the EU.[112] However, for our purposes, the most important element of this judgment is the approach taken by the CJEU in balancing the data protection rules and the freedom of expression. It is worth noting here once again that the freedom of expression entails the freedom to both imparting and *receiving* information and ideas.[113]

In this case, the individual argued that he should be able to oppose to the processing of his personal data by the search engine operator in order to index the content available on third party websites where his fundamental rights to data protection and privacy are being negatively affected.[114] He also argued that his rights to data protection and privacy should override both the search engine operator's interests and the general public's interest in receiving information.[115]

[107] GDPR Art. 17/1 (a)
[108] EU Directive Art. 12 (b)
[109] Court of Justice of the European Union, Google Spain SL, Google Inc. v. Agencia Española de Protección de Datos (AEPD), Mario Costeja González, C-131/12, (13 May 2014). ("Google Spain")
[110] Google Spain §15
[111] Google Spain §41
[112] Google Spain §60
[113] CFEU Art. 11
[114] Google Spain §91
[115] Google Spain §91

In the judgment, CJEU pointed out that the data processing activities which are carried out by the search engine operator might affect the fundamental rights to privacy and protection of personal data "when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet — information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty — and thereby to establish a more or less detailed profile of him"[116].

Considering the potential impact of the search engine operator's processing activity on the individual concerned, CJEU concluded that such a processing activity cannot be justified merely on the basis of the search engine operator's economic interests[117]. That said, CJEU also referred to the "legitimate interest of internet users potentially interested in having access to that information" and indicated that "a fair balance should be sought in particular between" the interest of the internet users and the individual's right to data protection[118].

As for the fair balance, the CJEU noted that the individual's right to privacy and right to data protection override, "as a general rule, that interest of internet users, that balance may however depend, in specific cases, on the *nature of the information in question* and *its sensitivity for the data subject's private life* and *on the interest of the public in having that information*, an interest which may vary, in particular, according to the *role played by the data subject in public life*"[119].

The CJEU makes a distinction between the activities of the search engine operator and the publishers of websites[120]. Accordingly, the CJEU indicates that "the processing by the publisher of a web page consisting in the publication of information relating to an individual may, in some circumstances, be carried out 'solely for journalistic purposes' and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine"[121]. The CJEU notes that in certain circumstances the individual might be able to exercise its right to data protection against the search engine operator but not against the publisher of a website[122]. The distinction between the search engine operator and the publisher of the website is explained by the differences in the (i) legitimate interests justifying the processing and (ii) "consequences of the processing for the data subject, and in particular for his private life"[123]. The CJEU also notes that "since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and

[116] Google Spain §80
[117] Google Spain §81
[118] Google Spain §81
[119] Google Spain §81 [emphasis added]
[120] Google Spain §83
[121] Google Spain §85
[122] Google Spain §85
[123] Google Spain §86

of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page"[124].

After engaging with the foregoing discussions, the court concludes that "the operator of a search engine is obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in a case where that name or information is not erased beforehand or simultaneously from those web pages, and even, as the case may be, when its publication in itself on those pages is lawful"[125].

This case has been an important example of a direct clash between data protection and the freedom of expression. While the need for a balance between data protection and freedom of expression has long been known[126], this case showed what the balancing exercise may look like in practice.

Google Spain case involved a tension between an individual's right to data protection and privacy and (i) the general public's right to access and receive information, (ii) the search engine operator's right to impart information and (iii) the original article's author's right to impart information.[127] As the original article which was indexed on the search engine was a news article, the case concerned the freedom of press as well.

As for the tension with the right to receive information, the CJEU established that "since one right cannot always trump the other, these competing justifications necessarily result in tension between the right to be forgotten and the right to freedom of expression".[128] However, based on the specific facts of the case, CJEU ruled in favour of the individual indicating the individual's rights and interests override the freedom of expression interests as far as the search engine operator and the search engine users are concerned. The CJEU left the door open for the possibility of upholding the rights of the publisher of the website.

Some scholars argue that although freedom of expression is protected under the CFEU and despite the fact that data protection rules shall not be considered to have a higher effect than

[124] Google Spain §87
[125] Google Spain §88
[126] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 178.
[127] Kulk, Stefan and Frederik Zuiderveen Borgesius. "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain." *European Data Protection Law Review* 1, no. 2 (2015): 113-124. https://heinonline-org.ezproxy.uio.no/HOL/P?h=hein.journals/edpl1&i=127. 114-115.
[128] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 180.

freedom of expression, "*the CJEU upholds the right to be forgotten at the expense of-in some cases-the freedom of expression and information*".[129]

It is possible to both agree and disagree with this claim. On the one hand, the CJEU makes a significant distinction between the search engine operator and the publisher of the website, and the court expressly indicates that a claim based on data protection, which might succeed against the search engine operator, might not be able to succeed against the publisher of the website[130]. This might be interpreted as demonstrating the CJEU's willingness to uphold and protect freedom of expression and information when a publisher and a news article is concerned. In this sense, it is possible to argue that the CJEU does not uphold the freedom of expression or the right to data protection at the expense of one another.

