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Conflicts between Fundamental Rights in Europe

-A case-law study of the CJEU and the ECtHR
approach to conflicts between fundamental rights
in the light of Google Spain

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Summary

Fundamental rights are an expanding area of law, which is demonstrated by the increasing number of cases in European courts drawing upon fundamental rights provisions. This development in combination with the expanding rights catalogue and a more extensive interpretation given to existing rights inevitably also leads to an increase in conflicts between fundamental rights. This issue has however only been modestly studied until very recently, which makes it an interesting topic to research. In a scenario of two fundamental rights protected by the European legal order in conflict, the judiciary is faced with a dilemma as to how to solve the conflict. Which of the rights, if any, should be prioritized?

The CJEU and the ECtHR are the two primary Fundamental Rights adjudicators in Europe. This thesis examines the approach of the two courts as to conflicts between fundamental rights with emphasis on the recent CJEU judgment in *Google Spain* from May 2014. The CJEU approach is based on the horizontal clauses in the EU Charter and foremost the general limitation clause. Prior to the Charter, the manifest test was applied by the Court, essentially examining whether a measure of EU law contains a manifest error or misuse of power. Article 52(1) of the Charter is now applied by the Court when faced with conflicts between fundamental rights. The case-law of the Court point to an inconsistent use of the analytical stages of Article 52(1), reiterating that the provision holds that limitations of the rights enshrined in the Charter may be made to protect the rights and freedoms of others. The CJEU have moreover held that a fair balance must be struck between the rights or interests in question. The ECtHR approach on conflicts between fundamental rights is determined by the case at hand, and thus several methods are applied. The jurisprudence of the ECtHR include the use of the necessity test as included in the second paragraph of Articles 8-11 of the ECHR, the margin of appreciation doctrine and the use of balancing. With regards to the special nature of the inherent conflict

between the right to privacy and the right to freedom of expression, several principles have been established through case-law.

The second section of the thesis aim to examine whether the CJEU approach is reflected in *Google Spain* and whether there is reason to believe that the outcome would be different if Google Spain was brought before the ECtHR. *Google Spain* concerns the right to be forgotten by de-listing search results containing personal information on a search engine, in this case Google. The CJEU has previously stressed the importance of data protection within the area of EU law, and this judgment is in line with the previous position of the Court. The Court applies the general limitation clause to the conflict between the right to data protection and the freedom of expression, however it determines the right to data protection to trump the freedom of expression. There is reason to believe that the case would have a different outcome if brought before the ECtHR based on the principles applied to conflicts between the right to private life and the right to freedom of expression, e.g. the severity of the sanction imposed, the role played by the individual in society and the nature of the information. Moreover, it can be argued that the outcome would have been different as the ECtHR acknowledge the rights to have equal value. Regarding Google Spain and whether or not a fair balance was struck between the right to private life and the right to freedom of expression, the judgment constitute an extensive interpretation of the right to privacy at the expense of the freedom of expression. This is furthermore a development that may lead to diverging interpretations of the rights under the ECHR and the Charter, which will affect the transparency and foreseeability of fundamental rights in Europe. Moreover, the judgments raises questions on the legal position of EU Member States as Contracting Parties to the ECHR if the relationship between the Courts is questioned or stressed based on diverging interpretations. Yet to be discovered is also whether the practical implementation of the right to be forgotten will entail an effective protection or simply a search engine obliged to practice the delicate act of balancing two of our most essential fundamental rights.

Sammanfattning

Grundläggande mänskliga rättigheter är ett växande rättsområde, vilket illustreras av den ökande andelen mål med grund i mänskliga rättigheter vid Europeiska domstolar. Denna utveckling, i kombination med att rättighetskatalogen utvidgas och att de befintliga rättigheterna får en mer extensiv tolkning innebär oundvikligen att även mål där två mänskliga rättigheter ställs emot varandra ökar. Denna företeelse har studerats mycket lite, varför det är ett intressant rättsområde att undersöka. I fall där två mänskliga rättigheter vilka bägge skyddas av rättsordningen hamnar i konflikt med varandra ställs domsväsendet inför ett juridiskt dilemma. Vilken, om någon, av rättigheterna bör ges företräde?

EU-domstolen och Europa-domstolen är de primära domstolarna vad gäller mänskliga rättigheter i Europa. Denna uppsats studerar förhållningssättet till konflikter mellan mänskliga rättigheter hos respektive domstol med utgångspunkt i rättspraxis och i synnerhet utifrån *Google Spain*, EU-domstolens avgörande från maj 2014. EU-domstolens förhållningssätt till mänskliga rättigheter i allmänhet och konflikter mellan dessa regleras av de horisontella bestämmelserna i EU-stadgan. Under vilka omständigheter en mänsklig rättighet får inskränkas regleras i Artikel 52(1) Stadgan. Innan ikraftträdandet av EU-stadgan använde EU-domstolen sig av en 'uppenbar oriktighets-doktrin' innebärande att en bedömning gjordes utifrån huruvida en EU-akt utgjorde en uppenbar oriktighet eller maktmissbruk. Domstolen har i senare praxis inkonsekvent tillämpat en bedömning av den aktuella begränsningens tillåtlighet baserat på Artikel 52(1) och angivit att vid mostående intressen skall en avvägning göras till skydd för mänskliga rättigheter. Europadomstolens förhållningssätt vad gäller konflikter mellan mänskliga rättigheter är baserad på en individuell bedömning, och flera olika metoder kan därför urskönjas. Europadomstolens praxis illustrerar flertalet förhållningssätt, såsom nödvändighetsrekvisitet i det andra stycket i artiklar 8-11, 'margin of appreciation'-doktrinen samt avvägning. Vad gäller specifikt konflikter mellan rätten till privatliv och yttrandefriheten så har flertalet principer framtagits genom praxis för att konkretisera bedömningen. Den andra delen av uppsatsen syftar till att undersöka

huruvida EU-domstolens tidigare förhållningssätt speglas i *Google Spain* samt huruvida det finns anledning att anta att skillnader hade förelegat om målet avgjorts i Europadomstolen. *Google Spain* rör rätten att dölja lagligt publicerat personlig information från en indexerad lista på en sökmotor, i det här fallet Google. EU-domstolen har tidigare visat att rätten till skydd av personlig data innehar ett starkt skydd inom EU-rätten, varför målet är i enlighet med Domstolens tidigare förhållningssätt. Domstolen applicerar Artikel 52(1) EU-Statgan vid bedömningen av restriktionen av yttrandefriheten. Det finns anledning att anta att avgörandet fått ett annat utslag i Europadomstolen då principer utvecklade genom Europadomstolens praxis innebär konkreta riktlinjer för avvägningsbedömningen vid en konflikt mellan rätten till privatliv och yttrandefrihet, exempelvis sanktionens inverkan, personens roll i samhället och informationens natur. Dessutom argumenteras för att målet fått en annorlunda utgång beroende på Europadomstolens kategorisering av rätten till privatliv och yttrandefriheten som av lika juridiskt värde.

Vad gäller *Google Spain* och avvägningen mellan rätten till privatliv och yttrandefriheten så kan det argumenteras för att målet innebär en mycket långtgående tolkning av rätten till privatliv, på bekostnad av yttrandefriheten. Detta kan i sin tur leda till att tolkningen av mänskliga rättigheter under EKMR och EU-Statgan inte längre kan anses vara liktydig, vilket innebär ett hot mot rättssäkerheten och förutsägbarheten för europeiska mänskliga rättigheter. Vidare aktualiserar domen i *Google Spain* frågor angående rättsläget för EU:s medlemstater vilka är anslutna till EKMR om förhållandet mellan de två domstolarna ifrågasätts. Kvar att besvara är även frågan huruvida den praktiska implementeringen av rätten att bli bortglömd innebär ett effektivt skydd för rätten till privatliv eller endast att privata företag är förpliktade att utföra den ömtåliga uppgiften att göra en avvägning mellan två av våra mest grundläggande mänskliga rättigheter.

Preface

In the spirit of EU law, this thesis has been written in no less than three EU Member States, Sweden, Germany and Denmark.

I would first like to thank my supervisor, Xavier Groussot, for his expertise, constructive comments and support. I also want to thank all my professors at Lund University and the University of Maastricht for your astonishing ability to inspire your students within your respective fields.

Lastly I would like to thank my grandmother, Marianne Carlberg.

Till mormor. För allt du gett mig.

Mikaela Carlberg,
Silkeborg, Denmark, August 2015.

Abbreviations

AG	Advocate General
Charter	EU Charter of Human Rights
ECHR	European Convention on Human Rights
EU	European Union
USA, U.S.	United States of America

1. Introduction

1.1. Background

Under certain circumstances, the judiciary is presented with a dilemma of solving a conflict between two fundamental rights. As the opposing interests both represent a right or a freedom, the method and reasoning on how to solve conflicts between fundamental rights is a complex task for the courts. Europe has two major instruments as to the protection of fundamental rights, the EU Charter of Fundamental Rights (hereinafter the Charter)¹ and the European Convention of Human Rights (hereinafter the ECHR)², safeguarded and interpreted by the two supranational fundamental rights adjudicators in Europe, the Court of Justice of the European Union (hereinafter the CJEU)³ and the European Court of Human Rights (hereinafter the ECtHR). In the light of the recent landmark judgment of the CJEU in *Google Spain v. AEPD and Mario Costeja González* (hereinafter *Google Spain*)⁴ where the Court established a right to be forgotten⁵ within the right to data protection, there is reason to examine conflicts between fundamental rights in Europe and whether or not the CJEU struck a fair balance between the right to privacy and the right to freedom of expression in *Google Spain*.

¹ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 [the Charter].

² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) [ECHR], 1950.

³ Throughout this thesis, the term CJEU will be used when referring to the Court of Justice of the European Union (formerly the European Court of Justice) and not of the EU Courts as a whole, i.e. the Court of Justice of the European Union, the General Court (GC, formerly the Court of First Instance), and the Civil Service Tribunal. When referring to one of the courts, their respective name will be used.

⁴ Case C-131/12, *Google Spain SL och Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* [2014] ECLI:EU:C:2014:317 [C-131/12 *Google Spain*].

⁵ This expression has been criticized for being misleading, as the definition should rather be 'the right to have results de-listed'. For readability, however, the phrase 'right to be forgotten' will be used throughout this thesis.

1.2. Purpose and question formulations

The purpose of this thesis is to examine and establish the current legal position on conflicts between fundamental rights in Europe, with emphasis on the jurisprudence of the two main European human right adjudicators, the CJEU and the ECtHR, and to examine Google Spain in the light of the jurisprudence of the two courts and accordingly analyse whether the judgment has struck a fair balance between the right to private life and the right to freedom of expression. Firstly, questions related to conflicts between fundamental rights in general will be examined as a basis for the concluding analysis. The general questions to be addressed are: *What is the CJEU respectively the ECtHR approach on conflicting fundamental rights? Is there a common European approach on solving conflicts between fundamental rights?*

Secondly, questions related to the recent CJEU authority Google Spain will be examined. These too will serve as a basis for the concluding analysis and discourse. The research questions to be discussed with regards to Google Spain are: *Firstly, in comparison with the ECtHR approach on conflicts between fundamental rights, would the outcome of Google Spain have been the same if it had been brought before the ECtHR? Secondly, can Google Spain be said to have successfully struck a fair balance between the right to privacy and the right to freedom of expression?*

1.3. Method and material

The method used for this thesis is a traditional legal dogmatic method. This corresponds with the purpose of this thesis as it strives to provide a coherent view of the legal order and the current legal position of the EU fundamental rights protection in relation to the ECHR. However, the traditional legal dogmatic method is slightly altered in this paper with regards to the special nature of the CJEU and the ECtHR jurisprudence. In comparison with settled case-law from national courts, the jurisprudence from the two courts

in question is far more authoritarian. The CJEU jurisprudence is in principle binding as it is the highest authority in interpreting the EU law.⁶ Moreover, the general principles of EU law established by the Court have made major contributions as to the development of EU law, such as the principle of direct effect and the supremacy of EU law.⁷ A case-law study is therefore applied to illustrate the approach of the two human rights courts approaches to conflicts between fundamental rights. Moreover, a comparative perspective and a legal analytic method will be used in order to properly examine the *Google Spain* judgment in the light of the approaches to balance fundamental rights as developed by the CJEU and the ECHR approach, as shown by the interpretation and legal reasoning of the courts. The comparative perspective and legal analytical method is used to avoid a merely descriptive presentation and following analysis.⁸

In line with the chosen traditional legal dogmatic method, the material used is primary sources of law, such as statutory texts and international agreements such as the ECHR. Moreover, secondary sources of law such as regulations, directives, and case-law from the CJEU and the ECtHR will be examined.⁹ With emphasis on the primary sources of EU law, the Charter and the ECHR will respectively be examined in the light of the CJEU and ECtHR jurisprudence as it determined the meaning and interpretation of the instruments. Moreover, *travaux préparatoires* will not be examined in the following presentation, as it does not correspond with the purpose of examining the approach of the courts and do not, in general, provide for substantial guidance as to the interpretation of the sources of law.¹⁰ To ensure a substantial analysis as to the approach of the European Courts,

⁶ Jörgen Hettne & Ida Otken Eriksson (red), *EU-rättslig metod: teori och genomslag i svensk rättstillämpning* (2 omarb. uppl. Norstedts juridik 2011) [Hettne, Otken Eriksson], p. 39ff.

⁷ Hettne, Otken Eriksson, (n) p. 163.

⁸ Nils Jareborg, 'Rättsdogmatik som vetenskap', *Svensk Juristtidning*, 2004, s.1-10.

⁹ See further on a traditional EU legal method, Jane Reichel 'EU-rättslig metod' in Fredric Korling & Mauro Zamboni (reds) *Juridisk metodlära* (Studentlitteratur, 2013), p. 109f and Hettne & Otken Eriksson (n), p. 39ff.

¹⁰ Hettne, Otken Eriksson (n) p.114.

conflicts of fundamental rights in general the implications of *Google Spain*, legal doctrine and other publications by legal scholars will be presented throughout the following. It should in this context be emphasized that the presented material has been screened as to the source credibility, striving to present well-known and respected writers within their field of expertise. When the presented material is subjective or argumentative that will be clearly accounted for with a reference to the opinion of the author in question. In order to keep the information presented as up to date as possible, newspaper articles and memorandums from the European Union website is on occasion used to describe e.g. the ongoing debate on the right to be forgotten and the development of the EU's Data Protection Policy.

1.4. Delimitations

Due to the limited scope of this thesis, a variety of delimitations have been made in order to centre the thesis on the presented purpose. Firstly, the relationship between EU law and the ECHR will be examined without consideration of a possible accession by the EU to the ECHR. This delimitation has been made due to the complexity of the matter and the fact that the draft agreement on the EU to the ECHR was ruled incompatible with EU law in December 2014.¹¹ The discourse will thus be based on the recent situation the EU is not a Contracting Party to the ECHR. Secondly, the aim of the case-law presented in this paper is to examine the legal reasoning on solving conflicts between fundamental rights or the relationship between the CJEU and the ECtHR in general. The background and outcome of the presented jurisprudence will for this reason on occasion be left out. Thirdly, with regards to *Google Spain*, the judgment is examined on the basis of the conflict between the right to private life and protection of personal data and the right to freedom of expression and information. On Directive 95/46, the provisions on the prohibition of processing of special

¹¹ Opinion 2/13 by the Court of Justice of the European Union (Full Court) of the 18 December 2014: Accession by the Union to the European Convention for the Protection of Human Rights and Fundamental Freedoms, ECLI:EU:C:2014:2454.

categories of personal data and the definition of those categories will not be included in this paper. The technical aspects of Directive 95/46 will only be presented briefly as a background for the forthcoming discussion. This moreover holds true for the presentation of the case in general, as both the CJEU judgment and the Advocate General Opinion will only briefly be presented except for the sections concerning the reasoning on the conflict between fundamental rights. Fourthly, the proposed General Data Protection Regulation¹² will not be examined as it has not yet been approved by the European Council of Ministers and will most likely not be entered into force before 2016.¹³ The reason for this delimitation is also the fact that the proposed General Data Protection Regulation most likely will have limited implications for the right to be forgotten.¹⁴ This thesis will therefore focus on the right to be forgotten as configured by the CJEU in *Google Spain*, thus drawn from the provisions of Directive 95/46. Furthermore, this paper concerns solemnly *stricto sensu* conflicts between two or more fundamental rights, and not conflicts between fundamental rights at one hand and a constitutional interest e.g. security or public interests on the other, so called *lato sensu* conflicts.¹⁵ Lastly, publications, information or events after June 2015 will not be included in this paper.

1.5. Research Position

¹²”Proposal for a regulation of the European Parliament and the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data” (General Data Protection Regulation), of 25 January 2012, COM (2012) 11 final.

¹³For more on the progress of the proposed General Data Protection Regulation, see MEMO 15/3802 European Commission Fact Sheet of 28 January 2015.

¹⁴ See e.g. European Commission, *Safeguarding privacy in a Connected World: A European Data Protection Framework for the 21st Century*, COM 2012 9 Final, p.3. See also however the European Parliament, *Legislative Resolution of 12 March on the Proposal for a Regulation 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 (General Data Protection Regulation)* 2014, COM 2012 0011 – C7-0025/2012 , amendment of article 80 and the discourse in David Erdos, ‘Exploring the Expansive yet Diverse Interpretative Stance of European Data Protection Authorities as regards Freedom of Expression on the ‘New Media’ (2014), no. 65/2014 *University of Cambridge Legal Studies Research Paper Series*, p.27.

¹⁵ See further Lorenzo Zuca ‘Conflicts of Fundamental Rights as Constitutional Dilemmas’ in Eva Brems (ed.) *Conflicts between Fundamental Rights*, Intersentia, 2008 [Zucca, 2008].

Conflicts between European fundamental rights on a general level was the subject of an International Conference at Ghent University in 2006, resulting in a publication in 2008 with contributions of several legal scholars and edited by Eva Brems, professor in human rights at Ghent University.¹⁶ In the area of constitutional law, conflicts between fundamental rights have been researched by Lorenzo Zucca at King's College, London.¹⁷ Moreover, on the subject of European Data Protection, contributions have been made by a number of legal professionals. For example, Serge Gutwirth, professor at the Vrije Universiteit Brussel, is the author and editor of several literary posts regarding data protection in Europe.¹⁸ Dr. David Erdos is a university lecturer at the University of Cambridge, currently researching the nature of Data Protection and the intersection between the right to privacy, the freedom of expression, the freedom of information and the freedom of research.¹⁹ Another recent publication on the area of data protection is Research Professor at Vrije Universiteit Brussel and former European Commission employee, Gloria

¹⁶ Eva Brems (ed.) *Conflicts Between Fundamental Rights*, Intersentia, 2008; More information on the International Conference available at <http://www.law.ugent.be/pub/ICCFR/index.htm>.

¹⁷ Lorenzo Zucca *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford University Press, 2007 [Zucca 2007].

¹⁸ Serge Gutwirth, Ronald Leenes, Paul de Hert, Yves Poullet (eds.), *European Data Protection: Coming Of Age*, Springer International Publishing, 2013; Serge Gutwirth, Yves Poullet, Paul de Hert, Cécile de Terwangne, Sjaak Nouwt (eds.), *Reinventing Data Protection?*, Springer International Publishing, 2009; Serge Gutwirth, Ronald Leenes, Paul de Hert (eds.) *Reloading Data Protection*, Springer International Publishing, 2014.

¹⁹ David Erdos, 'Towards a Policy Convergence on Privacy in the Web 2.0 Era?' (2010), in *Privacy Law and Business (International Edition)* (No. 108), December 2010; 'Freedom of Expression Turned On Its Head: Academic Social Research and Journalism in the European Union's Privacy Framework' (2013), in *Public Law*, Issue 1, pp. 52-73; 'Constructing the Labyrinth: The impact of data protection on the development of 'ethical' regulation in social science' (2012), in *Information Communication and Society*, Vol. 15 (1), pp. 104-123; 'Systematically Handicapped? Social Research in the Data Protection Framework' (2011), in *Information and Communications Technology Law*, Vol. 20 (2), pp. 83-101; 'Stuck in the Thicket? Social Research under the First Data Protection Principle' (2011), in *International Journal of Law and Information Technology*, Vol. 19 (2), pp. 133-152.

González Fuster's *The Emergence of Personal Data Protection as a Fundamental Right of the EU*.²⁰

1.6. Outline

This paper will be divided into four parts. In chapter two, the terminology and typology used when examining and classifying conflicts between fundamental rights used in the following presentation will be presented in order to provide a framework for the forthcoming discourse and to define a conflict between fundamental rights for the purposes of this paper. In chapter three, the EU approach on conflicts between fundamental rights will be examined based on CJEU case-law. After a short presentation of the development of fundamental rights protection within the EU, the Charter will be presented briefly as to provide a basis for the forthcoming discourse. The case-law from the CJEU will be presented next to illustrate the reasoning and approach of the Court regarding fundamental rights in general and of the right to privacy and the right to data protection in conflict with the freedom of expression in particular. In Chapter four, the ECtHR approach on solving conflicts between fundamental rights will be examined. Firstly, the ECHR will be presented briefly and secondly, the case-law of the ECHR will be examined. The selected case-law will serve to illustrate the Courts approach on conflicts between fundamental rights in general and between the right to private life and freedom of expression in particular. Lastly, the ECtHR case-law on data protection will be presented. The fifth chapter is focused on Google Spain. After a short background a commentary on the CJEU judgment and the Advocate General's opinion will be presented, followed by the implications of the judgment. The sixth and final chapter consist of a concluding analysis of the findings of the foregoing chapters and a discourse and analysis of the research questions. The final

²⁰ Gloria González Fuster, *The Emergence of Personal Data Protection as a Fundamental Right of the EU* (Law, Governance and Technology Series 16, Springer International Publishing, 2014).

section of this chapter is an attempt to answer the research questions and summarise the findings.

2. The definition of a conflict between fundamental rights

In order to properly examine the problematic issue of solving a conflict between fundamental rights, a terminological and methodological discussion is imperative. A substantial discourse on the subject calls for a clarification on the definition of conflicts between fundamental rights. In the following, Zucca's classification of conflicts between fundamental rights will be applied to facilitate the examination and discourse on conflicts between fundamental rights.²¹

2.1. Zucca's classification

Zucca's classification of conflicts between fundamental rights is based on the notion that legal reasoning has limitations when faced with certain conflicts of rights. He has introduced the concept of a conflict constituting an impossible choice, weighing being out of the question as giving in to one right would inevitably extinguish the other, so called constitutional dilemmas. These conflicts cannot be solved through legal reasoning, in Zucca's opinion.²² Zucca's theory divides conflicts into four main categories. The first two categories relate to the right or rights involved. The first category is a conflict caused by tension between two opposing fundamental rights, *inter-rights* conflicts. In the second category, the conflict is caused by tensions within the same fundamental right, *intra-right* conflicts. The other two categories concern the nature of the conflict. A *partial* conflict can be solved without the core of the right or rights being negated, while as a *total* conflict cannot be solved without one right or interest extinguishing the other. For example, the conflict between the right to privacy and the right to freedom of expression mostly constitutes a *partial inter-rights* conflict. An example of a total *inter-rights* conflict is

²¹ See Zucca, 2008 (n). See furthermore on the same topic Lorenzo Zucca *Constitutional Dilemmas: Conflicts of Fundamental Legal Rights in Europe and the USA*, Oxford University Press 2007, [Zucca, 2007]. For other classifications of conflicts between fundamental rights, see e.g. Kamm's tripartite distinction in Frances Kamm, 'Rights', *Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford University Press, 2004, pp. 476-513.

²² Zucca, 2008 (n), pp. 24f.

assisted suicide, as it conflicts the right to private life with the right to life, which embeds an absolute prohibition to kill.²³ One example of a total intra-rights conflict is *Evans*, where a woman and her former husband had fertilized her eggs with his sperm as she was diagnosed with cervical cancer and had her ovaries removed.²⁴ After the couple split up, both individuals claimed their right to private life - Ms. Evans wanted biological children, and Mr. Evans did not want to become a father. This conflict could not be solved without one individual's right being completely disregarded, thus balancing was not possible.²⁵ A *partial intra-rights* conflict is illustrated by *Zucca* by two extremist groups claiming their right to freedom of speech by demonstrating in the same city. The conflict causes tension within the same right, the conflict can however be solved through legal reasoning and regulation. For example, the two extremist groups can exercise their freedom of speech on different places, dates or times.²⁶

2.2. Lato sensu and stricto sensu conflicts

Traditionally a distinction is made between conflicts between two fundamental rights and a conflict between a fundamental right and an interest.²⁷ For the purpose of this paper, a *stricto sensu* conflict involves two fundamental rights protected by the EU or the ECHR. Thus, a conflict between a fundamental right and a constitutional good which is not enshrined within the fundamental right provisions will be classified as a *lato sensu* conflict.²⁸ With regards to the ECHR, the ECtHR have taken an approach that accord a superior position to fundamental rights in relation to

²³ Ibid, pp. 26f.

²⁴ European Court of Human Rights (GC) Judgment of 10 April 2007 *Evans v. The United Kingdom* (appl. no. 6339/05) ECHR 2007-I.

²⁵ Ibid, § 73.

²⁶ Zucca, 2008 (n) p. 27; See further Hans Kelsen *General Theory of Norms*, 123 Clarendon Press, 1991, Chapter 29.

²⁷ See e.g. Zucca, 2007 (n)pp. 49-50; Maleiha Malik 'From Conflict to Cohesion: Competing Interests in Equality Law and Policy', London, Equality and Diversity Forum, 2008, pp 5f, available on the website of the Equality and Diversity Forum at http://www.edf.org.uk/blog/wp-content/uploads/2009/02/competing-rights-report_web.pdf;

Regarding the ECHR see Olivier de Schutter and Françoise Tulkens 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' in Eva Brems (ed.), *Conflicts Between Fundamental Rights* (Intersentia 2008) pp. 175-178.

²⁸ Zucca, 2008 (n) p. 25f.

interests, the priority-to-rights principle.²⁹ This approach is however not applicable in conflicts between two fundamental rights of equal value.³⁰ Whether or not certain fundamental rights can or should be given precedence over other fundamental rights have been widely debated and will not be elaborated further in this paper.³¹ In the following, fundamental rights will be presumed to have equal legal value in accordance with the principle of the interdependence and the indivisibility of human rights which provides for the equality of fundamental rights *a priori*.³² In the light of the legal theoretical concepts of value pluralism and incommensurability, this therefore paper presupposes the equality of fundamental rights, with the exception of where international law provides precedence criteria for a fundamental right over another.³³

²⁹ See e.g. Steven Greer *The European Convention on Human Rights: Achievements, Problems and Prospects*, (Cambridge University Press 2006), pp. 203–213, in particular p. 208.

³⁰ See e.g. Leto Cariolou 'The Search for Equilibrium by the European Court of Human Rights', in Eva Brems, (ed.) *Conflicts Between Fundamental Rights*, Intersentia, 2008, p. 261.

³¹ KÄLLA!

³² See e.g. The Vienna Declaration and Programme of Action, adopted on 25 June 1993 by the World Conference on Human Rights, (5) (United Nations, General Assembly A/CONF.157/23); and Resolution 60/251, adopted 15 March 2006 by the United Nations General Assembly (A/RES/60/251).

³³ For a further discussion on value pluralism, see e.g. Horacio Spector 'Value Pluralism and the Two Concepts of Rights', Special Topic: Perspectives in Moral Science, *Rationality, Markets and Moral Journal*, vol. 0, 2009, pp. 355-371; and George Crowder *Liberalism and Value Pluralism*, 2002, London, Continuum, p. 45f. For a further discussion on incommensurability, see e.g. Zucca, 2008 (n), p. 29f; Matthew Adler 'Law and Incommensurability: introduction', pp. 1169f (1998); Eric A. Posner 'The strategic basis of principled behaviour: A Critique of the incommensurability thesis', pp. 1185f; Frederick Schauer 'Instrumental Commensurability', pp. 1215; Matthew Adler 'Incommensurability and Cost-Benefit Analysis', pp. 1371ff, all in 146 *University Pennsylvania Law Review* (1998).

3. The EU approach regarding conflicting fundamental rights

Seen from the number of cases brought before the EU Member States' national courts as well as the CJEU, conflicts between fundamental rights are of increasing importance.³⁴ There are several possible reasons for that development. The rights catalogue is expanding, pre-existing rights are given a more extensive meaning and interpretation and the horizontal effect³⁵ affect the application and scope of fundamental rights. Regardless, these tendencies have led to an increase of actions based upon violations of fundamental rights, and subsequently an increase of conflicts between fundamental rights.³⁶ This Chapter will set out to present the general EU approach on conflicts between fundamental rights. Firstly, the background of fundamental rights as a part of the EU legal order will be presented, followed by a short presentation of the EU legal framework on fundamental rights and, in the concluding section, a presentation and examination of CJEU case-law.

3.1. Background

In the early figurations of the EU, fundamental rights were not included in statutory texts, nor did early jurisprudence from the CJEU recognize rights and principles drawn from domestic law.³⁷ In the late 1960's, fundamental rights were introduced by the CJEU as a part of the general principles of Community law.³⁸ In *Stauder*, the Court for the first time held that

³⁴ See further Eva Brems 'Introduction' in Eva Brems (ed), *Conflicts Between Fundamental Rights*, Intersentia, 2008, pp. 2ff.

³⁵ For a further discussion on horizontal effect of the EU Charter, see e.g. Dorota Leczykiewicz, 'Horizontal Application of the Charter of Fundamental Rights' (2013) 38 *European Law Review* 479; Matteo Fornasier, 'The Impact of EU Fundamental Rights on Private Relationships: Direct or Indirect Effect?' (2015), *European Review of Private Law* Vol. 23 No. 1, pp. 29-46.

³⁶ European Union Commission Thematic Report, 2010, *In search of a balance between the right to equality and other fundamental rights*, Emmanuelle Birbosia and Isabelle Rorive, p. 14.

³⁷ See e.g. Case 1/58 *Stork v High Authority* [1959] ECR 17; Cases 36, 37, 38 and 40/59 *Geitling v High Authority* [1960] ECR 423; and Case 40/64 *Sgarlata and others v Commission* [1965] ECR 215.

³⁸ This has been introduced as a consequence of the supremacy of EU law introduced by the ECJ in Case 6/64 *Costa v ENEL* [1964] ECR 585, as to ensure the avoidance of human

fundamental rights are enshrined in the general principles of Community law and protected by the Court.³⁹ This approach was reaffirmed and further developed by the CJEU in *Internationale Handelsgesellschaft*.⁴⁰ In *Nold*, the CJEU introduced international treaties protecting fundamental rights and 'on which the Member States have collaborated or of which they are signatories' as able to supply guidelines which should be followed within the framework of Community law.⁴¹ Since *Stauder*, the CJEU have on several occasions safeguarded fundamental rights, deriving fundamental rights from international human rights treaties such as the ECHR, as well as constitutional traditions common to the Member States.⁴² A joint declaration between the Parliament, Council and Commission in 1977 reflected the recent development in the CJEU case-law and gave fundamental rights political approval within the EU.⁴³ Explicit reference to fundamental rights in EU statutory texts was subsequently made in the Maastricht, Amsterdam, Nice and Lisbon Treaties.⁴⁴

rights protected by national law being undermined. See further Dehousse, F., Report on the Supremacy of EC Law over National Law of the Member States, European Parliament Doc 43 (1965-66), [1965] JO (2923) 14.

³⁹ Case 29/69, *Stauder v City of Ulm* [1969] ECR 41 9 434, para 7.

⁴⁰ Case 11/70, *Internationale Handelsgesellschaft mbH v Einfuhr- und Vorratsstelle für Getreide und Futtermittel* [1970] ECR 1125, para 4.

⁴¹ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 13.

⁴² See for example regarding constitutional traditions common to the Member States Case T-112/98 Judgment of the Court of First Instance, *Mannesmannröhren-Werke AG v Commission of the European Communities* [2001] ECR II 729, para 84; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH v Oberbürgermeisterin der Bundesstadt Bonn* [2004] ECR I- 09609, para 33; Case C-112/00 *Eugen Schmidberger, Internationale Transporte und Planzüge v Republik Österreich* [2003] ECR I-5659 [C-112/00 Schmidberger], para 71.

⁴³ See Joint Declaration of the Parliament, Council and Commission on fundamental rights [1977] OJ C103/1.

⁴⁴ See Treaty on European Union (Maastricht text), 29/7/1992, OJ C 191/1, Title I Article F; Treaty of Amsterdam Amending the Treaty on European Union, the Treaties Establishing the European Communities and Certain Related Acts, 10/11/1997 O.J. C 340/1, Article 1(8), Article 6; Treaty of Nice amending the Treaty on European Union, the Treaties establishing the European Communities and certain related acts, 10/3/2001 OJ C 80/1, Article 7; Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 17/12/2007 OJ C 306/1, see e.g. Article 6(2) TEU. See further Paul Craig, Grainne de Burca *EU law - text, cases and materials* 5th ed. Oxford University Press, 2011, p. 389.

3.2. The legal framework

Initially developed through the CJEU case law as general principles of EU law, fundamental rights were given a number of explicit references in the Lisbon Treaty. The main provision on fundamental rights is found in Article 6 TEU⁴⁵, which provides:

1. The Union recognizes the rights, freedoms and principles set out in the Charter of Fundamental Rights of the European Union of 7 December 2000, as adapted at Strasbourg, on 12 December 2007, which shall have the same legal value as the Treaties.

The provisions of the Charter shall not extend in any way the competences of the Union as defined in the Treaties.

The rights, freedoms and principles in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations referred to in the Charter, that set out the sources of those provisions.

2. The Union shall accede to the European Convention for the Protection of Human Rights and Fundamental Freedoms. Such accession shall not affect the Union's competences as defined in the Treaties.

3. Fundamental rights, as guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms and as they result from the constitutional traditions common to the Member States, shall constitute general principles of the Union's law.

Hereby the Charter is given the same legal status as the Treaties. Moreover, fundamental rights, as guaranteed by the ECHR and as a result of the constitutional traditions common to the Member States are given the status of general principles of EU law in Article 6(3) TEU. Legislation or other measures of EU law in non-conformity with the fundamental rights enshrined in the Charter or as general principles of EU law will subsequently be set aside if they cannot be interpreted in conformity with fundamental rights.⁴⁶

3.3. The European Charter of Fundamental Rights

Firstly drafted in 1999, the Charter of Fundamental Rights of the European Union of 7 December 2000 was adopted in Strasbourg on 12 December

⁴⁵Consolidated Version of the Treaty on European Union 2010 OJ C 83/01 [TEU].

⁴⁶ See e.g. C-112/00 Schmidberger (n) para 73; Joined Cases C-402/05 and C-415/05 *Yassin Abdullah Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR 2008 I-06351 [C-402/05 and C-415/05 Kadi], para 284.

2007, and came into force through the Lisbon Treaty in December 2009.⁴⁷ The Charter is a legally binding instrument on fundamental rights within the scope of EU law, given the same legal status as the Treaties.⁴⁸ The Charter provides several categories of rights, each chapter containing a group of rights, for example I Dignity, II Freedoms, III Equality, IV Solidarity, V Citizen's Rights and VI Justice. Some provisions of the Charter can be seen as modern and quite innovative, for example the prohibition on human cloning.⁴⁹ Moreover, new rights are introduced, such as the protection of personal data in Article 8 and the freedom to conduct a business in Article 16. The substantial provisions of the Charter will not be elaborated upon, albeit the general provisions will be presented more thoroughly here. The final chapter of the Charter is named VII *General Provisions Governing the Interpretation and Application of the Charter* regulates the application of the Charter in Article 51, which holds that the Charter is addressed to the institutions of the EU and the Member States when implementing EU law. Article 51(3) holds that the Charter do not create any new power of task for the EU, nor modify existing such. Article 52(1) of the Charter is a general limitation clause, which provides that any limitation on the exercise of the rights and freedoms guaranteed by the Charter must be provided for by law and respect the essence of that right. Furthermore the limitations must meet the requirements of the principle of proportionality, be necessary and genuinely meet objectives of a general interest recognized by the union or the need to protect the rights and freedoms of others. Article 52(3) and Article 53 addresses the relationship between the Charter and the ECHR,

⁴⁷ Charter of Fundamental Rights of the European Union [2010] OJ C 83/02 [the Charter].

⁴⁸ For further discussions on the scope of EU law and the limits of the applicability of the Charter, see e.g. Grainne de Búrca 'The Drafting of the European Union Charter of Fundamental Rights' (2001), 26 *European Law Review* 1, p. 136; Leonard Besselink 'The Member States, the national constitutions, and the scope of the Charter' (2001), 8 *Maastricht Journal of European and Comparative Law* 1; Koen Lenaerts 'Exploring the Limits of the EU Charter of Fundamental Rights' (2012), 8 *European Constitutional Law Review* 3, p. 375-403.

⁴⁹ See Article 3(d) of the Charter.

other international instruments and national constitutional provisions. Article 52(3) provide that the rights guaranteed by the Charter corresponding with rights in the ECHR shall be given the same meaning and scope as those laid down by the Convention, with the exception of EU law providing more extensive protection. The possibility for more extensive protection has been exercised by the CJEU in rights regarding data protection⁵⁰, lawyer-client confidentiality⁵¹ and refugee rights.⁵² The binding nature of the Charter, in combination with the expanding scope and application of EU law and the extension of jurisdiction of the CJEU provided by the Lisbon Treaty, has led to an increase in the number of judgments involving fundamental rights.⁵³ Since the Charter entered into force, the number of judgments before the CJEU drawing upon Charter provisions has increased dramatically, at least 122 judgments of the CJEU and at least 37 judgments of the General Court (previously the Court of First Instance).⁵⁴ This increase is a product of the Charter as a legally binding framework on protection of fundamental rights, but also of to the nature of modern EU law. The expanded scope of EU law into former third pillar areas does not only create an increase of possible breaches of fundamental rights in size, but moreover also in substantial areas as migration, asylum and privacy.⁵⁵

⁵⁰ See e.g. Case C-28/08 *Commission v Bavarian Lager* [2010] ECR 2010 I-06055.

⁵¹ See e.g. Case 155/79 *AM & S Europe Ltd v Commission* [1982] ECR 1575; Case C-550/07 *P Akso Nobel Chemicals and Akcros Chemicals Ltd v Commission* [2010] ECR 2010 I-08301.

⁵² See e.g. Case C-465/07 *Meki Elgafaji and Noor Elgafaji v Staatssecretaris van Justitie* [2009] ECR 2009 I-00921.

⁵³ See further e.g. Sergio Carrera, Marie De Somer, and Bilyana Petkova 'The Court of Justice of the European Union as a Fundamental Rights Tribunal: Challenges for the Effective Delivery of Fundamental Rights in the Area of Freedom, Security and Justice' (2012), in CEPS, *Justice and Home Affairs Liberty and Security in Europe Papers* No. 49.