However, the CJEU's judgment might also be interpreted as a willingness to uphold the data protection rights over the freedom of expression and information. While the CJEU seems to acknowledge and give regard to the freedom of expression and information in the case of the publisher and the original article, the court seems to disregard these freedoms with respect to the search engine operator and the users of the search engine operator. Considering the gravity of the reliance of internet users on search engines to access information, and the important role search engines play in facilitating access to information in today's world, it might be argued that the CJEU should have taken into account the freedom of expression and information aspect with respect to the search engines as well. One might even argue that the freedom of expression of the search engine operator and the freedom of information of the search engine users should have overridden the individual's right to data protection.

Moving on from the Google Spain case to the right to be forgotten in general as a right under the GDPR, the journalism exemption might help striking a balance and easing the tension between the right to be forgotten and the freedom of expression. Journalism exemption urges states to take into account the freedom of expression when applying data protection rules. Having regard to both data protection and freedom of expression in cases where these two rights might clash would prevent one of these rights to be upheld at the expense of the other. However, not everyone is in agreement that this exemption offers meaningful protection to freedom of expression.

Some scholars instead choose to highlight internet actors such as search engine operators in this context because "an immense amount of information is available" [131] on the internet and search engines play a critical role in enabling people to access online information. "Without a search engine, online information about people would be laborious to find" [132]. Fazlioglu is among

[129] See for example Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 180.
[130] Google Spain §85
[131] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 113.
[132] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 113-114.

them and addresses two important issues. Firstly, she focuses on the limited scope of the journalism exemption, in particular to the protection offered by the journalism exemption on the search engines and social media platforms. She notes that in order to fall within the scope of the protection offered to journalistic, artistic, and literary expression, search engines and online social platforms would have to argue that their data processing activities are for journalistic, literary, or artistic purposes. This would require both search engines and social network platforms to engage with the contents provided by content providers in a different and closer way. This would not be in line with their existence as neutral hosting providers under other EU laws.[133]

The second problem is the fractured system that was outlined above. Fazlioglu, like Reventlow, refers to the fact that the scope of the exemptions is to be determined by the member states individually.[134] It is ironic that while the aim of replacing the EU Directive with an EU Regulation was harmonization of data protection laws and their implementation across the member states, this aim does not seem to be considered when it comes to the protection of the freedom of expression.[135]

To assess the impact of the right to be forgotten under the GDPR on freedom of expression in practice, I have reviewed statistical data provided by online service providers. After the Google Spain judgment in May 2014, Google launched an official request process for claims under the GDPR.[136] Since then, Google has received more than one million requests to delist content from its search results. These one million requests include more than 4.5 million URL addresses. While 18.5% of these URL addresses directed to news contents, around 25% of them were directories and social media websites.

The fact that Google receives more than one million requests in less than eight years shows that the "right to be forgotten" is not a right on paper. It shows that individuals are willing to use this right frequently and effectively. Moreover, almost one fifth of these requests relate to online news contents. As these news contents could potentially be protected under the freedom of expression, this data demonstrates that the clash between the right to be forgotten and freedom of expression is also real and taking place in practice.

Moving on, Google also provides data on their compliance with these removal requests, which might give us an insight on the substance of the clash between the right to be forgotten and freedom of expression. Google has delisted 48% of the URL addresses which were requested to be removed.[137] In its transparency report, Google provides reasons for why they do not delist

[133] Fazlioglu, "Forget me not," 154.
[134] Fazlioglu, "Forget me not," 154.
[135] Fazlioglu, "Forget me not," 154.
[136] BBC. "Google sets up 'right to be forgotten' form after EU ruling". *BBC* May 30, 2014. https://www.bbc.com/news/technology-27631001.
Google. "Personal Information Removal Request Form" Accessed December 1, 2021. https://www.google.com/webmasters/tools/legal-removal-request?complaint_type=rtbf.
[137] Google. "Transparency Report: Requests to delist content under European privacy law" Accessed December 1, 2021. https://transparencyreport.google.com/eu-privacy/overview?hl=en.

certain URL addresses. Among other reasons, it is expressly indicated that some of these contents are "journalistic in nature" or they contain "information which is strongly in the public interest".[138] This shows that individuals do in fact request removal of content which might be subject to freedom of expression and information.

There are some case examples included in the transparency report. For example, a request which was forwarded from the Belgian Data Protection Authority to Google pertain to two news articles which was reporting an individual's past crimes including physical violence and rape. Google concluded that there is a legitimate public interest in these URL addresses remaining accessible and decided not to delist the URLs.[139]

This example demonstrates Google's approach to the interaction between freedom of expression and right to data protection. The individual has the right to request protection and therefore, removal of his personal data and he exercises this right by contacting Google to remove news articles including his name and information on the crimes he committed in the past. However, that individual's right to data protection is not the only right concerned in this case. The general public has a right to be informed of this information which might be of special significance due to its nature (i.e., that it relates to past violent crimes). Therefore, in this example, the right to data protection is in conflict with the freedom of expression and information. In this case, Google decides that the freedom of expression overrides the individual's right to data protection. However, it is not clear how the CJEU would have evaluated this case.

It is important that the foregoing is not to indicate that Google refuses to comply with requests for URL addresses which are news articles in each and every case. In a different request received from another Belgian individual, Google decided to delist the URL address of a news article on the requestor's attempted suicide. They reached this conclusion by taking into consideration the fact that the article was published eight years before the date of the request and the information on suicide being sensitive.[140]

These practical examples shine a light on the potential clash between freedom of expression and data protection rules in practice and how Google, as a search engine operator, balancing these two rights. Based on the data provided by Google in its transparency report, and especially the fact that they delist 48% of the URL addresses and refuse to comply with the removal requests for 52% of the URL addresses, it might be possible to conclude that Google is trying to strike a balance between the right to data protection and freedom of expression, rather than upholding one of these rights at the expense of the other.

[138] Google, "Transparency Report"
[139] Google, "Transparency Report"
[140] Google, "Transparency Report"

David Erdos provides useful statistical data on the national data protection authorities' approach to the interaction between freedom of expression and data protection[141]. Accordingly, around 60% of data protection authorities "reported having undertaken some action against professional media"[142]. Moreover, while the data protection authorities were "largely abstaining from regulating most professional artists and writers, many regulators have attempted to subject academic scholars to the onerous statutory restrictions set out for medical, scientific, and related research»[143].

[141] Erdos, "European Data Protection Regulation, Journalism, and Traditional Publishers," 275-276.
[142] Erdos, "European Data Protection Regulation, Journalism, and Traditional Publishers," 275.
[143] Erdos, "European Data Protection Regulation, Journalism, and Traditional Publishers," 275-276.

3 Chapter 3: How to strike a balance and ensure harmony?

The interaction, and sometimes the clash, between different rights are common. Data protection regulations are not the first rules that had an impact on the exercise of freedom of expression. Freedom of religion is a good and well-known example.[144]

Moreover, the tension between freedom of expression and data protection (or in general, privacy) is not new either. In many instances, both the ECtHR and the CJEU have been asked to rule on the interaction between these two rights. For example, in Von Hannover v. Germany (2), ECtHR indicated that "as a matter of principle these rights deserve equal respect".[145]

Despite its long history, the interaction between these two rights is arguably more relevant today than ever.

GDPR takes the level of protection for personal data to a new level from the EU Directive both in terms of requirements and sanctions. There are important transparency and accountability requirements under the GDPR for those who are processing personal data. There are also significant sanctions attached to these requirements.[146] Therefore, the risks associated with not complying with the law increases alongside the gravity of the requirements. This, of course, is bringing higher and better protection for us all and it is necessary considering both the value of our personal data to businesses and states and to us as individuals as well as threats concerning it.

That said, there is another side of the coin. For journalistic activities, GDPR's new and stronger protections might have a negative impact as explained above. Therefore, while the interaction and the tension between freedom of expression and data protection is not new, GDPR is raising new questions as to the possibility of protecting both of the rights at the same time and their co-existence.