⁵⁴ See for a discussion on the increase Grainne de Burca 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator?' (2013), *Maastricht Journal of European and Comparative Law*, vol 20, pp. 174ff [de Burca, 2013]; and substantive S. Sánchez, 'The Court and the Charter: The impact of the entry into force of the Lisbon Treaty in the ECJ's approach to fundamental rights', 49 *Common Market Law Review* 5 (2012), p. 1565-1612.

⁵⁵ de Burca, 2013, pp. 175f.

3.4. EU Data Protection

In order to examine conflicts between fundamental rights with emphasis on the right to private life and the right to freedom of expression, the right to protection of personal data will be presented in this section. The right of protection of data can be found in several provisions in EU law, e.g. Article 16 TFEU and in Article 8 of the Charter. Article 8(1) of the Charter holds that everyone has the right to protection of personal data concerning him or her, and Article 8(2) states 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. Furthermore, Article 8(2) holds that everyone has the right of access to data which has been collected concerning him or her, and to have it rectified. Moreover, Article 7 of the Charter, respect for private and family life is closely linked to the right of protection of personal data.⁵⁶

3.4.1. Directive 95/46

The aim of Directive 95/46⁵⁷ is 'protecting the fundamental rights and freedoms of natural persons, and in particular their right to privacy with the respect to the processing of personal data, and of removing obstacles to the free flow of such data'.⁵⁸ In the application of the directive, the interests of the person responsible for processing personal data and the individual subject to processing shall be weighed.⁵⁹ Directive 95/46 guarantees the protection of personal data e.g. by obliging Member States to provide that personal data must be processed fairly and lawfully, collected for specified, explicit and legitimate purposes, to which the controller of the data is responsible⁶⁰, and that personal data may be processed only if one of the

⁵⁶ See e.g. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd and Kärntner Landesregierung* [2014] ECLI:EU:C:2014:238 [C-293/12 and C-594/12 *Digital Rights Ireland*], para 52.

⁵⁷ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, OJ L281 of 23 November 1995 [Directive 95/46].

⁵⁸ Article 1 of Directive 95/46.

⁵⁹ Recital 25 in the preamble of Directive 95/46.

⁶⁰ Article 6(1) and (2) of Directive 95/46.

criteria for legitimization is satisfied.⁶¹ With regards to balancing the right to private life and data protection against the right to freedom of expression, the directive holds that Member States shall provide for exemptions or derogations from the provisions of the directive for the processing of data carried out solemnly for journalistic purposes or for the purpose of artistic or literary expression 'only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression'.⁶² Moreover, the directive holds that journalistic purposes of journalism, literary or artistic expression should qualify for exemption from the requirements of certain provisions insofar as necessary to reconcile fundamental rights of individuals with freedom of information and notably the right to receive and impart information, as guaranteed in particular in Article 10 of the ECHR.⁶³

The directive moreover afford data subjects'⁶⁴ rights to 'the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data.'⁶⁵ The data subject also under some circumstances has a right to object to data processing 'at any time' on compelling legitimate grounds relating to his particular situation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data.⁶⁶

3.5. Conflicts between fundamental rights

This section will examine the CJEU approach on conflicts between fundamental rights. As noted above, the purpose of this paper is to examine conflicts between fundamental rights in general, in particular the right to data protection. Conflicts between rights and freedoms⁶⁷ will however also

⁶¹ Article 7 of Directive 95/46.

⁶² Article 9 of Directive 95/46.

⁶³ Recital 37 of the preamble of Directive 95/46,

⁶⁴ i.e. the person who is the subject for processing of data relating to him or her.

⁶⁵ Article 12 (b) of Directive 95/46.

⁶⁶ Subparagraph (a) of the first paragraph of Article 14 of Directive 95/46. SKRIVA OM?

⁶⁷ Here, 'fundamental freedom' refers to the free movement of goods, services, capital and persons, i.e. the four pillars of the common market. See further Costas Kombos

briefly be presented to supplement the CJEU case-law on conflicts between two fundamental rights enshrined in the Charter and clarify the applied methodology. A short section will therefore examine *lato sensu* conflicts in order to exemplify the approach on a conflict between a fundamental right and a fundamental freedom.⁶⁸ Secondly, *stricto sensu* conflicts will be presented. Firstly, however, the methodology of balancing as applied by the CJEU will be presented in general terms.

3. 5. 1 Methodology

After the entering into force of the Charter, the case-law of the CJEU point to the application of the method of balancing when faced with conflicts between rights or interests. The balancing of rights applied by the Court discern two main tendencies, the first being the 'manifest test' approach. In short, this method consists of an assessment on whether the EU institutions' exercise of legislative power contains a manifest error or a misuse of power.⁶⁹

'Fundamental Rights and Fundamental Freedoms: A Symbiosis on the Basis of Subsidiarity' (2006) 12 *European Public Law* pp. 433ff, p. 435; and Catherine Barnard, *The Substantive Law of the EU - The Four Freedoms*, Oxford University Press, 2004.

⁶⁸ See on the conflicts between fundamental rights and fundamental freedoms *inter alia* Joseph H. H. Weiler, and Nicholas J.H. Lockhart, N., 'Taking Rights Seriously: The European Court and its Fundamental Rights Jurisprudence' (1995) 32 *Common Market Law Review* pp. 51, 579; Francis Jacobs 'Human Rights in the European Union: The Role of the Court of Justice' (2001) *European Law Review* pp. 331ff; and Bruno de Witte, 'The Past and Future Role of the European Court of Justice in the Protection of Human Rights' in Philip Alston (ed) *The EU and Human Rights*, Oxford University Press, 1999, pp. 859ff.

⁶⁹ See e.g. Case 138/79 *SA Roquette Frères v Council of the European Communities (Fifth Roquette Case)* [1980] ECR 3333, para. 25; and Case C-558/07 *S.P.C.M. and Others* [2009] ECR I-5783, Opinion of AG Kokott, para 70-71. For a discussion on the 'manifest test' in relation to Article 16 of the Charter, see Xavier Groussot, Gunnar Thor Pétursson, Justin Pierce, 'Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights', *Lund University Legal Research Papers* nr. 01/14 (2014), p. 11.

As the recent case-law of the Court point towards a more frequent use of the proportionality framework in Article 52(1) of the Charter, the manifest test will not be examined further.⁷⁰ Unlike the TEU or the TFEU, the Charter provides for guidelines as to the interpretation and application of the instrument as illustrated by Article 6(1) TEU which refers to Title VII of the Charter. As opposed to the ECHR, the rights guaranteed by the Charter are not categorized in absolute or non-absolute rights. Instead, Article 52(1) of the Charter is a horizontal provision acting as a general limitation clause.⁷¹ Note however that the rights under Title I cannot be imposed to limitations.⁷² The wording and structure of Article 52(1) is drawn from the jurisprudence of the CJEU⁷³, the latter inspired by the specific derogation clauses on the limitation of qualified rights enshrined within the ECHR.⁷⁴ The article constructs conditions which a limitation or derogation on the rights and freedoms enshrined in the Charter must fulfill in order to comply with EU law. The conditions determining whether or not a limitation is justified are; the limitation on the exercise of rights and freedoms must be provided for by law⁷⁵; it must respect the essence of the right⁷⁶; and it must

⁷⁰ See *inter alia*, Joined Cases C-92/09 and 93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063; and C-293/12 and C-594/12 *Digital Rights Ireland* (n).

⁷¹ See e.g. Koen Lenaerts, Vice President of the Court of Justice of the European Union and professor in EU law at Leuven University, 'The Court of Justice of the European Union and the Protection of Fundamental Rights', *Polish Yearbook of International Law*, Vol. 31 (2011), p. 79-106., pp 92ff [Lenaerts, 2011].

⁷² See The explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, p. 17 and Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80.

⁷³ See e.g. Case C-62/90 *Commission v Germany* [1992] ECR I-2575, para. 23; Case C-44/94 *Fishermen's Organisations and Others* [1995] ECR I-3115, para. 55; Case C-292/97 *Karlsson* [2000] ECR I-2737, para. 45; Joined Cases C-317/08 to C-320/08 *Alassini and Others* [2010] ECR I-2213, para. 63

⁷⁴ See e.g. Article 8-11 ECHR; and European Court of Human Rights judgment of 21 November 2001 *Fogarty v United Kingdom* (appl. no. 37112/97) ECHR 2001-XI, para. 33.

⁷⁵ For further aspects on and definition of 'provided for by law', see e.g. Case C-407/08 P *Knauf Gips v Commission* [2010] ECR I-6371, paras 87ff; Opinion of AG Cruz Villalón in Case C-70/10 *Scarlet Extended SA*, delivered on 14 April 2011, para 67; and by analogy the case-law of the ECtHR in European Court of Human Rights Judgment of 26 April 1979 *Sunday Times v United Kingdom*, Series A no. 30; European Court of Human Rights Judgment of 24 April 1990 *Kruslin v France*, Series A No 176-A, § 27.

⁷⁶ There are numerous examples in ECJ case-law referring to 'the very substance of the rights guaranteed', e.g. Case 44/79 *Hauer* [1979] ECR3727, para 23; Case 265/87 *Schröder HS Kraftfutter* [1989] ECR 2237, para 15; Case C-293/97 *Standley and Others* [1999] ECR I-2603, para 54; Case 5/88 *Wachauf* [1989] ECR-2609, para 18; Joined Cases C-402/05 P

comply with the principle of proportionality. The criterion on the principle of proportionality is considered fulfilled if the limitation in question is necessary and genuinely meet the objectives of a general interest recognized by the EU or the need to protect the rights and freedoms of others.⁷⁷ In *Volker*, the CJEU explicitly applied Article 52(1) of the Charter for the first time.⁷⁸ The CJEU found the limitation in question to be provided for by law⁷⁹, and to meet an objective of a general interest recognized by the EU.⁸⁰ On whether the limitation was proportionate to the aim pursued, the Court held that ‘the principle of proportionality, which is one of the general principles of European Union law, requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it’.⁸¹ The Court moreover stated that a limitation ‘may not be pursued without having regard to the fact that that objective must be reconciled with the fundamental rights set forth in Articles 7 and 8 of the Charter’, and that a balance must be struck between the EU interests at stake and the claimants’ right to private life in general and to the protection of their personal data in particular.⁸² Thus, the Court applied a *stricto sensu* balancing, i.e. there must be proportionality between the restriction on the one hand and the aim pursued on the other.⁸³ Since, the CJEU have referred to Article 52(1) of the Charter

and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, para 355; and Joined Cases C-379/08 and C-380/08 *ERG* [2010] ECR I-2007, para 80. The notion of the ‘essence of the right can moreover be derived from constitutional traditions of the Member States, for example Article 19(2) of the German Basic Law (Grundgesetz für die Bundesrepublik Deutschland) provide that ‘in no case may the essence of a basic right be affected.’ Moreover, see the case-law of the ECtHR in European Court of Human Rights Judgment of 23 September 1982 *Sporrong and Lönnroth v Sweden*, Series A No. 52.

⁷⁷ Article 52(1) of the Charter.

⁷⁸ Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I - 11063 [C-92/09 and C-93/09 *Volker*].

⁷⁹ C-92/09 and C-93/09 *Volker (n)*, para 66.

⁸⁰ *Ibid*, paras 67-71.

⁸¹ *Ibid*, para 74; moreover referring to Case C-58/08 *Vodafone and Others* [2010] ECR I-0000, para 51.

⁸² C-92/09 and C-93/09 *Volker (n)*, paras 76f.

⁸³ See e.g. Xavier Groussot, Gunnar Thor Pétursson, Justin Pierce, ‘Weak Right, Strong Court - The Freedom to Conduct Business and the EU Charter of Fundamental Rights’, *Lund University Legal Research Papers* nr. 01/14 (2014). p.13. For a further discussion on

when faced with conflicts between fundamental rights, however in *Sky Österreich*⁸⁴ and *Digital Rights Ireland*⁸⁵, the analytical stages of Article 52(1) of the Charter were not applied to the same extent as in *Volker*.

As to how the proportionality assessment should be executed and the rights be reconciled when the EU law in question is a directive, the CJEU held in *Promusicae* that;

”Community law requires that when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Furthermore, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality.”⁸⁶

Thus, the CJEU in this case returned the issue of balancing the rights to the Member States. The EU Member States are accordingly obliged to strike a fair balance between different fundamental rights and freedoms within the EU legal order when interpreting and implementing EU law.⁸⁷ Authorities and courts of the Member States must interpret their national law in a manner consistent to the EU law and ensure that the interpretation is not in conflict with fundamental rights or other principles of EU law, such as the principle of proportionality.⁸⁸ In sum, in the light of the recent jurisprudence

stricto sensu balancing see e.g. Jan H. Jans ‘Proportionality Revisited’, 2000 *legal Issues of Economic Integration* 27 (3) pp. 239-265.

⁸⁴ Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECR I-0000 [C-283/11 *Sky Österreich*].

⁸⁵ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd and Kärntner Landesregierung* [2014].

⁸⁶ Case C-275/06 *Promusicae* [2008] ECR I-271 [C-275/06 *Promusicae*], para 70; See further the discussion of Groussot in Xavier Groussot ‘Music Production in Spain (Promusicae) v Telefónica de España SAU - Rock the KaZaA: Another Clash of Fundamental Rights’ (2008) 45 *CMLR* pp.1745, p. 1763.

⁸⁷ See e.g. C-275/06 *Promusicae* (n); C-283/11 *Sky Österreich*; Case C- 314/12 *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega*

Filmproduktionsgesellschaft mbH [2014] ECLI:EU:C:2014:192, para 46.

⁸⁸ *ibid*, para 46.

of the CJEU, the proportionality assessment is to be made in accordance with Article 52(1) of the Charter.⁸⁹

3.5.2. Lato sensu conflicts

General interests recognized by the EU are set out in Article 3 TEU and other provisions of the Treaty.⁹⁰ The Court has taken a broad approach on qualifying an objective as a general interest of the EU, for example the objectives of protection of public health and international security have been categorized as general interests.⁹¹ The CJEU jurisprudence provide numerous examples of a conflict between a fundamental right guaranteed by the Charter and a general interest.⁹² In *Deutsches Weintor*, the general interest of protection of health was in conflict with the right to conduct a business in Article 16 of the Charter.⁹³ Here, the CJEU reiterated that a conflict of fundamental rights or interests must be solved in accordance with the need to reconcile the requirements of the protection of those fundamental rights protected by the EU legal order, and striking a fair balance between them.⁹⁴ In this context, the EU fundamental freedoms must be mentioned. The general approach on conflicts between a fundamental right and a fundamental freedom is that the two are to be given equal weight, thus no hierarchy between the fundamental freedoms and the fundamental rights protected by the EU legal order.⁹⁵ Thus 'the rights and freedoms of

⁸⁹ See further e.g. C-92/09 and C-93/09 *Volker*, paras 65ff; Case C-300/11 *ZZ v Secretary of State for the Home Department* [2014] ECLI:EU:C:2013:363 [C-300/11 ZZ], para 51; Case C-390/12 *Robert Pflieger and Others* [2014] ECLI:EU:C:2014:281, para 59; Case C-129/14 *PPU Zoran Spasic* [2014] ECLI:EU:C:2014:586, paras 56ff; and C-611/12 P *Jean-François Giordano v European Commission* [2014] ECLI:EU:C:2014:2282, para 49.

⁹⁰ See e.g. Articles 36, 45 (3), and 52 TFEU.

⁹¹ See on public health Case C-293/97 *Standley and Others* [1999] ECR I-2603, on international security Joined Cases C-402/05 P and C-415/05 P *Kadi and Al Barakaat International Foundation v Council and Commission* [2008] ECR I-6351, and on the establishment of a common organization of the market Case 44/79 *Hauer* [1979] ECR 3727.

⁹² Case C-300/11 *ZZ* (n), paras 51, 52, 57, 64; See for more examples of conflicts between Article 47 of the Charter and the legitimate interest of State Security Case C-280/12 P *Council v Commission* [2013] ECLI:EU:C:2013:775, para 62; Case C-348/12 P *Council v Commission* [2013] ECLI:EU:C:2013:776, para 69.

⁹³ Case C-544/10 *Deutsches Weintor eG v Land Rheinland-Pfalz* [2012] ECLI:EU:C:2012:526, [Case C-544/10 *Deutsches Weintor*].

⁹⁴ Case C-544/10 *Deutsches Weintor* C-544/10 (n), para 47.

⁹⁵ See e.g. Sybe A. de Vries 'Balancing Fundamental Rights with Economic Freedoms according to the European Court of Justice' (2013), *Utrecht Law Review*, Vol. 9, Issue 1,

others' as contained in Article 52(1) of the Charter is not restricted to fundamental rights of third parties enshrined within the EU legal order, but also other rights and freedoms derived from EU law, such as Treaty provisions on freedom of movement and other fundamental freedoms.⁹⁶

3.5.3. *Stricto sensu* conflicts

From the wording of Article 52(1) of the Charter, limitations of rights enshrined within the EU legal order can be of a horizontal as well as a vertical nature, as the rights must be balanced with the need to protect the rights and freedom of others.⁹⁷ A conflict between two fundamental rights in theory constitute a vertical dimension as the qualified rights in the Charter are not hierarchical, except naturally the rights under Title I, as noted above. As the qualified fundamental rights guaranteed by the Charter are *a priori* equal, any limitation must be subject to the principle of proportionality.⁹⁸ The EU institutions and the Member States must therefore when interpreting and implementing EU law, in compliance with Article 52(1) of the Charter, verify that the limitation of a fundamental right meet the objectives of a general interest recognized by the EU or for the need for protection of the rights and freedoms of others. The limitation of the right at hand may not go beyond what is necessary to achieve the objective in question.

pp. 169-192, pp. 177f; see also Jacqueline Duteil de la Rochère 'Challenges for the protection of fundamental rights in the EU at the time of the entry into force of the Lisbon Treaty' (2010), 2010 *Fordham International law Journal* 33, p. 1787

⁹⁶ In this context, see e.g. Case C-112/00 *Schmidberger* [2003] ECR I-5659; Case C-438/05 *International Transport Workers' Federation and Finnish Seamen's Union, Viking Line*, [2007] ECR I-10779; Case C-250/06 *UnitedPan-Europe Communications Belgium and Others* [2007] ECR I-11135; and Case C-244/06 *Dynamic Medien* [2008] ECR I-505; Case C-36/02 *Omega Spielhallen- und Automatenaufstellungs-GmbH* [2004] ECR I- 9609; and Case C-341/05 *Laval un Partneri Ltd v Svenska Byggnadsarbetareförbundet* [2007] ECR I-11767.

⁹⁷ See e.g. Case C-101/01 *Lindqvist* [2003] ECR I-12971, para. 86 and Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, paras 53-56.

⁹⁸ See on the principle of proportionality, *inter alia* Case C-343/09 *Afton Chemical* [2010] ECR I-7027, para 45, and Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012] ECLI:EU:C:2012:657, para 71, Joined Cases C-92/09, C-93/09 *Volker* [2010], para 74; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013] ECLI:EU:C:2013:28, para 50; and Case C-101/12 *Schaible* [2013] ECLI:EU:C:2013:661, para 29.