The fact that the GDPR imposes strict obligations on data controllers in relation to their handling of personal data, including erasure might be detrimental to data journalism. Risks of strong sanctions might be financially unbearable for journalists and news agencies, which might result in self-censorship or a chilling effect.[147]

Moreover, it might be argued that there is an imbalance in the protection offered to the personal data in comparison to the freedom of expression. The main recourse to justice in freedom of

[144] See for example: European Court of Human Rights, *Osmanoglu and Kocabas v. Switzerland*, no. 29086/12 (10 January 2017) and Peonidis, Filimon. "Freedom of Expression, Secularism and Defamation of Religion: The Case of Charlie Hebdo." *Social Sciences* 8, no. 10 (2019): 276. https://doi.org/10.3390/socsci8100276
[145] European Court of Human Rights, *Von Hannover v. Germany (No. 2)*, no. 40660/08 and no. 60641/08 (7 February 2012) §106
[146] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.
[147] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34., Fazlioglu, "Forget me not," 155.

expression claims is the ECtHR.[148] However, data protection rules under the EU/EEA are enforced by national data protection authorities such as Norway, Ireland, and Luxembourg.[149] ECHR's protection as well as the consequences of an ECtHR ruling is considerably lighter compared to the GDPR.[150] This can be demonstrated by looking at the sanctions regulated under the GDPR. Entities infringing the provisions under the GDPR might be subject to "administrative fines up to 20 000 000 EUR, or in the case of an undertaking, up to 4 % of the total worldwide annual turnover of the preceding financial year, whichever is higher"[151]. On the other hand, "the ECtHR places a clear emphasis on just satisfaction, whereby states have to compensate the victim's loss and suffering"[152]. The damages imposed on the state are of compensatory nature and is nowhere near as strong as the sanctions regulated under the GDPR.

As mentioned above, the ECtHR has previously indicated that the rights to privacy and freedom of expression are of equal value.[153] This has been affirmed in the EU context as well by the mention of both of these rights in the CFEU.[154] However, there have been occasions like the Google Spain case where the CJEU has been subject to criticism for not striking a fair balance, especially in terms of freedom of expression and information when the search engine operators and the search engine users are concerned.

Another example of such cases is the Bavarian Lager ruling.[155] Scholars highlighted that the CJEU's ruling in this case was not in line with its previous rulings. For example, Petkova indicated that in this case "the CJEU prioritized the autonomy aspect of data privacy rights over the political values of accountability and self-government enshrined in the right to access to documents".[156]

The Bavarian Lager ruling concerns the conflict between the right to data protection and the right to access to documents. However, it is included in this thesis, as the CJEU's approach to this conflict might be relevant to the interaction between the right to data protection and freedom of expression by analogy.

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[148] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.

[149] See for example:
Songe-Møller Jepper and Sondre Arora Aaserud. "Norway: Recent Fines Imposed By The Norwegian Data Protection Authority ("NDPA")". *Mondaq*. November 29, 2021. https://www.mondaq.com/data-protection/1136070/recent-fines-imposed-by-the-norwegian-data-protection-authority-ndpa.
Bateman Tom. "WhatsApp rewrites its Europe privacy policy after a record €225 million GDPR fine". *EuroNews*. November 22, 2021. https://www.euronews.com/next/2021/11/22/whatsapp-rewrites-its-europe-privacy-policy-after-a-record-225-million-gdpr-fine.
Kayali, Laura and Vincent Manancourt. "Amazon fined €746M for violating privacy rules". *Politico*. July 30, 2021. https://www.politico.eu/article/amazon-fined-e746m-for-violating-privacy-rules/.

[150] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 34.

[151] GDPR Art. 83/5

[152] Fikfak, Veronika. "Changing State Behaviour: Damages before the European Court of Human Rights." *The European Journal of International Law 29*, no. 4 (2019): 1091-1125. https://doi.org/10.1093/ejil/chy064. 1093.

[153] European Court of Human Rights, *Von Hannover v. Germany (No. 2)*, no. 40660/08 and no. 60641/08 (7 February 2012) §106

[154] CFEU Art. 7, 8, 10, 11

[155] Court of Justice of the European Union, European Commission v. The Bavarian Lager Co. Ltd, C-28/08 (29 June 2010) ("Bavarian Lager")

[156] Petkova, "Towards an Internal Hierarchy of Values in The EU Legal Order," 435.

The Bavarian Lager company, which is a company importing German beer for bars in the United Kingdom, had requested to attend a meeting which could affect their business. However, Bavarian Lager was not allowed to attend this meeting which was "attended by officers of the Directorate-General (DG) for the Internal Market and Financial Services, officials of the United Kingdom Government Department of Trade and Industry and representatives of the Confederation des Brasseurs du Marche Commun ("CBMC")[157]".

Later on, Bavarian Lager requested access to certain documents in relation to this meeting by applying to the European Commission. Bavarian Lager also wanted to obtain the names of the delegates of the CBMC who had attended the meeting and the names of the companies and any persons falling under specific categories[158]. Bavarian Lager's request was complied with in part. However, on the list of attendees "five names had been blanked out (…) following two express refusals by persons to consent to the disclosure of their identity and the Commission's failure to contact the remaining three attendees"[159]. Upon Bavarian Lager's request to the names in full, the European Commission indicated that Bavarian Lager "had not established an express and legitimate purpose or need for such a disclosure" and therefore, the personal data of the relevant individuals shall be withheld in accordance with the relevant data protection rules[160].

The Bavarian Lager applied to court against the European Commission's decision. The court concluded that "the Commission had erred in law by holding that Bavarian Lager had not established either an express and legitimate purpose or any need to obtain the names of the five persons who participated in the meeting»[161].

When the case came before the CJEU, the CJEU disagreed with the court and upheld the right to data protection of the five individuals whose names were blanked out. The CJEU established that the European Commission "sufficiently complied with its duty of openness»[162] by providing the documents (even though five participants' names were removed), and the European Commission was right to require Bavarian Lager to establish the necessity for the disclosure of the relevant individuals' name as these individuals did not give their express consent[163].

Petkova criticizes the CJEU's approach to the conflict or interaction between two rights with the following words: "Although this serves the interest of the individual (who is then able to determine whether personal information is public or not), it simultaneously undermines the interest underlying the right to access (...) making the possibility of identifying and holding the people working for the government accountable completely dependent upon the willingness of

[157] Bavarian Lager §19
[158] Bavarian Lager §19
[159] Bavarian Lager §19
[160] Bavarian Lager §19
[161] Bavarian Lager §19
[162] Bavarian Lager §76
[163] Bavarian Lager §77

the persons involved"[164]. Considering, in particular, the public roles carried out by the participants of the meeting and the fact that the information regarding attending a meeting in professional capacity not being closely related to a person's private life, the argument that the CJEU prioritises the right to data protection over other fundamental rights seems convincing.

These discussions and the difficult questions posed by the interaction between the data protection and freedom of expression have led legal scholars to call for reform.[165] I would like to address the changes proposed in order to strike a fair balance between these rights under two categories: (i) changes to the legislation and (ii) changes to the application of the laws by the CJEU.

3.1 Legislative Changes

The first group of reform suggestions relate to the wording of the GDPR. As discussed in detail above, GDPR intends to ensure that data protection and freedom of expression co-exists in harmony. This becomes apparent at the beginning of the recitals, where it is expressly indicated that right to protection of personal data should «be balanced against other fundamental rights".[166] GDPR's consideration for freedom of expression is also apparent from the inclusion of the journalism exemption in the text and the fact that the legislators even went further and expanded the scope of this exemption compared to the previous EU Directive.

That said, it seems as though the GDPR has not yet been able to fully achieve the intended purposes. This shortcoming might be explained with two reasons. First of all, the GDPR refers specifically to *"processing for journalistic purposes and the purposes of academic, artistic or literary expression"*.[167] Freedom of expression, however, does not call for protection only for these specified circumstances. Freedom to impart and receive ideas and information forms an important part of freedom of expression. However, the GDPR's exemption does not seem to offer sufficient protection for the general public's right to impart and receive information. The protection does not seem to extend in practice to the right to impart information either (such as in the case of a search engine), unless the data controller, in other words, the person processing the data is a journalist, artist, or a scholar[168].

The Google Spain judgment might help clarifying this point. The CJEU points to the possibility of the publisher of a website to be protected under the journalism exemption under the EU data protection regime by stating that in certain circumstances the individual might be able to exercise its right to data protection against the search engine operator but not against the publisher of a website[169]. This is a good example on how the CJEU interprets the scope of the

[164] Petkova, "Towards an Internal Hierarchy of Values in The EU Legal Order," 435.
[165] See for example: Petkova, "Towards an Internal Hierarchy of Values in The EU Legal Order,". and Erdos, "From the Scylla of restriction to the Charybdis of licence?,".
[166] GDPR Rec. 4
[167] GDPR Art. 85
[168] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 144.
[169] Google Spain §85

protection offered under the journalism exemption. While the exemption might apply to publishers of websites, the exemption does not extend to the freedom of the search engine operator to impart information or to the freedom of the search engine user to receive information. As discussed above, search engines serve an important role in access to information and therefore, there are good reasons to argue for the protection of their freedom to impart information as well as publishers, journalists and scholars.