3.5.4. Case-law on the right to data protection

In this section, particular aspects of the right to protection of personal data will be presented. The right to protection of personal data is given special weight under EU law, and derogations and limitations in relation to the protection of personal data must apply only in so far as is strictly necessary.⁹⁹ The right to protection of personal data is however not an absolute right, and must be considered in relation to its function in society.¹⁰⁰ The CJEU case-law on Article 8 of the Charter and Directive 95/46 refer to a balancing of the right to protection of personal data and the 'right to free movement of personal data'.¹⁰¹ The directive moreover holds that a derogation must only be made insofar necessary to reconcile the right to private life and the right to freedom of expression.¹⁰² In *Satamedia*, on the relation between data protection and freedom of expression, the CJEU held that the provisions of Directive 95/46 must be interpreted in the light of the aims pursued by the latter and the system it establishes.¹⁰³ The CJEU moreover found that the objective of the directive cannot be pursued without having regard to the fact that those fundamental rights must to some degree be reconciled with the fundamental right to freedom of expression, and that the obligation to do so lies on the Member States.¹⁰⁴ Limitations or derogations must be necessary in order to reconcile the rights at hand.¹⁰⁵ The Court moreover noted the importance of freedom of expression and

⁹⁹ See e.g. Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831, para 56; Joined Cases C-92/09 and C-93/09 *Volker* [2010], paras 77, 86; Case C-473/12 *IPI* [2013] ECLI:EU:C:2013:715, para 39; and Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland* [2014], para 52.

¹⁰⁰ Joined Cases C-92/09, C-93/09 *Volker* [2010], para 48; Case C-112/00 *Schmidberger* [2003] ECR I-5659, para 80.

¹⁰¹ See e.g. Case C-101/01 *Lindkvist* [2003] ECR I-12971, para 97, Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD v. Administración del Estado* [2011] ECR I-12181, para 34 [C-468/10, C-469/10 *ASNEF and FECEMD* 2011].

¹⁰² See Article 9 'Processing of personal data and freedom of expression' in Directive 95/46/EC, the derogations and limitations are specified in Chapter II, IV and VI of the directive.

¹⁰³ Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECR I-9831 [C-73/07 *Satamedia*], para 50; See further Case C-265/07 *Caffaro* [2008] ECR I-7085, para 14.

¹⁰⁴ *ibid*, para 53.

¹⁰⁵ *ibid*, para 55.

held that notions related to that freedom, such as journalism, are to be interpreted broadly.¹⁰⁶ However, the Court found that in order to strike a balance between the two fundamental rights, the limitations of the right to data protection must only apply insofar as strictly necessary.¹⁰⁷ The Court finally concluded that processing of personal data may be classified as 'journalistic activities' if the objective is the public disclosure of information, regardless of the medium used to transmit them, the undertakings in question and profit-making purposes.¹⁰⁸ In sum, the CJEU allowed for a broad interpretation as to the definition of journalism, leaving the Member States with a wide discretion, but without providing concrete guidelines as to strike a balance between the right to data protection and the right to freedom of expression.¹⁰⁹ In *ASNEF and FECEMD*, the CJEU reiterated that Member States when interpreting Directive 95/46 must allow a fair balance between 'various fundamental rights and freedoms protected by the EU legal order'.¹¹⁰ The balancing of rights depend on the individual circumstances of the case at hand 'and in the context of which the person or the institution which carries out the balancing must take account of the significance of the data subject's rights arising from Articles 7 and 8 of the Charter.'¹¹¹ The Court furthermore found it possible to take into consideration whether or not the data in question already appear in public sources when examining the seriousness of an infringement on a data subjects fundamental rights.¹¹²

In light of the above, the case-law on the protection of personal data emphasizes the importance of Article 8 of the Charter. Since *Lindqvist*, the CJEU have safeguarded the right to protection of data, and held that in the

¹⁰⁶ *ibid*, para 56.

¹⁰⁷ *ibid*.

¹⁰⁸ *ibid*, para 61.

¹⁰⁹ For a further discussion on the implications of the judgment, see e.g. Peter Oliver 'The Protection of Privacy in the Economic Sphere before the European Court of Justice' (2009) 46 *CML Rev* 1443, p. 1461.

¹¹⁰ C-468/10 and C-469/10 *ASNEF and FECEMD* 2011, para 43; Case C-275/06 *Promusicae* [2008] ECR I-271, para 68.

¹¹¹ C-468/10 and C-469/10 *ASNEF and FECEMD* 2011, para 40.

¹¹² *Ibid*, para 44.

light of the principle of proportionality, account shall be taken of all the circumstances of a case, such as the duration of the breach and the importance for those concerned of the protection of the disclosed data.¹¹³ The CJEU case-law moreover stresses the responsibility for national authorities and courts in the application of national legislation implementing EU law to ensure a fair balance between fundamental rights protected by the EU legal order.¹¹⁴ In the recent authority *Digital Rights Ireland*, the CJEU was to examine whether Directive 2006/24¹¹⁵ was in conformity with Articles 7,8, and 11 of the Charter.¹¹⁶ The court held that the limitation on the right to private life and the right to protection of personal data was provided for by law, respected the essence of the rights and satisfied an objective of general interest. On the principle of proportionality, the CJEU reiterated that the principle of proportionality requires that acts of the EU institutions are appropriate for attaining the legitimate objectives pursued and that they do not exceed the limits of what is appropriate and necessary to achieve those objectives.¹¹⁷ In this case, the Court found that the provisions of Directive 2006/24 were not proportionate and subsequently declared the directive invalid.¹¹⁸

3.6. EU Fundamental Rights and the ECHR

The fundamental rights enshrined in and protected by the EU legal order have a close relationship to the rights guaranteed under the ECHR as will be

¹¹³ Case C- 101/01 *Lindqvist* [2003] ECR I-12971 [C-101/01 Lindqvist], paras 88, 89.

¹¹⁴ C-101/01 Lindqvist, para 90; Case C-305/05 *Ordre des barreaux francophones et germanophone and Others* [2007] ECR I-5305, para 28; Joined Cases C-468/10 and C-469/10 *ASNEF and FECEMD* 2011], paras 43ff.

¹¹⁵ Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks and amending Directive 2002/58/EC, L 105/54 OJ 13.4.2006.

¹¹⁶ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*, para 23.

¹¹⁷ See e.g. Case C- 343/09 *Afton Chemical Limited v Secretary of State for Transport* [2010], para 45; Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I-11063, para 74; Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012], para 71; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013], para 50; and Case C-101/12 *Schaible* [2013], para 29.

¹¹⁸ Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd and Kärntner Landesregierung* [2014], para 71.

presented in this section. In *Nold*, the CJEU first provided the possibility for the ECHR to supply guidelines regarding fundamental rights.¹¹⁹ This was elaborated further in *Johnston*, where the CJEU held the ECHR to have 'special significance'.¹²⁰ Prior to the Charter entering into force, the CJEU case-law made numerous references to ECtHR jurisprudence, confirming the ECHR as having special significance for the interpretation of fundamental rights.¹²¹ Article 52(3) and Article 53 of the Charter regulates the relationship between the Charter and the ECHR. Article 52(3) states that insofar as a right contained in the Charter correspond to a right guaranteed by the ECHR, the meaning and scope of the Charter rights shall correspond with those in the ECHR, without prejudice to the Charter providing more extensive protection. The ECHR thus constitutes the minimum level of the EU fundamental rights protection, but not the maximum level. Read from the explanations relating to the Charter, the provision is intended to ensure the necessary consistency between the Charter and the ECHR without affecting the autonomy of EU law and of the CJEU.¹²² The autonomy of EU fundamental rights is thus restricted to providing more extensive rights, as the level of protection can never fall below the level of protection guaranteed by the ECHR. Article 53 of the Charter provides that the level of protection can never be reduced. The EU is however still not a Contracting Party to the ECHR, although the EU Member States are, which has led to a somewhat indirect review of EU acts by the ECtHR when faced with complaints raised against an EU Member State acting in compliance with or under an obligation of EU law.¹²³ In *Matthews*, the ECtHR held that the

¹¹⁹ Case 4/73, *J. Nold, Kohlen- und Baustoffgroßhandlung v Commission of the European Communities* [1974] ECR 491, para 13.

¹²⁰ Case C-222/84 *Marguerite Johnston v Chief Constable of the Royal Ulster Constabulary* [1986] ECR 1986 1651, para 18.

¹²¹ See, *inter alia*, Case C-260/89 *ERT* [1991] ECR I-2925, para 41; Case C-299/95 *Kremzow v Austria* [1997] ECR I-2629, para 14; Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para 37, and Case C-94/00 *Roquette Frères* [2002] ECR I-9011, para 25; and Joined Cases 46/87 and 227/88 *Hoechst v Commission* [1989] ECR 2859, p. 2859.

¹²² The Explanations relating to the Charter of Fundamental Rights, [2007] OJ C 303/17, under Article 52(1).

¹²³ See e.g. European Court of Human Rights Judgment of 4 July 2000 *Guérin Automobiles v. les 15 Etats de l'Union Européenne* (appl. no. 51717/99); and European Court of Human

ECHR did not preclude a Contracting Party to transfer competences to an international organisation, albeit the obligations of the Contracting Party in relation to the ECHR would be upheld.¹²⁴ The most important example of an indirect review of EU acts to date is *Bosphorus*.¹²⁵ The ECtHR firstly reiterated that the ECHR do not prohibit Contracting Parties from transferring sovereign power to an international organisation, that organisation can however not be held responsible under the Convention.¹²⁶ Thus, the Contracting Party is held responsible under the ECHR regardless of whether the act or omission was based on domestic law or international legal obligations.¹²⁷ The ECtHR moreover observed that there is a presumption for a Contracting Party to be in compliance with the ECHR when complying with an EU act that do not leave a discretion for the Member States, as long as the EU control system provides a fundamental rights protection equivalent to the Convention.¹²⁸ However, in the more recent judgment *MSS v Belgium and Greece*¹²⁹, the Court found the Contracting Parties to violate the Convention with regards to asylum-seekers, although the criticized procedures was based on the EU's Dublin Regulation.¹³⁰ Despite this fact, the two courts have a history of seeking to avoid finding the other Court at fault, or to deliver openly contradictory judgments.¹³¹ The CJEU has frequently drawn from ECtHR jurisprudence,

Rights admissibility decision of 10 March 2004 *DSR-Senator Lines GmbH v The 15 Member States of the European Union* (appl. no. 56672/00), the application for interim relief on the Commission decision which was the subject of the complaint to the ECtHR, (CFI) Case T-191/98 *DSR Senator Lines GmbH v Commission* [1999] ECR II-2531 and the ECJ appeal Case C-364/99 P R [1999] ECR I-8733.

¹²⁴ European Court of Human Rights Judgment of 18 February 1999 *Matthews v. United Kingdom* (appl. no. 24833/94), §§ 34, 35.

¹²⁵ European Court of Human Rights Judgment of 30 June 2005 *Bosphorus v. Ireland* (appl. no. 45036/98) [ECtHR Judgment of 30 June 2005 *Bosphorus*].

¹²⁶ *Ibid* §152.

¹²⁷ *Ibid* §153.

¹²⁸ ECtHR Judgment of 30 June 2005 *Bosphorus* (n), §§155, 156.

¹²⁹ European Court of Human Rights (GC) Judgment of 21 January 2011 *MSS v. Belgium and Greece* (appl. no. 30696/09).

¹³⁰ *ibid*, see e.g. paras 359, 360.

¹³¹ See e.g. European Court of Human Rights Decision on admissibility of 13 January 2005 *Emesa Sugar v. Netherlands* (appl. no. 62023/00). The ECJ judgment subject of the complaint C-17/98 *Emesa Sugar v Aruba* [2000] ECR I-665. See further Rick Lawson 'Note' (2000) 37 *CMLR* 983.

and the ECtHR has on occasion referred to CJEU case-law.¹³² The question has however been raised on whether or not there is harmony between the courts.¹³³ The delayed accession of the EU to the ECHR, albeit outside the scope of this paper, have also by some been interpreted as a sign of the CJEU to ensure its own autonomy and margin of appreciation in the area of fundamental rights.¹³⁴

3.7. Concluding remarks

As noted above, the CJEU jurisprudence place emphasis on the principle of proportionality when faced with conflicts between fundamental rights and freedoms.¹³⁵ Former case-law of the Court lack clear guidelines as to the balancing conflicting rights and interests.¹³⁶ This have been criticized by scholars as the lack of guidelines in combination with the deferential approach of the Court, allowing for a wide discretion of the Member States in how to strike a fair balance between conflicting interests could entail a diverging level of protection.¹³⁷ However, after the Charter entering into force, Article 52(1) of the Charter as a general limitation clause provide for a set of criteria to be fulfilled in order for a limitation of a fundamental right to comply with EU law. The article has been applied by the CJEU in a

¹³² See e.g. European Court of Human Rights Judgment of 12 April 2006 *Stec v. United Kingdom* (appl. nos. 65731/01 and 65900/01), §58, and European Court of Human Rights (GC) Judgment of 13 November 2007 *DH and Others v. Czech Republic* (appl. no. 57325/0), §§85-91.

¹³³ See further e.g. Jörg Polakiewicz (Rule of Law, Council of Europe) 'EU Law and the ECHR: Will EU accession to the European Convention on Human Rights square the circle?' Working Paper, 'Fundamental Rights in Europe: A Matter For Two Courts', Brookes University 18 January 2013, available at http://www.coe.int/t/dghl/standardsetting/hrpolicy/Accession/Others_docs_en.asp.

¹³⁴ See further e.g. Allan Rosas 'The European Court of Justice in Context: Forms and Patterns of Judicial Dialogue' (2007) 1 *European Journal of Legal Studies* 1.

¹³⁵ See e.g. Case C- 343/09 *Afton Chemical Limited v Secretary of State for Transport* [2010], para 45; Joined Cases C- 92/09 and C- 93/09 *Volker und Markus Schecke and Eifert* [2010] ECR I- 11063, para 74; Joined Cases C-581/10 and C-629/10 *Nelson and Others* [2012], para 71; Case C-283/11 *Sky Österreich GmbH v Österreichischer Rundfunk* [2013], para 50; and Case C-101/12 *Schaible* [2013], para 29.

¹³⁶ See e.g. C-73/07 *Satamedia* paras 53-56 ;Case C-275/06 *Promusicae* [2008] ECR I-271 para 70.

¹³⁷ See e.g. Maria Tzanou 'Balancing Fundamental Rights: United in Diversity? Some Reflections on the Recent Case Law of the European Court of Justice on Data Protection' (2010) *Croatian Yearbook of European Law and Policy* 6 pp. 53-74, pp. 71ff.

number of more recent cases, such as *Volker* and *Digital Rights Ireland*.¹³⁸ The principle of proportionality have been stressed by the CJEU when determining whether a limitation is justified.¹³⁹ The elements of the principle of proportionality is generally that there is a casual connection between the measure and the aim pursued, that the measure is the least restrictive available and that there is a relationship of proportionality between the restriction and the objective the measure is striving to attain.¹⁴⁰ There are still questions as to the concrete balancing procedure of the CJEU when applying the principle of proportionality to conflicts between fundamental rights, as the case-law shows some divergence.¹⁴¹ The case-law of the Court do however point to the fact that Article 52(1) of the Charter is to be interpreted and applied in conflicts between fundamental rights, as an analytical instrument when striking a fair balance between the right subject to limitation and the right as the underlying rationale for the objective pursued.

¹³⁸ Joined Cases C-92/09 and C-93/09 *Volker*; Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland*.

¹³⁹ See e.g. Case C- 101/01 *Lindqvist*, paras 88ff.

¹⁴⁰ The latter, *stricto sensu* proportionality, have rarely been applied by the ECJ, according to de Vries, see Sybe A. de Vries 'Balancing Fundamental Rights with Economic Freedoms according to the European Court of Justice' (2013), *Utrecht Law Review*, Vol. 9, Issue 1, pp. 169-192, pp 172ff.

¹⁴¹ See e.g. Case C-101/12 *Schaible* [2013].

4. The general ECHR approach regarding conflicting fundamental rights

4.1. Background

In the aftermath of the Second World War, the Council of Europe (hereinafter the CoE) was formed to promote fundamental rights, the rule of law, democracy and social development. In 1950, the CoE adopted the European Convention of Human Rights (ECHR).¹⁴² All CoE Member States have at this moment incorporated the ECHR in domestic law, and the Contracting Parties are obliged to act in accordance with the Convention. To ensure the Contracting Parties' compliance with the ECHR, the European Court of Human Rights (ECtHR) was established in 1959, located in Strasbourg, France.¹⁴³ Since, the ECtHR has been a major human rights adjudicator within Europe, delivering 891 judgments in 2014.¹⁴⁴

4.2. Conflicts between fundamental rights

The ECtHR jurisprudence illustrates several approaches on how to solve conflicts between fundamental rights, as will be presented in this section.

4.2.1. Lato sensu conflicts in ECtHR case-law

The first situation, a *lato sensu* conflict, is a fundamental right in conflict with another interest given weight under domestic or national law. Thus, the interest as such is not protected under the Convention but nevertheless invokes a conflict between obligations for a State. To avoid Contracting Parties facing contradictory obligations, the ECtHR case law provides that the ECHR if possible should be read in accordance with general public law

¹⁴² Council of Europe, Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights, as Amended) [ECHR] 1950. Entering into force in 1953.

¹⁴³ See Rules of Court of The European Court of Human Rights adopted on 18 September 1959, CDH 59(8), available at [http://www.echr.coe.int/Documents/Library_1959_RoC_CDH\(59\)8_ENG.PDF](http://www.echr.coe.int/Documents/Library_1959_RoC_CDH(59)8_ENG.PDF).

¹⁴⁴ A total of 86,063 applications were decided in 2014 through a judgment or decision, or by being struck out of the list. At 31 December 2014, approximately 69,900 applications were pending before a judicial formation. European Court of Human Rights Statistics of 2014, European Court of Human Rights Facts & Figures 2014, (2015), available at http://www.echr.coe.int/Documents/Facts_Figures_2014_ENG.pdf, pp. 5ff.

and insofar possible interpreted in the light thereof.¹⁴⁵ Conflicts between a provision of the Convention and a State obligation due to an international agreement, as well as a conflict between a provision of the Convention and domestic legislation, are regarded by the Court as State interests. These interests will in the eyes of the Court be more or less compelling.¹⁴⁶ In an external conflict, a provision of the Convention is in conflict with a state interest, be it drawn from an international agreement or domestic legislation. An internal conflict is two provisions of the Conventions in conflict, i.e. a *stricto sensu* conflict. However, a conflict between a right protected by the Convention and a right protected by another instrument, domestic or international is according to the ECtHR approach an external conflict as well, be it in which the Court will seek to interpret the Convention in line with rights drawn from other instruments.¹⁴⁷ When faced with a conflict between a right protected by the Convention and a State Interest the ECtHR, in conformity with the Vienna Convention on the Law of Treaties seek to, insofar possible, avoid conflicts between the international obligations of a State.¹⁴⁸ A State Interest based on domestic legislation does however not to the same extent provide for equally extensive interpretation, thus, a State cannot invoke a domestic legal order limiting the State's international

¹⁴⁵ Examples of the ECtHR established case law on the subject are European Court of Human Rights (GC) Judgment of 18 February 1999 *Beer and Regan v. Germany* (appl. no. 28934/95), §53; European Court of Human Rights (GC) Judgment of 18 February 1999 *Waite and Kennedy v. Germany*, (appl. no. 26083/94), § 63; European Court of Human Rights (GC) Judgment of 21 November 2001 *Al-Askani v. United Kingdom* (appl. no. 35763/97), §55; European Court of Human Rights (GC) Judgment of 30 June 2005 *Bosphorus Hava Yollari Turizm ve Ticaret Anonim Sirketi v. Ireland* (appl. no. 45036/98), §150. See further Article 31§3c) United Nations, *Vienna Convention on the Law of Treaties*, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331 [Vienna Convention on the Law of Treaties].