Erdos proposed the wording of the GDPR to be amended in a way that encompasses "all activities which aim at or instantiate disclosure to the public of information, opinions or ideas".[170] He argues that by doing so GDPR's exemption for freedom of expression would apply to a sufficiently wide range of activities, "including scholarship, socio-political campaigning and many types of blogging".[171]

The second problem which may be addressed through amending the GDPR is caused by the fact that currently GDPR is urging member states to reconcile data protection and freedom of expression by law, rather than setting out clear rules applicable to all member states.[172] Without the existence of clear and harmonized rules in the EU, protection of freedom of expression is left at the hands of individual states and might result in a fractured system.[173] The consequences of this have been discussed in detail above.

Amending the GDPR by including clear obligations imposed on member states to ensure sufficient degree of protection of freedom of expression could lead to harmony, certainty, and predictability across the EU. Harmonisation of data protection rules in Europe and ensuring that individuals in the EU are protected to the same level regardless of their home state have been the aims at the heart of moving from the EU Directive to the GDPR.[174] It seems only right that the GDPR takes a step ahead and achieves these aims in terms of the protection offered to freedom of expression as well.

Scholars agree that this reform "would enhance coherence and certainty within the law, secure a greater degree of European harmonization in those areas where this is both more necessary and more appropriate and, finally, ensure a fairer balance between these two rights which are so often in critical conflict".[175]

[170] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 148.
[171] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 152.
[172] GDPR Rec. 153, Art. 85
[173] Reventlow, "Can the GDPR and Freedom of Expression Coexist," 32.
[174] GDPR Rec. 8,9,10,11,13
[175] Erdos, "From the Scylla of restriction to the Charybdis of licence?," 153.

3.2 Changes to the Interpretation and Application of the Rules

Legislative amendments are only one way of addressing the imbalance between data protection and freedom of expression. In fact, many scholars[176] focus more on the CJEU's practice and offer reforms to the way CJEU interpret and applies the GDPR to ensure a fair balance.

Kulk takes a comparative look at the application of the right to be forgotten in Netherlands and at the CJEU level.[177] Focusing specifically on the Google Spain ruling, Kulk touches upon several points in which CJEU might have taken a different approach and thus, struck a better balance between freedom of expression and protection of the individual's personal data.

First of all, in the Google Spain case, the CJEU does not place a significance on the right to receive information (which is an essential part of freedom of expression) and instead, refers to the general public's "interest" in receiving the relevant information.[178] The term *interest*, especially the face of a *right* to data protection, seems weak and therefore, tilts the balance in favour of data protection. This is at odds with the idea that freedom of expression and data protection are of equal value, and they are both protected under the EU laws.[179]

Kulk argues that "the CJEU should have explicitly considered the search engine operator's right to freedom of expression and information and should have given more attention to people's right to receive and impart information".[180] In failing to do so, the CJEU raises concerns for the protection of freedom of expression in cases arising in the future before search engines or national courts.[181] In other words, the CJEU's lack of emphasis on freedom of expression did not only impact the balance between data protection and freedom of expression in the Google Spain case but it has also arguably tilted the balance in favour of data protection for the future as well. This is because search engines, like Google, are likely to base their evaluations of right to be forgotten claims on the CJEU's ruling. Many scholars and experts are worried that this would lead to censorship.[182]

In comparison to CJEU, the Dutch national courts, seem to be placing more significance on freedom of expression. As for Dutch national courts, Kulk explains that the Dutch courts

[176] See for example: Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain,". and Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD,"
[177] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain,".
[178] Google Spain §81
[179] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 116.
[180] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 116.
[181] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 116.
[182] See for example: Advocate General Niilo Jdiskinen's cited in Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 186.

emphasize the role played by search engines in the society and in accessing information.[183] Kulk writes that the Dutch national court indicates that "search engines help people to find information online. If search engines were subject to too many restrictions, their cataloguing function would be hampered, resulting in a loss of credibility for those search engines"[184]. Moreover, the Dutch national court refers expressly to "Google's right to 'freedom of information' (as the Court calls the right to receive and impart information)"[185]. Last but not least, the Dutch national court states that "the interests of internet users, webmasters, and authors of online information should be taken into account as well".[186]

Perhaps a similar approach, emphasising the role of search engines as well as the search engine operators and users' freedom of expression and information, by the CJEU would help striking a better balance. The outcomes of the cases might remain the same, but the balancing exercise might benefit on a conceptual level from an approach where freedom of expression and data protection are considered to have equal value.

Singleton takes a different approach and recommends CJEU to look back at its own decisions in the past where their task have been to balance different fundamental rights.[187] Reminding that Google Spain is not the first instance of tension between rights, Singleton indicates that the CJEU's approach in Lindqvist case[188] might be helpful in right to be forgotten cases as well. In that case, the CJEU indicated that the member states may weigh different rights such as privacy and freedom of expression against each other, but they must do so in adherence with the fundamental rights protected under the EU law.[189] Singleton especially makes note of CJEU's previous requirement that "any balancing comport with the EU's fundamental rights would make it clear that one right will not always take precedence over the other, and that they can coexist".[190]

In their essence, both of the next two reform proposals relate to the lack of clarity in CJEU's Google Spain judgment. First of all, it is possible to argue that the CJEU did not explain in sufficient detail in which circumstances states may derogate from the right to be forgotten.[191] While noting that a balancing exercise is necessary, CJEU did not go further than stating that

[183] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 122.
[184] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 120.
[185] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 120.
[186] Kulk and Borgesius, "Freedom of Expression and 'Right to Be Forgotten' Cases in the Netherlands After Google Spain," 120.
[187] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 181.
[188] Court of Justice of the European Union, Bodil Lindqvist Göta hovrätt (Sweden), C-101/01, (6 November 2003).
[189] Court of Justice of the European Union, Bodil Lindqvist Göta hovrätt (Sweden), C-101/01, (6 November 2003). §87
[190] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 182.
[191] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 188.

the balance "may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information".[192] Without clarity on how this balancing exercise should be carried out and which specific considerations are to be had, it is difficult for national courts to strike a balance between the right to be forgotten, freedom of expression and right of the general public to receive information.

One might argue that the CJEU, in fact, did provide detailed information as to how the balancing exercise should be carried out and which specific considerations are to be had. However, the nature of information, the sensitivity of the information to the data subject's private life and the interest of the public in receiving the relevant information are not easy concepts to apply in practice. For example, Singleton rightly argues that "it would be easier to determine which right will hold more weight in a given context if the CJEU specifically stated what kinds of information fall under the broad heading of "public interest."".[193]

An example on how much more specific the CJEU could have been in its guidance can be the first ever right to be forgotten decision rendered by the Turkish Constitutional Court on 3 March 2016[194]. By way of background, the right to be forgotten has not been included in the Constitution or data protection of Turkey. The right to be forgotten was introduced into the Turkish jurisdiction by Supreme Court and Constitutional Court decisions which have expressly referred to the CJEU's Google Spain judgment[195].

The Turkish Constitutional Court indicated in its landmark right to be forgotten decision that many factors including the following should be taken into account when deciding whether the right to be forgotten applies to online news content: (i) the substance of the content, (ii) the time and duration in which the content was available, (iii) the currency of the content, (iv) whether the content may be considered to be historical data or not, (v) the content's value to public good (the public value of the content, the importance of the content for the future), (vi) whether the person subject to the content is a politician or a celebrity, (vii) subject of the news or article, (viii) whether the news content contain factual information or value judgments and (ix) interest of the general public in the information contained in the relevant content[196].

During my time practising in Turkey as an attorney-at-law, in particular with internet regulation cases concerning content removal requests, I have observed that the detailed criteria set out by the Turkish Constitutional Court were very helpful for both practitioners and lower courts in assessing the applicability of the right to be forgotten to online contents. It is based on this

[192] Google Spain §81
[193] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 188.
[194] Turkish Constitutional Court, *N.B.B. Application*, no. 2013/5653 (3 March 2016)
[195] Turkish Constitutional Court, *N.B.B. Application*, no. 2013/5653 (3 March 2016) § 46-47 *[in Turkish, translated by the author]*
[196] Turkish Constitutional Court, *N.B.B. Application*, no. 2013/5653 (3 March 2016) § 50 *[in Turkish, translated by the author]*

experience that I agree with the criticisms that the CJEU failed to explain in sufficient detail in which circumstances states may derogate from the right to be forgotten.

The second point on lack of clarity relates to the guidance provided to the search engines or the different legal entities which might find themselves at the receiving end of the right to be forgotten requests. One of the most practical consequences of the Google Spain judgment is the increase in the number of right to be forgotten claims received by search engines. This means that search engines, and other legal entities, are placed in a position where they have to evaluate more requests and make decisions as to comply or not comply with these requests. Considering the gravity of the sanctions regulated under the GDPR, it would be right to expect the CJEU to provide clear guidance to ensure that search engines are able to handle the right to be forgotten requests in a way compatible with their obligations under the GDPR. However, this is arguably not the case in the Google Spain decision. In that judgment, the court referred to "inadequate, irrelevant" information which is "no longer relevant, or excessive". However, these terms are highly subjective. As a result, "those seeking to invoke the right to be forgotten and the search engine companies charged with honouring their requests may have different opinions on when the adequacy, relevance, and accuracy requirements are met".[197]

The consequence of lack of clarity in the circumstances discussed above is further threat to the protection of freedom of expression when it is in interaction with data protection. Therefore, it is highly important that the legislators and/or the judiciary takes certain steps to reform EU's current approach to the tension between freedom of expression and data protection.