¹⁴⁶ For examples of where a State interest is put forward to justify a restriction on a right protected by the ECHR, see the well-known cases of European Court of Human Rights (GC) Judgment of 13 February 2003 *Refah Partisi (The Welfare Party) and Others v. Turkey* (appl. nos. 41340/98, 41342/98, 41343/98 and 41344/98), § 95; European Court of Human Rights (GC) Judgment of 10 November 2005 *Leyla Sahin v. Turkey* (appl. no. 44774/98), §107.

¹⁴⁷ See for example European Court of Human Rights (GC) Judgment of 23 September 1994 *Jersild v. Denmark* (appl. no. 15890/89), §30 "Denmark's obligations under Article 10 (art. 10) must be interpreted, to the extent possible, so as to be reconcilable with its obligations under the UN Convention."

¹⁴⁸ Vienna Convention on the Law of Treaties (n).

obligations.¹⁴⁹ More weight will therefore be given conflicts due to conflicting international obligations as those will be considered by the ECtHR as a legitimate aim for the State to pursue. Potentially, this may justify restrictions on the provisions of the ECHR, provided the restrictions are necessary and proportionate to that aim. A State interest based on domestic legislation will however in general be given less weight as to limit the scope of the Convention, albeit the assessment of proportionality and legitimate aim will be the same.¹⁵⁰

4. 2. 2. *Stricto sensu* conflicts in ECtHR case-law

The second category of conflicts between fundamental rights derived from the case-law of the ECtHR are *stricto sensu* conflicts in the sense that the rights in question are guaranteed by the ECHR, albeit one of the rights in question is an absolute right and the other right is subject to restrictions, thus the rights in conflict are categorized differently.¹⁵¹ This is a result of the fact that some of the rights of the Convention are absolute, and therefore cannot be restricted. As opposed to the rights of the Convention that can be restricted if the restrictions pursue a legitimate aim and respect the principles of legality and proportionality.¹⁵² One example of this type of absolute right is the right not to be subjected to torture. Irrespective of the legitimate aim pursued, such as e.g. stopping terrorist attacks that could

¹⁴⁹ See furthermore, Article 27 of the Vienna Convention on the Law of Treaties (n); 'A party may not invoke the provisions of its own internal law as justification for failure to perform a treaty'.

¹⁵⁰ See further Olivier De Schutter, Françoise Tulkens (judge at the European Court of Human Rights), 'Rights in Conflict: the European Court of Human Rights as a Pragmatic Institution', Reflexive Governance in the Public Interest, Working Paper Series REFGOV-FR-14, Available at [http://sites.uclouvain.be/cpdr-refgov/publications/Working%20Papers/Fundamental%20Rights%20-%20FR_\(02.10.2007_10h10\)_WP-FR-14.pdf](http://sites.uclouvain.be/cpdr-refgov/publications/Working%20Papers/Fundamental%20Rights%20-%20FR_(02.10.2007_10h10)_WP-FR-14.pdf), pp. 10f. [De Schutter, Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution'].

¹⁵¹ In this context, some scholars have raised a potential hierarchy of rights allowing rights to be ranked against each other, see e.g. Dinah Shelton 'Normative Hierarchy in International Law' (2006), *American Journal of International Law*, vol 100, no 2 pp. 291ff. This however have been widely debated and as noted in [chapter 2.2](#) above, this paper will presume the equal value of fundamental rights in the light of the principles of indivisibility and interdependence.

¹⁵² See for example Article 8(2), 9(2), 10(2), 11(2) European Convention on Human Rights. See further Colin Warbrick, Michael O'Boyle, David Harris *Law of the European Convention on Human Rights*, (Butterworths 1995), pp 296f.

potentially kill a large number of people, the ECtHR has on a number of occasions pointed to the absolute nature of Article 3 ECHR.¹⁵³ Absolute rights are of a special nature in the sense that they cannot be restricted by any legitimate general interests.¹⁵⁴ However, that should not necessarily be interpreted as absolute rights being given priority before another right in the Convention.¹⁵⁵ A third type of conflict is a conflict between two fundamental rights guaranteed by the ECHR of different natures. One of the rights obliges the State to *respect* and the other right obliges the State to *protect*. Although no clear-cut distinction can be made, the ECtHR have in case-law showed tendencies towards prioritizing the obligation to respect. As a positive obligation, the obligation to protect is subject to far more restrictions than the negative obligation to respect.¹⁵⁶

4. 2. 3. Conflicts between two non-absolute rights

As noted above, the case-law of the ECtHR shows a more or less coherent approach. However, the question remains on how to solve a genuine *stricto sensu* conflict between two fundamental rights guaranteed by the ECHR, where none of them imposes a positive obligation for the State nor constitute an absolute right. In this section the most used approaches by the

¹⁵³ See e.g. European Court of Human Rights Judgment of 18 January 1978 *Ireland v. United Kingdom* (appl. no. 5310/71), §163; European Court of Human Rights Judgment of 27 August 1992 *Tomasi v. France* (appl. no. 12850/87), §115; European Court of Human Rights (GC) Judgment of 15 November 1996 *Chahal v. United Kingdom* (appl. no. 22414/93), §79; European Court of Human Rights (GC) Judgment of 28 July 1999 *Selmouni v. France* (appl. no. 25803/94), § 95, ECHR 1999-V; European Court of Human Rights (GC) Judgment of 1 June 2010 *Gäfgen v. Germany* (appl. no. 22978/05), §87.

¹⁵⁴ See moreover on the special nature of absolute rights e.g. European Court of Human Rights (GC) Judgment of 22 March 2001 *Streletz, Kessler and Krenz v. Germany* (appl. nos. 34044/96, 35532/97 and 44801/98), §§ 72, 94; European Court of Human Rights Judgment of 29 April 2002 *Pretty v. UK* (appl. no. 2346/02), §37.

¹⁵⁵ Such an interpretation could entail that a link to an absolute right, no matter how remote, trumps a non-absolute right, see for example the discussion on violations of Article 8 ECHR as opposed to alleged violations of Article 3 ECHR of children being taken from their families, European Court of Human Rights (GC) Judgment of 10 May 2001 *Z and Others v. United Kingdom* (appl.no. 29392/95), §74; European Court of Human Rights (GC) Judgment of 10 May 2001 *T.P. and K.M. v. United Kingdom* (appl. no. 28945/95).

¹⁵⁶ See e.g. European Court of Human Rights (GC) Judgment of 28 October 1998 *Osman v. United Kingdom* (appl. no.(87/1997/871/1083), §116; European Court of Human Rights Judgment of 25 April 1996 *Gustafsson v. Sweden* (appl. no. 15573/89), §45; European Court of Human Rights Judgment of 25 January 2005 *Enhorn v. Sweden* (appl. no. 56529/00), §44; European Court of Human Rights Judgment of 3 April 2001 *Keenan v. United Kingdom* (appl. no. 27229/95), §93.

ECtHR will be presented and examined, first the necessity test provided for in a number of provisions in the Convention, secondly the balancing of rights and thirdly, the margin of appreciation. The necessity test is applied to the qualified rights of the ECHR.¹⁵⁷ The freedom or right is enshrined in the first paragraph of the article, followed by the second paragraph stating under which circumstances restrictions are justified. Restrictions of a right or freedom can be justified if it is provided for by law, seeking to fulfill a legitimate aim, and necessary in a democratic society to fulfill the legitimate aim in question.¹⁵⁸ The necessity test will not be elaborated upon, it is however relevant to point out that the ECtHR on several occasions has extended the necessity test to rights that do not explicitly refer to aforementioned justification of restricting rights.¹⁵⁹ As a concluding note, the necessity test has been held by some to be problematic, as it entails one right to be considered before the other. The right brought before the court will, by the structure of the necessity test, be given priority before the other as the question to be answered by the court is whether or not the right invoked by the applicant has been violated.¹⁶⁰

The second method in solving genuine conflicts of fundamental rights within ECtHR case-law is the well-known, vague concept of 'balancing'. Balancing consist of weighing the rights at hand against each other,

¹⁵⁷ Qualified rights are rights which require a balance between the rights of the individual and the needs of the wider community or state interest, see Articles 8-11 ECHR and Council of Europe, 'Protocol No. 4 to the Convention for the Protection of Human Rights and Fundamental Freedoms, securing certain rights and freedoms other than those already included in the Convention and in the first Protocol thereto' of 16 September 1963 ETS 46 [Protocol No. 4], Article 2.

¹⁵⁸ See Articles 8-11 ECHR and Article 2 Protocol No. 4 (n).

¹⁵⁹ See e.g. European Court of Human Rights Judgment of 21 February 1975 *Golder v. United Kingdom* (appl. no. 4451/70) §§28-36; European Court of Human Rights Judgment of 17 December 2002 *A. v. United Kingdom* (appl. no. 35373/97) §74; European Court of Human Rights Judgment of 25 January 2005 *Enhorn v. Sweden* (appl. no. 56529/00), §42; European Court of Human Rights Judgment of 4 April 2000 *Witold Litwa v. Poland* (appl. no. 26629/95) §78.

¹⁶⁰ See further Eva Brems 'Conflicting Human Rights: An Exploration in the Context of the Right to a Fair Trial in the European Convention for the Protection of Human Rights and Fundamental Freedoms' (2005), *Human Rights Quarterly*, vol 27 (2005), pp 294-326, p. 305.

prioritizing the right given a higher value.¹⁶¹ This methodology has been criticized and questioned on the basis of it creating a hierarchy of rights. Weighing as a concept do in some ways presuppose a scale where the rights would be ascertained different value, or weight. A scale common for all the rights guaranteed by the Convention is argued by legal theorists to be impossible, known as the problem of incommensurability.¹⁶² This approach furthermore provides significant freedom in the process of balancing, which may entail subjectivity and intuitionism from the judges. A recent paper by De Schutter and Tulkens draws attention to three possible outcomes of balancing as a method of legal reasoning.¹⁶³ Firstly, when trying to circumvent the subjectivity of balancing, the balancing act may be given a more mathematical approach, leading to a cost-benefit analysis. Although objective, a cost-benefit analysis of fundamental rights may undermine the value of the rights not intended to be measured through economic value, and respectively overvalue the rights where economic worth can easily be calculated.¹⁶⁴ Secondly, balancing of rights may lead to an assessment influenced by the number of respective rights-holders, e.g. when freedom of expression is in conflict with freedom of religion. The case law of the ECtHR on this area seem to point to giving the larger group, i.e. the religious population that may be possibly offended by allegedly blasphemous media, more weight than the other right-holders, arguing their freedom of expression.¹⁶⁵ The third problematic aspect brought forward in the aforementioned paper is the difference in judicial attitudes with regards

¹⁶¹De Schutter, Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' (n), p. 22.

¹⁶²For a further discussion, see Ruth Chang (ed.), *Incommensurability, Incomparability and Practical Reason*, Harvard University Press, 1997; Olivier De Schutter 'Mainstreaming Human Rights in the European Union', in Philip Alston, Olivier De Schutter (eds.), *Monitoring Fundamental Rights in the EU. The Contribution of the Fundamental Rights Agency* (Hart Publ. 2005), pp. 37-72.

¹⁶³De Schutter, Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' (n).

¹⁶⁴Ibid, pp 23ff.

¹⁶⁵See e.g. European Court of Human Rights Judgment of 20 September 1994 *Otto-Preminger-Institut v. Austria* (appl. no. 13470/87), §§ 55-56; European Court of Human Rights Judgment of 13 September 2005 *I.A. v. Turkey* (appl. no. 42571/98), §§ 27, 30.

to balancing. Firstly, there is an *ad hoc* balancing where the judge is to balance the competing interest on a case-by-case basis, seeking to find the best solution for the case at hand. Secondly, a more definitional balancing where the judge is to provide reasoning not limited to the case at hand, but including future cases regarding a similar conflict.¹⁶⁶

The third method used in the case-law of the ECtHR in solving conflicts between fundamental rights is the margin of appreciation enjoyed by the Contracting Parties. The controversial nature of conflicts between fundamental rights may sometimes benefit from a more contextual solution, as the State naturally have more insight and thus can provide a closer analysis on a national level. Accordingly, the ECtHR has regularly referred to the States' margin of appreciation, providing for a wide margin of appreciation in conflicts between fundamental rights.¹⁶⁷ Moreover, the ECtHR allow States a broader margin of appreciation related to its positive obligations in comparison to the margin of appreciation enjoyed by the States regarding negative obligations.¹⁶⁸ Lastly, the Contracting Parties enjoy a wider margin of appreciation in areas where there is a clear divergence in attitudes amongst the Contracting Parties as they have adopted 'a diversity of practice' as to the implications of the Convention.¹⁶⁹

¹⁶⁶ For literature on this subject, e.g. Patrick McFadden 'The Balancing Test' (1988), *Boston College Law Review* vol. 29 585; T. Alexander Aleinikoff 'Constitutional Law in the Age of Balancing' (1987), 96 *Yale Law Journal* 943, 948; Kathleen M. Sullivan 'Post-Liberal Judging: The Roles of Categorization and Balancing' (1992) 63 *University of Colombia Law Review* 293.

¹⁶⁷ See e.g. European Court of Human Rights (GC) Judgment of 29 April 1999 *Chassagnou and Others v. France* (appl. nos. 25088/94, 28331/95 and 28443/95) §113. For further discussion, see Eva Brems 'The Margin of Appreciation Doctrine in the Case-Law of the European Court of Human Rights in (56) *Zeitschrift für ausländisches öffentliches Recht und Völkerrecht*, 1996, pp. 240-314; and Howard C. Yourow *The Margin of Appreciation Doctrine in the Dynamics of European Human Rights Jurisprudence* (Martinus Nijhoff Publications 1996).

¹⁶⁸ De Schutter, Tulkens, 'Rights in Conflict: The European Court of Human Rights as a Pragmatic Institution' (n), pp. 27f.

¹⁶⁹ See e.g. European Court of Human Rights Judgment of 20 September 1994 *Otto-Preminger Institut v. Austria* (appl. no. 13470/87), §49; European Court of Human Rights Judgment of 10 July 2003 *Murphy v. Ireland* (appl. no. 44179/98), § 67; European Court of Human Rights (GC) Judgment of 13 February 2003 *Odièvre v. France* (appl. no. 42326/98) §§ 46, 47, 49. See moreover e.g. the ECtHR reasoning on same-sex marriage in European

4.3. Case-law on Article 8 and Article 10 ECHR

In order to examine the ECtHR approach on conflicts between fundamental rights, with emphasis on the conflict between the right to private life and the right to freedom of expression, the principles established in ECtHR case-law on the balancing Article 8 and Article 10 ECHR will be presented below.¹⁷⁰ According to the Courts case-law, the two fundamental rights do in principle deserve equal respect.¹⁷¹ The ECHR have proclaimed the right to freedom of expression to constitute one of the essential foundations of a democratic society.¹⁷² Any measure limiting access to information which the public has the right to receive require particularly strong reasons.¹⁷³ The press however do not have an unlimited freedom of expression, it cannot exceed the limits of the right given, particularly with regards to the rights and reputation of others.¹⁷⁴

4.3.1. Principles established by the Court

Six principles have been established through the ECtHR case-law when faced with conflicts between the right to private life and the right to freedom of expression. The first criterion established through the ECtHR case-law is the 'contribution to a debate of general interest'. This concern the contribution made by the information or data in question, such as

Court of Human Rights Judgment of 24 June 2010 *Schalk and Kopf v. Austria* (appl. no. 30141/04), paras 58 and 98, with reference to European Court of Human Rights Judgment of 27 March 1998 *Petrovic v. Austria* (appl. no. 20458/92) para 38.

¹⁷⁰See, on the relation between Article 8 and Article 10 ECHR European Court of Human Rights Judgment of 28 April 2009 *Karakó v. Hungary*, (appl. no. 39311/05) § 26; European Court of Human Rights Judgment of 25 November 2008 *Armonienė v. Lithuania* (appl. no. 36919/02), § 39; and European Court of Human Rights (GC) Judgment of 7 February 2012 *Axel Springer AG v. Germany* (appl. no. 39954/08) § 89.

¹⁷¹European Court of Human Rights Judgment of 23 July 2009 *Hachette Filipacchi Associés (ICI PARIS) v. France*, (appl. no. 12268/03), § 41; European Court of Human Rights Decision of 12 October 2010 *Timciuc v. Romania* (dec.), (appl. no. 28999/03), § 144; and European Court of Human Rights Judgment of 10 May 2011 *Mosley v. the United Kingdom*, (appl. no. 48009/08), § 111.

¹⁷²European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07), §57.

¹⁷³See e.g. European Court of Human Rights Judgment of 27 November 2007 *Timpul Info-Magazin and Anghel v. Moldova* (appl. no. 42864/05), § 31.

¹⁷⁴See e.g. European Court of Human Rights Judgment of 6 February 2001 *Tammer v. Estonia*, (appl. no. 41205/98) ECHR 2001-I, §62; and European Court of Human Rights (GC) Judgment of 28 September 1999 *Dalban v. Romania* (appl. no. 28114/95) ECHR 1999-VI, §49.

photographs and newspaper articles.¹⁷⁵ The definition of a subject of a general interest is examined on a case-by-case basis with consideration to the circumstances of the case. The existence of a general interest has been found by the ECtHR where the publication concerned politics or criminal acts¹⁷⁶, as well as when concerning athletes or performance artists.¹⁷⁷ The ECtHR did not find rumours of a president with marriage problems or a famous artist's financial difficulty to be matters of general interest, complicating the possibility to determine a general approach on what constitutes a subject of general interest.¹⁷⁸

The second criterion developed by the ECtHR is whether the person concerned is well-known. This is related to the previous criterion, as it concerns the role or function of the person whose right to be forgotten have allegedly been violated. The ECtHR in this context distinct between private individuals and public individuals, e.g. politicians or public figures such as actors, royalties and socialites. Subsequently, a person acting in a public context in general have a more narrow right to private life in relation to a private individual.¹⁷⁹ The Court has however stated that although the public

¹⁷⁵ See e.g. European Court of Human Rights Judgment of 24 June 2004 *Von Hannover v. Germany* (appl. no. 59320/00), § 60; European Court of Human Rights Judgment of 9 November 2006 *Leempoel & S.A. ED. Ciné Revue v. Belgium* (appl. no. 64772/01), § 68; and European Court of Human Rights Judgment of 4 June 2009 *Standard Verlags GmbH v. Austria (no. 2)* (appl. no. 21277/05), §46.

¹⁷⁶ See e.g. European Court of Human Rights Judgment of 19 September 2006 *White v. Sweden* (appl. no. 42435/02), §29; European Court of Human Rights Judgment of 16 April 2009 *Egeland and Hanseid v. Norway* (appl. nos. 34438/04), §58; and European Court of Human Rights Judgment of 9 November 2006 *Leempoel & S.A. ED. Ciné Revue v. Belgium* (appl. no. 64772/01), §72.

¹⁷⁷ See e.g. European Court of Human Rights Judgment of 22 February 2007 *Nikowitz and Verlagsgruppe News GmbH v. Austria* (appl. no. 5266/03), §25; European Court of Human Rights Judgment of 26 April 2007 *Colaço Mestre and SIC – Sociedade Independente de Comunicação, S.A. v. Portugal* (appl. nos. 11182/03 and 11319/03), §28; and European Court of Human Rights Judgment of 8 June 2010 *Sapan v. Turkey* (appl. no. 44102/04), §34.