[197] Singleton, "Balancing a Right to Be Forgotten with a Right to Freedom of Expression in the Wake of Google Spain v. AEPD," 192.

4 Chapter 4: Conclusion

In today's digital world, being able to receive and impart information and ideas and to feel safe about the handling of our personal data are both very important. In fact, we actively exercise both the right to data protection and freedom of expression every single day.

Every time we read news on the Internet, share our opinion and ideas on matters and issues we care about, we are exercising our freedom of expression. Every time we register on a website, buy something online, attend webinars, use social media platforms, we like to think that the information we provide about ourselves will be safe at the hands of the recipient and will only be used in appropriate ways.

Despite our extensive reliance on the ability to exercise freedom of expression and the protection of personal data, daily practices are far from ideal. It is not seldom that an online platform used by millions of people across the globe is being sanctioned by a data protection authority for handling our personal data in ways that are not compliant with data protection rules[198]. In other words, freedom of expression and data protection are immensely important for individuals to realise themselves, but they are also under constant attack by authorities and private legal entities.

Everyone is familiar with the picture I have tried to demonstrate in the foregoing paragraphs, at least to an extent. Therefore, I wanted to take the question one step further and ask: can freedom of expression and data protection be threats to one another? Or, in the world where these two rights are under serious attack, can these two rights strengthen each other?

This thesis aimed to answer these questions. In the first chapter, I investigated the ways in which data protection and freedom of expression co-exist. Looking at the wording of the data protection rules in Europe and the intentions of the legislators, it becomes apparent that ideally data protection and freedom of expression would have considerations for each other. Journalism exemptions under the GDPR is an example of this. Their co-existence can go even further than simply existing in harmony. It is clear that data protection rules can be utilised to protect journalists against unduly interference by the public authorities. Therefore, by providing safety to journalists, in the form of protection of their personal data, data protection framework can help strengthen freedom of expression.

What makes these questions very interesting, though, is that there are equally strong arguments and examples which demonstrate that data protection rules might hinder freedom of expression. The second chapter focused on these arguments and examples. For example, while the

[198] See for example:
BBC. "Amazon hit with $886m fine for alleged data law breach". *BBC*. July 30, 2021. https://www.bbc.com/news/business-58024116.
Reuters. "Irish regulator proposes 36 mln euro Facebook privacy fine - document". *Reuters*. October 13, 2021. https://www.reuters.com/technology/irish-regulator-proposes-36-mln-euro-facebook-privacy-fine-document-2021-10-13/.

journalism exemption exists in the GDPR's wording, its practical impact and contribution to the protection of freedom of expression is questionable. Moreover, extensive rights and protections offered to individuals under the data protection regimes might result in personal data being protected at the expense of the freedom of expression.

During the course of my research and engagement with the interaction of data protection and freedom of expression, I reached some conclusions. Neither data protection nor freedom of expression are absolute rights. It is an established principle, and practice, in international law that rights and freedoms may be subject to limitations. Therefore, the tension we witness between freedom of expression and data protection is not new and it is not one of a kind.

The solution to the tension is striking a fair balance. This solution has been tested and proved on many instances by courts and institutions across the globe for cases wherein two or more fundamental rights are involved.

My observation is that the examples in which data protection hinders freedom of expression are cases where there are obstacles or failures in striking the balance. For example, while the legislators clearly intended to protect freedom of expression while strengthening the data protection rules, they failed to provide adequate guidance in the wording of the GDPR on how these two important legal notions should be balanced in practice. The same can be told about the CJEU in the Google Spain judgment. While one might agree with the final ruling of the court based on the facts, the lack of clarity and guidance in the judgment have been criticised by many both in the field and in scholarship.

In light of my research and reflection, I conclude that freedom of expression and data protection can not only co-exist in harmony, but they can even be considered as supplements, if not prerequisite, for one another. The problems arising in practice cannot lead to conclusions that data protection is fundamentally contradictory or harmful to the exercise of freedom of expression. Because, as we have seen in the interaction of different fundamental rights, striking a fair balance every single time, allows for both of these rights to exist together and offers better and more meaningful protection of our rights. Therefore, reform proposals should be carefully considered and implemented so as to ensure a better practice in the future.

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