¹⁷⁸ See European Court of Human Rights Judgment of 4 June 2009 *Standard Verlags GmbH v. Austria (No. 2)* (appl. no. 34702/07), §52; and European Court of Human Rights Judgment of 23 July 2009 *Affaire Hachette Filipacchi Associés (ICI PARIS) v. France* (appl. no.12268/03),§ 43.

¹⁷⁹ See e.g. European Court of Human Rights Judgment of 24 June 2004 *Von Hannover v. Germany* (appl. no. 59320/00), §63; European Court of Human Rights Judgment of 30 March 2010 *Petrenco v. Moldova* (appl. no. 20928/05), § 55; European Court of Human

has a legitimate interest and in some cases even a right to be informed of certain personal aspects of a public person's life, this cannot be the case when the information published exclusively concern personal details on a person's life, having the sole aim to satisfy the public's curiosity.¹⁸⁰

The third principle established by the ECtHR when balancing the right to privacy and the right to freedom of expression is the previous conduct of the person concerned. To this respect, the Court has moreover taken into account if the information in question have been published prior to the publication in question. It is not, however, possible to find prior co-operation with the press to deprive the person concerned of all publication of the information at issue.¹⁸¹ Method of obtaining the information and its veracity is the fourth principle developed by the ECtHR in conflicts between Article 8 and Article 10 ECHR. This is connected with the ethics of journalism, as the Court has held that in order to enjoy the freedom of expression, journalists shall act in good faith, on an accurate factual basis and provide reliable and precise information.¹⁸² The fifth principle provided by the ECtHR as an aspect to be considered when balancing the right to privacy and the freedom of expression is the content, form and consequences of the publication. This principle takes into account the consequences for the person concerned by the publication. This corroborates

Rights Judgment of 4 June 2009 *Standard Verlags GmbH v. Austria (No. 2)* (appl. no. 21277/05), §47; and European Court of Human Rights Judgment of 10 January 2012 *Standard Verlags GmbH v. Austria (No. 3)* (appl. no. 34702/07), §46;

¹⁸⁰European Court of Human Rights Judgment of 24 June 2004 *Von Hannover v. Germany* (appl. no. 59320/00), §65; European Court of Human Rights Judgment of 4 June 2009 *Standard Verlags GmbH v. Austria (No. 2)* (appl. no. 21277/05), §53; and European Court of Human Rights Judgment of 18 January 2011 *MGN Limited v. United Kingdom* (appl. no. 39401/04), §143.

¹⁸¹ See e.g. European Court of Human Rights Judgment of 23 July 2009 *Affaire Hachette Filipacchi Associés (ICI PARIS) v. France* (appl. no.12268/03), §§52, 53; European Court of Human Rights Judgment of 20 September 2011 *Sapan v. Turkey* (appl. no. 17252/09), §34; European Court of Human Rights Judgment of 16 April 2009 *Egeland and Hanseid v. Norway* (appl. no. 34438/04), §62.

¹⁸² See e.g. European Court of Human Rights (GC) Judgment of *Fressoz and Roire v. France* (appl. no. 29183/95), § 54, ECHR 1999-I; European Court of Human Rights Judgment of 17 December 2004 *Pedersen and Baadsgaard* (appl. no. 49017/99), § 78; and European Court of Human Rights (GC) Judgment of 10 December 2007 *Stoll v. Switzerland* (appl. no. 69698/01), § 103, ECHR 2007-V.

the consideration taken to what kind of information is being published, in what manner, and the legitimacy of the information.¹⁸³ Furthermore, this principle takes into account the dissemination of the publication, e.g. the size of the circulation and the geographical reach of the newspaper and the subsequent impact on the person concerned.¹⁸⁴ The sixth and final principle developed through ECtHR case-law is the severity of the sanction imposed. This is connected to the proportionality assessment on interfering with the freedom of expression.¹⁸⁵ Severe sanctions could entail that a restriction on the right to freedom of expression is disproportionate with regards to the violation of the right to privacy.¹⁸⁶

4.5. Data protection

Through the ECtHR case-law, data protection has been incorporated in the right to private and family life in Article 8 ECHR.¹⁸⁷ The question of the right to Data Protection has been raised in a number of cases regarding surveillance, interception of communication and data storage by authorities.¹⁸⁸ Furthermore, the ECtHR case-law have provided for a

¹⁸³ See e.g. European Court of Human Rights Judgment of 13 December 2005 *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria* (no.3) (appl. nos 66298/01 and 15653/02), §47; European Court of Human Rights Judgment of 15 January 2009 *Reklos and Davourlis v. Greece* (appl. no. 1234/05), § 42; and European Court of Human Rights Judgment of 6 April 2010 *Jokitaipale and Others v. Finland* (appl. no. 43349/05), § 68.

¹⁸⁴ See e.g. European Court of Human Rights Judgment of 6 April 2010 *Iltalehti and Karhuvaara v. Finland* (appl. no. 6372/06), § 47; and European Court of Human Rights Judgment of 17 October 2006 *Gurgenidze v. Georgia* (appl. no. 71678/01), § 55.

¹⁸⁵ See e.g. European Court of Human Rights Judgment of 6 April 2010 *Jokitaipale and Others v. Finland* (appl. no. 43349/05), §77; European Court of Human Rights Judgment of 17 December 2004 *Pedersen and Baadsgaard* (appl. no. 49017/99), §93;

¹⁸⁶ See, by analogy European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (appl. no. 33846/07), §68; and European Court of Human Rights Judgment of 28 April 2009 *Karakó v. Hungary* (appl. no. 39311/05), §28.

¹⁸⁷ See e.g. European Court of Human Rights Judgment of 17 July 2008 *I. v. Finland* (appl. no. 20511/03); European Court of Human Rights Judgment of 2 december 2008 *K.U. v. Finland* (appl. no. 2872/02).

¹⁸⁸ See e.g. European Court of Human Rights Judgment of 2 August 1984 *Malone v. United Kingdom* (appl. no. 8691/79); European Court of Human Rights Judgment of 3 April 2007 *Copland v. United Kingdom* (appl. no. 62617/00); European Court of Human Rights Judgment of 6 September 1978 *Klass and Others v. Germany* (appl. no. 5029/71); European Court of Human Rights Judgment of 2 September 2010 *Uzun v. Germany* (appl. no. 35623/05); European Court of Human Rights Judgment of 26 March 1987 *Leander v. Sweden* (appl. no. 9248/81); European Court of Human Rights Judgment of 4 December 2008 *S. and Marper v. United Kingdom* (appl. nos. 30562/04 and 30566/04).

positive obligation to be derived from Article 8 ECHR, where under certain circumstances the Contracting Parties have an obligation to take measures to ensure effective respect for private and family life.¹⁸⁹

4.5.1. Council of Europe Convention 108

In 1981, the CoE presented a Convention as to the protection of personal data in order to meet the pressing need of individual protection with regards to the information technology development. The Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (hereinafter Convention 108) is until this day the only legally binding international instrument on the subject of data protection.¹⁹⁰ The Convention is ratified by all EU Member States and was amended in 1999 to allow for the EU to become a Contracting Party.¹⁹¹ Further, an additional protocol to the Convention was established in 2001, establishing new provisions e.g. mandatory national Data Protection Authorities.¹⁹²

4.5.2. Case-law on Data Protection

As noted above, data protection is a right derived from Article 8 ECHR, and is thus not an absolute right. Article 8(2) ECHR provides for restrictions on the right to private and family life and reads "There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society [...] for the protection of the rights and freedoms of others". The right to protection of personal data will in this section be examined principally in relation to the

¹⁸⁹ See to this matter, European Court of Human Rights Judgment of 17 July 2008 *I. v. Finland* (appl. no. 20511/03) §48; European Court of Human Rights Judgment of 2 December 2008 *K.U. v. Finland* (appl. no. 2872/02) §49.

¹⁹⁰ Council of Europe Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data, Council of Europe, ETS 108, 1981.

¹⁹¹ Council of Europe, 'Amendments to the Convention for the protection of individuals with regard to automatic processing of Personal Data' (ETS No. 108) allowing the European Communities to accede, adopted by the Committee of Ministers, in Strasbourg, on 15 June 1999; Art. 23 (2) of the Convention 108 in its amended form.

¹⁹² Council of Europe 'Additional Protocol to the Convention for the protection of individuals with regard to automatic processing of personal data, regarding supervisory authorities and transborder data flows' ETS No. 181 2001.

right to freedom of expression and information.¹⁹³ Regarding freedom of expression, the general interest of the published information and the rights-holders official status is taken into account in accordance with the principles presented in the section above. A person well-known to the public thus has a more narrow right to protection of personal data as there is a public interest for e.g. personal information on politicians. Moreover, the ECtHR has taken into account the reliability of the information as well as how it was obtained.¹⁹⁴ From the ECtHR case-law it is evident that a debate of general public interest can be reached if the rights-holder invoking the right to private and family life is a public figure. The right to private and family life can be violated even if the rights-holder is a public figure, the threshold is however substantially higher in favor of the freedom of expression. Accordingly, the Court have found the right to private life to be violated when the rights-holder is a person of no public interest, the information shared is sensitive, or the means of expression are intrusive such as publication in national newspapers.¹⁹⁵

With regards to information published on the internet, the ECtHR separates the internet from the printed media, especially due to the storage capacity and information transmitting. The Court has moreover held that the internet, serving billions of users globally is not subject to the same regulations and

¹⁹³ Article 11 ECHR.

¹⁹⁴ See e.g. European Court of Human Rights (GC) Judgment of 7 February 2012 *Axel Springer AG v. Germany* (appl. no. 39954/08), §§ 90-91.

¹⁹⁵ For examples of where the ECtHR found no such 'debate of general public interest', see European Court of Human Rights Judgment of 25 November 2008 *Biriuk v. Lithuania* (appl. no. 23373/03) and European Court of Human Rights Judgment of 24 June 2004 *Von Hannover v. Germany* (appl. no. 59320/00), where the Court states in § 76 "As the Court has stated above, it considers that the decisive factor in balancing the protection of private life against freedom of expression should lie in the contribution that the published photos and articles make to a debate of general interest. It is clear in the instant case that they made no such contribution, since the applicant exercises no official function and the photos and articles related exclusively to details of her private life."

For examples where the ECtHR have found the opposite to be true, where the freedom of expression and information overruled the right to private life, see European Court of Human Rights Judgment of 10 May 2011 *Mosley v. the United Kingdom* (appl. no. 48009/08) §§ 129-130; European Court of Human Rights (GC) Judgment of 7 February 2012 *Von Hannover v. Germany (No. 2)* (appl. nos. 40660/08 and 60641/08), §§118, 124.

control as the printed media. In the light of the special nature of the internet, the ECtHR has found the risk of harm to fundamental rights and freedoms, especially the right to private life to be higher with regards to content on the internet than to information published in newspapers.¹⁹⁶ The ECtHR therefore allows different policies on material from the printed media and the internet, accepting that internet policies may have to be adjusted based on special technological features of the internet in order to protect the rights concerned.¹⁹⁷ In *Times Newspapers Ltd*, the ECtHR held on the nature of internet archives that the latter fell within the ambit of protection of Article 10 ECHR. The Court moreover stressed the substantial contribution made by internet archives as to both preserving but also making available information, and observed internet archives to be an important source of education and historical research, in particular due to their high accessibility to the public and the fact that internet archives generally are cost-free. Albeit the primary function of the press is one of a 'public watchdog', the ECtHR held that it has a valuable secondary role as making news previously reported available to the public.¹⁹⁸ The ECtHR later stated that to this role, internet archives are critical.¹⁹⁹ In *Times Newspapers Ltd*, the restrictions to the freedom of expression of the internet archive were justifiable and proportionate.²⁰⁰ It is however noteworthy that the restriction did not suggest that potentially defamatory articles be removed from the internet archives, but the case regarded the justifiability of a national rule providing new libel proceedings on an alleged defamatory article when accessed on the internet.²⁰¹ In the recent case of *Węgrzynowski and Smolczewski v.*

¹⁹⁶ European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07), §58.

¹⁹⁷ See e.g. European Court of Human Rights Judgment of 5 May 2011 *Editorial Board of Pravoye Delo and Shtetel v. Ukraine*, (appl. no. 33014/05) ECHR 2011 (extracts), §63.

¹⁹⁸ European Court of Human Rights Judgment of 10 March 2009 *Times Newspapers Ltd v. United Kingdom* (Nos.1 and 2) (appl. nos. 3002/03 and 23676/03), §27.

¹⁹⁹ European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07), §59.

²⁰⁰ European Court of Human Rights Judgment of 10 March 2009 *Times Newspapers Ltd v. United Kingdom* (Nos.1 and 2) (appl. nos. 3002/03 and 23676/03), §49.

²⁰¹ European Court of Human Rights Judgment of 10 March 2009 *Times Newspapers Ltd v. United Kingdom* (Nos.1 and 2) (appl. nos. 3002/03 and 23676/03), §47.

Poland, the alleged violation of the right to private life was regarding a defamatory article in a newspaper.²⁰² The article was a breach of the claimants right to private life, which was acknowledged by the domestic courts.²⁰³ However, the proceedings brought before the ECtHR was based on the article being published on a website. The question was whether the State had failed its positive obligation to ensure the respect for private life. The claimants did not make any claims during the national proceedings regarding the article being published on the newspaper's website, hence the courts did not adjudicate on this matter.²⁰⁴ The second case brought before the domestic courts was turned down based on the fact that the article had been published simultaneously on the website and in the printed newspaper and was known to the courts during the first proceedings, and thus concerned the same factual circumstances.²⁰⁵ The ECtHR agreed with the finding of the national court, that it was not for the courts to order the article to be expunged as if it had never existed, accepting that 'it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations.'²⁰⁶

In conclusion, the ECtHR found the alleged violations to be redressed by adequate remedies under domestic law, and as the internet publication was enclosed with full information on the judicial decisions based on the article in question, ensured effective protection under domestic law of the applicant's rights and reputation.²⁰⁷ As the applicants in this case did not submit a request specifying the removal of the information on the website, the ECtHR found that the State had complied with its obligation to strike a

²⁰²European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07).

²⁰³ *ibid* §§6-8.

²⁰⁴ *ibid* §61.

²⁰⁵ *ibid* §61.

²⁰⁶ *ibid* §65.

²⁰⁷ *ibid* §66.

balance between the right to private life and the right to freedom of expression, and held that 'a limitation on freedom of expression for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention'.²⁰⁸

²⁰⁸European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07), §68; see further European Court of Human Rights Judgment of 28 April 2009 *Karakó v. Hungary* (appl. no. 39311/05)§ 28.

5. Google Spain

Internet, as the fastest growing means of communication and information, presents a very real challenge for the protection of the right to private life, as shown by the recent landmark judgment of the CJEU in *Google Spain*.²⁰⁹ In this section, the judgment will be presented briefly with emphasis on the aspects regarding the conflict between the right to privacy and data protection and the right to freedom of expression. Furthermore, the Advocate General's opinion will be examined, and finally the implications of the judgment will be presented.

5.1 Background

Mr Costeja González and the Spanish Data Protection Authority²¹⁰ (hereinafter the AEPD) lodged in march 2010 a complaint against a spanish newspaper, La Vanguardia Ediciones SL, as well as against Google Spain and Google Inc., at a spanish court. Mr Costeja González based his complaint on the fact that when searching for his name on google, links would appear redirecting the reader to La Vanguardia's webpage and two articles found there. The articles, both from 1998, mentioned Mr Costeja González name in an article regarding a real estate auction for the recovery of social security debts.²¹¹ Mr Costeja González stated that the attachment proceedings against him had been resolved a number of years ago and therefore, the information found on the La Vanguardia website was now entirely irrelevant. On those grounds, Mr Costeja González requested that La Vanguardia be required to remove or alter the pages in question in order to protect the data. Secondly, Mr Costeja González requested Google Spain or Google Inc. to be required to remove or conceal the data relating to him

²⁰⁹ Case C-131/12, *Google Spain SL och Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (ECJ judgment of 13 May 2014) [Case C-131/12 Google Spain].

²¹⁰ Agencia Española de Protección de Datos.

²¹¹ Case C-131/12 Google Spain, para 14.

when conducting a Google search. He wished no longer for the links to La Vanguardia to appear when conducting a search on his name.²¹²

The Spanish Court rejected the complaint in as so far as La Vanguardia was concerned, due to the fact that the publication of the information at the time was legally justified, as it was ordered by the Ministry of Labour and Social Affairs to ensure attention to the auction.²¹³ However, the complaint was upheld regarding Google Spain and Google Inc. In this regard, the Court held operators of search engines to be subject to data protection legislation.²¹⁴ Google Spain and Google Inc. separately brought appeal proceedings before the Spanish National High Court, Audiencia Nacional, which joined the actions.²¹⁵ The Spanish Court found that the case raised the question of whether or not operators of search engines have obligations to protect data displayed by a link to a third party website, containing personal information regarding a person who does not wish that information be indexed, located, and made available to internet users indefinitely. The Spanish Court moreover found that the answer to above question were dependent on the interpretation of Directive 95/46.²¹⁶ Due to the uncertainty the development of the internet and the increasing internet usage brought in regards to the interpretation of Directive 95/46, the Audiencia Nacional referred in September 2012 questions for a preliminary ruling of the CJEU, raising three primary questions, regarding the territorial application of Directive 95/46, the meaning of 'controller' and its relation to search engines, and lastly whether or not a right to be forgotten can be derived from the directive.²¹⁷

²¹² *ibid* para 15.

²¹³ *ibid* para 16.

²¹⁴ *ibid* para 17.

²¹⁵ *ibid* para 18.

²¹⁶ *ibid* para 19.

²¹⁷ *ibid* para 20.

5.2 The CJEU Judgment

On 13 May 2014, the CJEU delivered a judgment in *Google Spain*, concerning the interpretation of Directive 95/46 and the responsibility of an operator of a search engine in relation to a link shown on listed search results to a third party webpage containing lawfully published information relating to an identifiable person who wishes to have that data removed from the list of search results. First, the CJEU examined the material scope of Directive 95/46, namely whether article 2 (a) and (b) of the directive were to be interpreted so that the activity of a search engine – i.e. providing content by finding information published or placed on the internet by third parties, indexing it, storing it temporarily and making it available to internet users by according to a particular order of preference is classified as 'processing of personal data' within the scope of that provision when the information viewed contains personal data.²¹⁸ The CJEU reiterated the definition of 'processing of personal data' found in Article 2 (b) of Directive 95/46²¹⁹ and moreover reaffirmed its position from *Lindqvist*²²⁰ stating that loading personal data on an internet page must be considered as 'processing' in the meaning of Article 2 (b).²²¹ On whether or not an search engine constitutes a 'controller' in the meaning of Directive 95/46 the CJEU referred to the Article 2 (d) definition of controller as 'the natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data'.²²² The Court moreover held that the operator of a search engine was to be regarded as controller pursuant to Article 2(d) as it determines the purposes and means of the processing of personal data.²²³ In conclusion, the CJEU found that the answers to the questions regarding the interpretation of Article 2 (b) and (d) of Directive 95/46 were that a search

²¹⁸ *ibid* para 21.

²¹⁹ *ibid* para 25.

²²⁰ Case C-101/01, *Lindqvist* [2003], ECR 2003 I-12971.

²²¹ Case C-131/12 *Google Spain*, para 26; Case C-101/01, *Lindqvist* [2003], ECR 2003 I-12971, para 25.

²²² Case C-131/12 *Google Spain*, para 32.

²²³ *ibid* para 33.

engine's activity is to be classified as 'processing of personal data' and that the operator of a search engine must be regarded as controller in respect of the aforementioned processing.²²⁴ Secondly, the CJEU examined the territorial scope of Directive 95/46, and whether 'established' in meaning of Article 4(1)(a) of the directive is to be interpreted as including a subsidiary where the parent company is located outside of a Member State although the subsidiary has not been established to process personal data.²²⁵ The CJEU found the circumstances at hand to fall within the meaning of 'established' within Article 4(1)(a), as the activities of the operator of the search engine and those of its establishment situated in the Member State were 'inextricably linked'. This as the activities relating to the advertising space constituted the means of rendering the search engine economically profitable.²²⁶

The third set of questions concerned the right to be forgotten and whether such a right could be drawn from Directive 95/46. The CJEU firstly re-established that the aim of the directive is to ensure a high level of protection of the fundamental rights and freedoms of natural persons, in particular so the right to privacy in respect to processing of personal data.²²⁷ The CJEU held moreover the necessity of interpreting the provisions of the directive in the light of fundamental rights, forming an integral part of the general principles of EU law, ensured by the CJEU and contained in the Charter.²²⁸ The right to respect for private life in Article 7 of the Charter as well as the right to protection of personal data in Article 8 of the Charter provides protection of personal data. Article 8(2) states that such data must be processed fairly for specified purposes and based on the consent of the

²²⁴ *ibid*, para 41.

²²⁵ *ibid*, para 45.

²²⁶ *ibid*, para 56.

²²⁷ Case C-131/12 *Google Spain (n)*, para 66; Directive 95/46 Article 1 and recital 10 of the preamble; See further Case C-473/12 *IPI* (ECJ judgment of 7 November 2013), para 28.

²²⁸ Case C-131/12 *Google Spain (n)*, para 68; See further Case C-274/99 P *Connolly v Commission* [2001], ECR I-1611, para 37; and Joined Cases C-465/00, C-138/01 and C-139/01 *Österreichischer Rundfunk and Others* [2003], ECR 2003 I-04989, para 68.

person concerned or on a legal basis. Article 8(3) states that everyone has the right to access data which has been collected concerning him or her and the right to have then data rectified, the requirements are also enshrined inter alia by Articles 6, 7, 12, 14 and 28 of the directive.²²⁹

Article 7 of Directive 95/46 regulates the legitimization of processing of personal data, and the CJEU found it applicable as to the processing of data by a search engine.²³⁰ This provision permits processing of personal data for purposes of the legitimate interests pursued by the controller, or by the third party or parties to whom the data are disclosed. This does not apply when such interests are overridden by the interests or fundamental rights and freedoms of the data subject, the right to privacy with respect to the processing of personal data in particular, which are protected by Article 1(1) of the directive. The application of Article 7(f) therefore contains a balancing between the opposing rights and interests, in which Article 7 and 8 of the Charter are to be taken into account.²³¹ The compliance of the processing with Articles 6 and 7(f) of Directive 96/46 can be determined through Article 12(b) and under certain conditions also through the right to object enshrined in subparagraph (a) of the first paragraph of Article 14 of the directive.²³² Article 12(b) of the directive is applicable subjected to the condition that the processing of personal data is incompatible with the directive. Incompatibility may result from the data being inaccurate, but also the data being inadequate, irrelevant or excessive with regards to the purposes of the processing. Moreover, the data being out-of-date or kept for longer than necessary may also be ground for the data processing being rendered incompatible with the directive.²³³ The CJEU held that it follows from those requirements that even initially lawful processing over time may

²²⁹ Case C-131/12 *Google Spain*, para 69.

²³⁰ *ibid* para 73.

²³¹ Case C-131/12 *Google Spain*, para 74; See further *Joined Cases C-468/10 and C-469/10, ASNEF and FECEMD* [2011], ECR 2011 I-12181, paras 38, 40.

²³² Case C-131/12 *Google Spain* (note), para 75.

²³³ *ibid* para 92; The requirements are laid down in Article 6(1)(c) to (e) of Directive 95/46.

become incompatible with the directive.²³⁴ In this context, the data processing at hand in the order for reference is found by the Court, at this point in time, to be incompatible with the directive and the information and links concerned must therefore be erased.²³⁵

Article 14 states that Member States are to grant the data subject the right to object at any time on compelling legitimate grounds to the processing of personal data related to the data subject, at least in cases referred to in Article 7(e) and (f) of the directive. The compelling legitimate grounds shall be based on the data subject's particular situation.²³⁶ This entails a balancing of the opposing interests by allowing account to be taken to all the circumstances surrounding the data subject's particular situation. If the objection is justified, the processing performed by the controller may no longer include the data in question.²³⁷ The CJEU found the processing of personal data carried out by the operator of a search engine liable to significantly affect the fundamental right to privacy and the right to protection of personal data when a search is carried out on the basis of an individual's name. Moreover, the CJEU held that the information without the search engine would most likely not be interconnected to internet users. The effect of interference with a data subjects rights is also reinforced by the increasingly important role of the internet and search engines in modern society.²³⁸ The Court further stated that a merely economic interest could not justify an interference of the right to privacy in the light of the potential seriousness of the interference, yet with regards to the information affecting other legitimate interests of internet users, a balance must be struck between that interest and the data subject' fundamental rights. The CJEU held to that respect that a data subject's rights under Article 7 and 8 of the Charter, as a general rule, override the interest of internet users. This can however vary

²³⁴ *ibid* para 93.

²³⁵ *ibid* para 94.

²³⁶ *ibid* para 76.

²³⁷ *ibid* para 76.

²³⁸ Case C-131/12 *Google Spain*, para 80; See further *Joined Cases C-509/09 and C-161/10 eDate Advertising and Others [2011]*, ECR 2011 I-10269, paragraph 45.

depending on the nature of the information and the public interest of the latter, which may very well vary depending on the data subject's role in public life.²³⁹

Based on the foregoing considerations, the CJEU reached the conclusion that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as that the operator of a search engine, in order to comply with the rights laid down in said provisions and insofar the conditions laid down in the provisions are satisfied, is obliged to remove links to web pages published by third parties which contain information related to a person following a search made in the basis of that person's name. This is the case even when that name or information is not erased beforehand or simultaneously by the publisher of the web page, and even when the publication itself on the web page is lawful.²⁴⁰ In conclusion, the CJEU found with regards to the right to have personal data removed that the data subject may, in the light of his fundamental rights guaranteed by Article 7 and 8 of the Charter, request removal of the data in question.²⁴¹ This as those rights as a rule override the economic interest of the operator of a search engine and the general public interest of having access to that information. The CJEU concluded its judgment by stating that there were circumstances, e.g. the role of the data subject in public life that could justify such an interference with the right to private life and data protection due to a preponderant interest of the general public having access to said information.²⁴²

5.3. Opinion of Advocate General Jääskinen

On 25 June 2013, Advocate General (hereinafter AG) Jääskinen delivered an opinion on Google Spain. The opinion will be presented briefly, with emphasis on the AG's findings on balancing the right to private life and data

²³⁹ Case C-131/12 Google Spain, para 81.

²⁴⁰ *ibid* para 88.

²⁴¹ *ibid* para 100.

²⁴² *ibid* para 100.

protection and the right to freedom of expression and the right to information. The AG firstly held regarding the territorial scope of Directive 95/46 that Google Inc. and Google Spain should be viewed as a single economic unit. As cost-free search engines depend on advertising to make a profit, the AG held that a controller should be considered 'established' in a Member State if that state is the place of establishment of the revenue generating limb of the company, even if the data processing is placed elsewhere.²⁴³ On the material scope of the Directive, the AG found that an operator of a search engine should be considered as 'processing personal data' in the meaning of Article 2(b) of Directive 95/46, when locating information published by third parties, indexing it automatically, storing it temporarily and making it available to internet users, when that information contains personal data.²⁴⁴ The AG did however not find an operator of a search engine to be the 'controller' of the processing of personal data in the sense of Article 2(d) of the directive, with the exception of the index of its search engine and provided that the operator of a search engine does not index or archive personal data against instructions or request of the publisher of the webpage linked.²⁴⁵ In case the CJEU did find the operator of a search engine to constitute a 'controller' within the meaning of Directive 95/46, the AG examined the third set of questions as well, regarding the right to be forgotten.²⁴⁶ This section of the AG's Opinion will be examined more thoroughly as it relates to the balancing of fundamental rights. The question was whether the rights to erasure or modification of data provided for in Article 12 (b) or subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 extend to 'enabling the data subject to, at his own discretion, address the operator of a search engine to prevent indexing of information relating to him/her personally, published on third

²⁴³ Case C-131/12, *Google Spain SL och Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González* (ECJ judgment of 14 May 2014), Opinion of AG Jääskinen [Case C-131/12 Google Spain AG Opinion], paras 66f, 138 (1).

²⁴⁴ *ibid* paras 72ff.

²⁴⁵ Case C-131/12 Google Spain AG Opinion, para 138 (2).

²⁴⁶ *ibid* paras 101f.

parties' webpages, although the information in question has been lawfully published', thus whether a right to be forgotten can be derived from Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of the directive.²⁴⁷ The AG held that if he did not find a right to be forgotten within the directive, he would consider whether such an interpretation is compatible with the EU Charter of Fundamental Rights, especially Articles 7, 8, 11 and 16.²⁴⁸ The AG did not find that the data could be regarded as incomplete or inaccurate as in the grounds for rectification in Article 12(b).²⁴⁹ He moreover did not find subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 to provide for a general right to be forgotten as 'the directive does not provide for a general right to be forgotten in the sense that a data subject is entitled to restrict or terminate dissemination of personal data that he considers to be harmful or contrary to his interests. The purpose of processing and the interests served by it, when compared to those of the data subject, are the criteria to be applied when data is processed without the subject's consent, and not the subjective preferences of the latter. A subjective preference alone does not amount to a compelling legitimate ground within the meaning of Article 14(a) of the Directive.'²⁵⁰ Subsequently, the AG examined whether a right to be forgotten could be derived from EU fundamental rights, starting with the right to protection of personal data in Article 8 of the Charter. Article 8 of the Charter holds that personal data must be processed fairly, for specified purposes and on the basis of the consent of the person concerned or other legitimate basis laid down in law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.²⁵¹ The AG did not find Article 8 to add 'any significant new elements' to the

²⁴⁷ *ibid* para 102.

²⁴⁸ Case C-131/12 *Google Spain* AG Opinion, n 103; see further Case C-400/10 PPU, *J.McB. v L. E.*, [2010], ECR 2010 I-08965, paras 44 and 49.

²⁴⁹ Case C-131/12 *Google Spain* AG Opinion, para 105.

²⁵⁰ *ibid*, paras 108 and 111.

²⁵¹ *ibid* para 112; Article 8 of Directive 95/46.

interpretation of Directive 95/46 and hence did not provide for a right to be forgotten.²⁵² On the right to respect right for private and family life in Article 7 of the Charter the AG observed, as Article 7 of the Charter is substantially the same as Article 8 of the ECHR, that the case-law of the ECtHR is pertinent in conformity with Article 52(3) of the Charter. Article 8 ECHR cover the protection of personal data according to ECtHR case-law.²⁵³ The AG therefore made a reference to ECtHR case-law establishing that the professional and business activities of an individual may fall within the scope of Article 8 ECHR.²⁵⁴ Furthermore, the AG referred to CJEU case-law concluding that the right to protection of personal data recognized by Articles 7 and 8 of the Charter concerns 'any information relating to an identified or identifiable individual' and that 'the limitations which may lawfully be imposed on the right to protection of personal data correspond to those tolerated in relation to Article 8 [ECHR]'.²⁵⁵ In the light of the aforementioned, the AG found that there was an interference with Article 7 of the Charter. According to the Charter and the ECHR, any interference with fundamental rights must be based on law and necessary in a democratic society. Subsequently, the remaining questions were whether there was a positive obligation for the EU and the Member States to enforce a right to be forgotten²⁵⁶, if there was justification for interference of Articles 7 and 8

²⁵²Case C-131/12 Google Spain AG Opinion, para 113,

²⁵³ See e.g. European Court of Human Rights Judgment of 2 August 1984 *Malone v. United Kingdom* (appl. no. 8691/79); European Court of Human Rights Judgment of 3 April 2007 *Copland v. United Kingdom* (appl. no. 62617/00); European Court of Human Rights Judgment of 6 September 1978 *Klass and Others v. Germany* (appl. no. 5029/71); European Court of Human Rights Judgment of 2 September 2010 *Uzun v. Germany* (appl. no. 35623/05); European Court of Human Rights Judgment of 26 March 1987 *Leander v. Sweden* (appl. no. 9248/81); European Court of Human Rights Judgment of 4 December 2008 *S. and Marper v. United Kingdom* (appl. nos. 30562/04 and 30566/04).

²⁵⁴ Case C-131/12 Google Spain AG Opinion, para 116; for the case-law of the ECtHR see e.g. European Court of Human Rights judgment of 16 December 1992 *Niemietz v. Germany* (appl. no. 13710/88), §29; European Court of Human Rights (GC) Judgment of 16 February 2000 *Amann v. Switzerland* (appl.no. 27798/95), §65; and European Court of Human Rights (GC) judgment of 4 may 2000 *Rotaru v. Romania* (appl. no. 28341/95), §43.

²⁵⁵ Case C-131/12 Google Spain AG Opinion, para 117; Joined Cases C-92/09, C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen*, ECR 2010 I-11063, paragraph 52.

²⁵⁶ See further on positive obligations on the State to act to protect privacy when it is being breached by private sector actors, and the need to balance any such obligation on the right

of the Charter, and the relationship between the opposing rights of freedom of expression and information and the right to conduct a business.²⁵⁷

The right to freedom of expression and information is enshrined in Article 11 of the Charter, corresponding to Article 10 ECHR.²⁵⁸ Internet users' right to seek and receive information is included in Article 11 of the Charter, regarding both source webpages and search engine indexes.²⁵⁹ The AG held that the right to information should be given particular protection in EU law, especially in the light of the increasing outer regimes limiting access to or censoring content on the internet.²⁶⁰ In this context, the AG referred to *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, where the ECtHR observed the substantial contribution made by internet archives as to preserving and making available information.²⁶¹ The AG moreover reiterated that the ECtHR allow a wide margin of appreciation to States in striking the balance when concerning news archives on past events.²⁶² As none of the rights at issue are absolute, they may be limited on the grounds

to freedom of expression of the latter, European Court of Human Rights Judgment of 24 June 2004, *Von Hannover v. Germany*, (appl. no. 59320/00), ECHR 2004-VI, and European Court of Human Rights Judgment of 18 April 2013, *Ageyevy v. Russia*, (appl. no. 7075/10) ECHR 346.

²⁵⁷ Case C-131/12 Google Spain AG Opinion, n 119. As noted above, the freedom to conduct a business will not be discussed further. However, on the right to conduct a business see Case C-131/12 Google Spain AG Opinion, n 124; See further Case C-70/10 *Scarlet Extended* [2011] ECR I-11959, para 46; and Case C-360/10 *SABAM v Netlog* [2012] ECLI:EU:C:2012:85, para 44.

²⁵⁸ See for examples of the European Court of Human Rights case-law regarding the interpretation of Article 10, European Court of Human Rights, Judgment of 7 December 1976 *Handyside v. the United Kingdom*, (appl. no. 5493/72), para 49; European Court of Human Rights Judgment of 24 May 1988 *Müller and Others v. Switzerland*, (appl. no. 10737/84), para 33; European Court of Human rights, Judgment of 26 September 1995 *Vogt v. Germany*, (appl. no. 17851/91), para 52; and European Court of Human Rights (GC) Judgment of 12 Februari 2008 *Guja v. Moldova* (appl. no. 14277/04), para 69. See furthermore Case C-274/99 P *Connolly v Commission* [2001] ECR I-1611, para 39 and Case C-73/07, *Satakunnan Markkinapörssi and Satamedia*, Opinion of AG Kokott, para 38.

²⁵⁹ See for example Case C-360/10 *SABAM v Netlog* [2012] (n) , para 48.

²⁶⁰ Case C-131/12 Google Spain AG Opinion, para 121; further referring to United Nations Human Rights Council, Report of the Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression, Frank La Rue (Document A/HRC/17/27), of 16 May 2011.

²⁶¹ European Court of Human Rights Judgment of 10 March 2009, *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, Applications nos. 3002/03 and 23676/03 [Times Newspapers 2009].

²⁶² Case C-131/12 Google Spain AG Opinion, para 123; Times Newspapers 2009, para 45.

of justification laid down in Article 52(1) of the Charter.²⁶³ The right to protection of private life must in this context be balanced with other fundamental rights, such as the right to freedom of expression, the freedom of information and the right to conduct a business, held the AG.²⁶⁴ He moreover observed that the ECtHR case-law provides for a possibility to restrict the reproduction of already published material, however in this context a demand to alter content from the originally printed version would amount to falsification of history.²⁶⁵ In the present situation, the AG found the internet user to, by searching for the claimant's name and surname, actively use his right to receive information concerning the data subject from public sources.²⁶⁶ He moreover held that the right to search information published on the internet is one of the most important ways to exercise the freedom of information, which would be compromised if the search results were modified.²⁶⁷ In this regard, an operator of a search engine exercises the right to freedom of expression and the freedom to

²⁶³ Case C-131/12 Google Spain AG Opinion, para 125. See also Joined Cases C-317/08 to C-320/08 *Allassini and Others* [2010] ECR I-221, para 63, where it was held that 'it is settled case-law that fundamental rights do not constitute unfettered prerogatives and may be restricted, provided that the restrictions in fact correspond to objectives of general interest pursued by the measure in question and that they do not involve, with regard to the objectives pursued, a disproportionate and intolerable interference which infringes upon the very substance of the rights guaranteed. See, to that effect, Case C-28/05 *Doktor and Others* [2006] ECR I-5431, para 75 and the case-law cited, and the European Court of Human Rights judgment of 21 November 2001, *Fogarty v. the United Kingdom*, (appl. no. 37112/97), §33.

²⁶⁴ Case C-131/12 Google Spain AG Opinion, para. 128; The right to conduct a business (found in Article 16 of the Charter) will not be examined further, as it is not within the scope of this paper.

²⁶⁵ Case C-131/12 Google Spain AG Opinion, para 129; with references to European Court of Human Rights Judgment of 10 March 2009 *Times Newspapers Ltd v. the United Kingdom* (nos. 1 and 2) (appl. nos. 3002/03 and 23676/03); and European Court of Human Rights Judgment of 16 December 2010 *Aleksey Ovchinnikov v. Russia* (appl. no. 24061/04).

²⁶⁶ Case C-131/12 Google Spain AG Opinion, para 130; with reference to the European Court of Human Rights judgment of 26 November 1991, *Observer and Guardian v. the United Kingdom*, (appl. no. 13585/88), Series A no. 216, paragraph 60, and the European Court of Human Rights judgment of 27 November 2007, *Timpul Info -Magazin and Anghel v. Moldova* (appl. no. 42864/05), paragraph 34.

²⁶⁷ Case C-131/12 Google Spain AG Opinion, para 131.

conduct a business when making information available through indexing search results.²⁶⁸

In sum, the AG found the opposing fundamental right to freedom of expression to prevent justification for broadening the data subject's legal position under Directive 95/46. A right to be forgotten would in this case undermine other central fundamental rights. He moreover discouraged the CJEU from concluding that the striking of a balance between the conflicting interests could be done on a case-by-case basis, conducted by the operators of search engines, as that would likely lead to either automatic withdrawals of links to objected contents, or an unmanageable number of requests for the search engines.²⁶⁹ Such an obligation should not be imposed, held the AG, on an operator of a search engine, as this would interfere with the freedom of expression of the publisher of the third party webpage, who would not enjoy adequate legal protection as the evaluation and balancing of the right to be forgotten and the right to freedom of expression would be confined to the data subject and the operator of the search engine.²⁷⁰ In the light of the aforementioned, the AG concluded that the right to erasure and blocking of data enshrined in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 should not be read as extending to a right to be forgotten as described in the order for reference.²⁷¹

5.4. Implications of Google Spain

After *Google Spain*, there were still a lot of questions left unanswered as to the practical implementation and future of the right to be forgotten, as well as to the real impact of the CJEU approach. Both negative and positive opinions have been raised by more or less public sources. Among those criticising the judgment is, not surprising, corporate voices such as for

²⁶⁸ *ibid* para 132.

²⁶⁹ *ibid* para 133.

²⁷⁰ *ibid* para 134; See further Case 324/09 *L'Oréal and Others*, Opinion of AG Jääskinen para 155.

²⁷¹ *ibid* paras 136f.

example Wikipedia-founder Jimmy Wales, declaring it 'one of the most wide-sweeping internet censorship rulings that I've ever seen.'²⁷² Furthermore, journalist James Ball held that 'the result is either an eerie parallel with China's domestic censorship of search results, or a huge incentive for tech investment to get the hell out of Europe. Neither, presumably, is a remotely desirable result.'²⁷³ There has however been positive reactions as well, for example British politician David Davis held the judgment 'a sensible decision but it is only the first step in people having property rights in their own information.'²⁷⁴ The most pressing issue seems to be the vast contravention between the EU data protection and the American hands-off approach, protection of the freedom of expression.²⁷⁵ The relationship between the EU and the USA was questioned already in 2012²⁷⁶, and has been raised by several legal scholars.²⁷⁷ In sum, there is reason to anticipate a collision in the future as most search engine services affected by the EU right to be forgotten are U.S. companies, which have liberal approach to the freedom of expression and information.

5. 4. 1. The Google approach

In the end of July 2014, Google released a report on the implementation of the right to be forgotten on the basis of a questionnaire from the Article 29

²⁷² Online Article by Dave Lee 'Google ruling 'astonishing' says Wikipedia founder Wales', 14 May 2014, *BBC Technology*, available at <http://www.bbc.com/news/technology-27407017>.

²⁷³ Online Article by James Ball "'Right to be forgotten' ruling creates a quagmire for Google et al", 13 May 2014 in *The Guardian*, available at <http://www.theguardian.com/commentisfree/2014/may/13/right-to-be-forgotten-ruling-quagmire-google>.

²⁷⁴ Comment available at <http://www.daviddavismp.com/david-davis-responds-to-ecj-ruling-on-peoples-right-to-be-forgotten-online/>.

²⁷⁵ As expressed by for example Hayley Tsukayama "'Right to be forgotten' highlights sharp divide on U.S., European attitudes toward privacy", *Washington Post* of 13 May 2014, available at <http://www.washingtonpost.com/blogs/the-switch/wp/2014/05/13/right-to-be-forgotten-highlights-sharp-divide-on-u-s-european-attitudes-toward-privacy/>.

²⁷⁶ Online Article, "Private Data, Public Rules", article in *The Economist* of 28 January 2012, available at <http://www.economist.com/node/21543489>.

²⁷⁷ Jeffrey Rosen 'The Right to be Forgotten' (2012), *Stanford Law Review* nr 64, pp. 88-92. Jonathan Zittrain, professor at Harvard University, "Don't Force Google to 'Forget'", *The New York Times* of 14 May 2014, available at http://www.nytimes.com/2014/05/15/opinion/dont-force-google-to-forget.html?_r=1.

Working Party²⁷⁸, a result of a meeting between the two on 24 July 2014.²⁷⁹ In the report, Google stated that France at the time of the report had over 17,500 individual requests for removal of data, Germany 16, 000 requests and the UK just over 12,000 requests. The accumulated requests from the remaining EU Member States thus constitute a huge case-load for Google. Of the requests to remove URL-links, around 52 percent has been approved, around 32 percent has been denied and 15 percent referred back for completion of information, according to Google statistics.²⁸⁰ Google moreover reports that the assessment is being complicated by individuals not providing current information for their request of removal, for example not mentioning recent convictions when requesting the removal of old ones, or professional competitors targeting each other's webpages. Google finds the practice of considering the requests time-consuming, stating that a case-by-case examination is necessary and that ensuring enough resources for the processing of requests required a significant hiring effort.²⁸¹

²⁷⁸ The Article 29 Working Party is an independent organ with advisory status set up under Article 29 of Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281 of 23/11/1995), p. 31. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31/07/2002) p. 37. For more information visit the Article 29 Working Party website http://ec.europa.eu/justice/data-protection/index_en.htm.

²⁷⁹ Press Release from the 29 Article Working Party on the 17 July 2014, available at http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20140717_wp29_press_release_meeting_with_search_engine_s.pdf; The report containing the answers of Google Inc. is available at <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit>.

²⁸⁰ Google Inc. Report containing the answers to the questionnaire provided by the Article 29 Working Party, available at <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit>, point 23.

²⁸¹ Google Inc. Report containing the answers to the questionnaire provided by the Article 29 Working Party, available at <https://docs.google.com/file/d/0B8syaai6SSfiT0EwRUFyOENqR3M/edit>, point 17.

5.4.2. The Article 29 Working Party Guidelines

On 26 November 2014, the Article 29 Working Party published guidelines on the right to be forgotten.²⁸² The guidelines include 13 criteria to be considered by an operator of a search engine when examining a request under the right to be forgotten, and moreover established the territorial scope of the right to be forgotten.²⁸³ The Guidelines states that the territorial effect of a de-listing decision must guarantee the effective and complete protection of data subjects' rights, in order to give full effect to the rights as defined in Google Spain. Limiting de-listing results to EU domains based on the grounds that users tend to access search engines via their national domains is not a sufficient mean to guarantee the rights of the data subjects according to the CJEU ruling, according to the Article 29 Working Party Guidelines. De-listing of results should therefore in practice be effective on all relevant domains, including .com.²⁸⁴

²⁸² Press Release of the Article 29 Working Party of 26 November 2014, available at http://ec.europa.eu/justice/data-protection/article-29/press-material/press-release/art29_press_material/20141126_wp29_press_release_ecj_de-listing.pdf.

²⁸³ The Article 29 Working Party, "Guidelines on the implementation of the Court of Justice of the European Union judgment on Google Spain and Inc. v. Agencia Espanola de Proteccion de Datos (AEPD) and Mario Costeja González C-131/12" adopted on 26 November 2014, available at http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf.

²⁸⁴ *ibid*, point 7 p.3.

6. Analysis

This thesis has set out to answer four questions regarding the CJEU and the ECtHR approach on conflicts between fundamental rights in the light of *Google Spain*. This chapter will attempt to analyse the presented material and answer the research questions. The first section will focus on the approaches of the two courts when faced with conflicts between fundamental rights in general and answer the question of whether there is a common European approach to conflicts between fundamental rights. The second section will focus on *Google Spain* and the questions to be answered are firstly if the outcome of *Google Spain* had changed had the case been brought before the ECtHR, and secondly if the judgment can be said to strike a fair balance between the right to privacy and the right to freedom of expression.

6.1. The approaches of the two courts

The CJEU approach to conflicts between fundamental rights is drawn from the Charter. The horizontal provisions in Title VII of the Charter provide guidance to the interpretation and application of the Charter. In Article 6(1) of the TEU, the importance of the horizontal provisions of the Charter is stressed, setting out that ‘the rights, freedoms and principles set out in the Charter shall be interpreted in accordance with the general provisions in Title VII of the Charter governing its interpretation and application and with due regard to the explanations relating to the Charter, that set out the source of those provisions’.²⁸⁵ Article 52(1) is of utmost importance for the legal basis of the CJEU approach to conflicts between fundamental rights, as it prescribes under what circumstances a fundamental right can be lawfully restricted. The design of this provision is similar to the necessity test provided for in the non-absolute rights in the ECHR.²⁸⁶ Any limitation as to the rights and freedoms of the Charter must be provided by law, respect the

²⁸⁵ Article 6(1) third sentence, TEU.

²⁸⁶ See Article 8-11 ECHR.

essence of that right and subject to the principle of proportionality, be necessary and genuinely meet objectives of general interest of the EU or *to protect the rights and freedoms of others*.²⁸⁷ Limitations to protect the rights and freedoms of others include the use of balancing when faced with a conflict between fundamental rights. In this context, the CJEU have stressed the importance of the principle of proportionality. The principle of proportionality connote that there is a casual link between the measure and the aim it strives to attain, that the limitation must be the least restrictive means to reach the aim of protecting the other right at hand and that there is a relationship of proportionality between the restriction of the right at one hand and the aim to be pursued and the possible attainment of the protection of the opposing right at the other hand. With regards to the relationship between the right to private life and the right to freedom of expression, the Court held in *Lindqvist* that Mrs. Lindqvist's freedom of expression had to be weighed against the protection of private life.²⁸⁸ Here, the CJEU allows for a wide discretion to the Member States, stating that it is for the Member States to make sure they do not rely on an interpretation of the Directive which would be in conflict with the fundamental rights protected by the Community legal order or with the other general principles of Community law, such as *inter alia* the principle of proportionality.²⁸⁹ Thus, in *Lindqvist* the member States are given a wide discretion as to how the balancing of rights should be practiced.

The ECtHR approach regarding conflicts between fundamental rights varies depending on the nature of the rights and the opposing interests, as illustrated in the jurisprudence of the Court, where methods are used in conflicts between fundamental rights. Firstly, the Court is shown to use the necessity test as enshrined in the second paragraph of Articles 8-11 in the ECHR. As the ECHR is to be interpreted in the context in which it is

²⁸⁷ Emphasis added.

²⁸⁸ C-101/01 *Lindqvist*, para 86.

²⁸⁹ *ibid*, para 87.

applied, the meaning and interpretation of the rights may change according to the ECtHR jurisprudence.²⁹⁰ The necessity test has therefore on occasion been used even when not explicitly provided for in the article at hand.²⁹¹ The ECtHR also uses the concept of balancing rights to solve a conflict between fundamental rights. The ECtHR has moreover allowed a wide margin of appreciation in settling conflicts between fundamental rights that are sensitive due to the different cultural and social characteristics of the Contracting Parties. On balancing the right to private life with the right to freedom of expression, the Court mainly applies a case-by-case balancing, where principles developed through case-law are given weight in the assessment. The principles include i.e. the role in society of the individual claiming the right to private life, the nature of the published information and the contribution of the information to a debate of general interest.

6.1.1. A common European approach?

On the relationship between the Charter and the ECHR, Article 52(3) of the Charter holds that insofar as the Charter contains rights which correspond to rights guaranteed by the ECHR, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall however not prevent Union law from providing more extensive protection. The wording of the Article demonstrates an awareness of the fragile relationship between the European human rights instruments, i.e. the Charter and the ECHR, and can be interpreted as seeking to avoid conflicting interpretations of the Charter and the ECHR. This entails that the Charter can never undermine the level of fundamental rights in Europe as

²⁹⁰ On the ECHR as a living instrument, see e.g. European Court of Human rights Judgment of 25 April 1978 *Tyrer v. United Kingdom*, (appl. no. 5856/72) §31; European Court of Human Rights Judgment of 24 February 1983 *Dudgeon v United Kingdom*, (appl. no. 7525/76), §60; and European Court of Human Rights Judgment of 27 March 1996 *Goodwin v United Kingdom* (appl. no. 17488/90) §74.

²⁹¹ See e.g. European Court of Human Rights Judgment of 21 February 1975 *Golder v. United Kingdom* (appl. no. 4451/70) §§28-36; European Court of Human Rights Judgment of 17 December 2002 *A. v. United Kingdom* (appl. no. 35373/97) §74; European Court of Human Rights Judgment of 25 January 2005 *Enhorn v. Sweden* (appl. no. 56529/00), §42; and European Court of Human Rights Judgment of 4 April 2000 *Witold Litwa v. Poland* (appl. no. 26629/95) §78.

set out by the ECtHR. However, the minimum standard of fundamental rights within Europe provided by the ECHR is not uncomplicated, as the question remains to what extent the CJEU should take into account the ECtHR case-law? Firstly, as the ECHR is to be interpreted as a ‘living instrument’ it is natural to conclude that for that reason, the case-law of the ECtHR is of great importance as it makes the ECHR, drafted in the 1950’s, to develop along with the change in attitudes and fundamental rights development in Europe. On the other hand, nothing in Article 52(3) clearly states that the CJEU should be bound to interpret the Charter in conformity with ECtHR jurisprudence. In the explanations relating to the Charter, the reference to the ECHR is said to include not only the Convention and the Protocols but also the case-law of the ECtHR.²⁹² However, the explanations relating to the Charter are only to be given due regard by the interpreter, according to Article 6(1) and 52 (7) of the Charter.

As noted above, the relationship between the Charter and the ECHR is not clear. If the Article is read as the minimum level of protection being set to the level afforded by the ECHR, and allowing for the interpretation that minimum level is constructed by the ECtHR, there can be said to be a common approach between the CJEU and the ECtHR. Even so, it is not possible to conclude that the two courts have a common approach to solving conflicts between fundamental rights, as the act of balancing is both vague and difficult to examine, especially in the case of the CJEU and its minimalistic style of constructing judgments. However, the CJEU as well as the ECtHR seem to use the balancing of rights on a case-by-case basis when faced with conflicts between two non-absolute rights. Balancing of rights is a broad and vague concept, allowing for flexibility in the individual assessment, but can also lead to a decrease in transparency and legal certainty. The approach of the CJEU is therefore not necessarily equivalent to the approach of the ECtHR. One could argue that the recent development

²⁹² Explanations relating to the Charter of Fundamental Rights OJ 2007/C 303/33, on Article 52.

as to the meaning and interpretation of fundamental rights might result in a divergence between the two most powerful fundamental rights adjudicators as there is no longer a 'common European approach'. If the CJEU allows for a more extensive interpretation to a right in a conflict with another fundamental right, it could simultaneously limit the other right. There has however been a history of courtesy between the CJEU and the ECtHR, as seen in the *Bosphorus* presumption and in the unwillingness to directly criticize a judgment from the other court. In a utopian outcome of a double human rights protection in Europe, the ideal development would be one where the Charter as the more comprising and modern instrument would guarantee a higher human rights protection in Europe. Extending the interpretation and meaning of rights guaranteed by the Charter at the expense of another however raises the question of legal uncertainty if the two fundamental rights systems diverge in the future.

For the European Member States as Contracting Parties of the ECHR, this might lead to difficulties. From ECtHR case-law it is clear that the Contracting Parties of the Convention are responsible before the ECtHR even when acting under EU law. Regardless of the *Bosphorus*-presumption, EU Member States may well be held responsible for violating the rights guaranteed under the ECHR, even when acting under EU law without margin of manoeuvre. Two overlapping fundamental rights systems could thus entail confusion for the European States if the systems diverge to the point where complying with the interpretation of one system could violate the other.

6.2. Google Spain

Google Spain is a controversial judgment and has been criticized for omitting to address the question of the right to freedom of expression. Moreover, it contradicts the ECtHR case law when implying that the right to

privacy, as a rule, overrides the right to freedom of expression and information.²⁹³

6.2.1. Google Spain through an ECtHR lens

There are numerous examples in ECtHR case-law on balancing the right to private life and the freedom of expression. The ECtHR has stated that 'as a matter of principle, the rights guaranteed by these provisions deserve equal respect'.²⁹⁴ The approach of the ECtHR on balancing Article 8 and Article 10 with regards to information published on the internet can be illustrated by *Węgrzynowski*.²⁹⁵ Here, the Court made a distinction between internet and printed media, especially with regards to 'the capacity to store and transmit information', and observed that the risk of harm posed to fundamental rights, in particular the right to privacy, was higher than that posed by the traditional press.²⁹⁶ The Court subsequently held that policies therefore may differ regarding the traditional media and the internet.²⁹⁷ These policies have to be adjusted according to technology's specific features in order to protect the rights at hand.²⁹⁸ In *Węgrzynowski*, the Court found that there had been no violation of the right to private life and stated that 'a limitation on freedom of expression for the sake of the applicant's reputation in the circumstances of the present case would have been disproportionate under Article 10 of the Convention(...)'.²⁹⁹ The Court has also in its case-law stressed the importance of internet archives in preserving as well as making available information, in particular as they are

²⁹³ See C-131/12 *Google Spain*, paras 81, 97, 99, 100.

²⁹⁴ See e.g. European Court of Human Rights Judgment of 23 July 2009 *Hachette Filipacchi Associés (ICI PARIS) v. France* (appl. no. 12268/03) § 41; European Court of Human Rights Decision on Admissibility of 12 October 2010 *Timciuc v. Romania* (dec.), (appl. no. 28999/03) § 144, and European Court of Human Rights Judgment of 10 May 2011 *Mosley v. the United Kingdom* (appl. no. 48009/08) § 111.

²⁹⁵ European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07).

²⁹⁶ *ibid* §58.

²⁹⁷ *ibid* §58; See further European Court of Human Rights Judgment of 5 May 2011 *Editorial Board of Pravoye Delo and Shtekel v. Ukraine* (appl. no. 33014/05), § 63, ECHR 2011 (extracts).

²⁹⁸ European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07), §58.

²⁹⁹ *ibid* § 68. The ECtHR referred furthermore to the European Court of Human Rights Judgment of 28 April 2009 *Karakó v. Hungary* (appl. no. 39311/05), §28.

easy to access for the general public both cost-wise and in relation to general accessibility.³⁰⁰ In the light of the above, the ECtHR in balancing between the right to private life and data protection seem to give somewhat more weight in its reasoning to the right to freedom of expression and information than the CJEU, this however is balanced with the large number of judgments safeguarding the right to private life, as will be taken into account in the next section on the possible outcome of *Google Spain* if brought before the ECtHR instead of the CJEU.

On more than one occasion, the ECtHR has proclaimed the right to privacy and the right to freedom of expression and information to be of the same legal value.³⁰¹ As neither the right to privacy in Article 8 ECHR nor the right to freedom of expression in Article 10 ECHR is an absolute right, they can be restricted. Any restriction of fundamental rights must however be justified. Under the circumstances at hand in *Google Spain*, the case would be brought before the ECtHR as an alleged violation of Article 8 ECHR. As held in Article 8(2), any interference with the right to privacy must be 'in accordance with the law' and 'necessary in a democratic society' for a legitimate aim listed.

The ECtHR case-law holds as to this respect that the interference should correspond to a pressing social need and that the interference is proportionate to the aim pursued.³⁰² Inherent in the respect for private life there may be positive obligations for the Contracting Party, such as the adoption of measures within the regulatory framework, adjudicatory and

³⁰⁰ European Court of Human Rights Judgment of 10 March 2009 *Times Newspapers Ltd (Nos. 1 and 2) v. United Kingdom* (appl. no. 3002/03 and 23676/03), §27.

³⁰¹ European Court of Human Rights Judgment of 7 February 2012 *Axel Springer AG v. Germany* (app. no. 39954/08) § 87; European Court of Human Rights Judgment of 7 February 2012 *Von Hannover v. Germany* (app. nos. 40660/08 and 60641/08), §100; European Court of Human Rights Judgment of 16 July 2013 *Węgrzynowski and Smolczewski v. Poland* (app. no. 33846/07), § 56.

³⁰² See e.g. European Court of Human Rights Judgment of 24 March 1988 *Olsson v. Sweden (No. 1)* (appl. no. 10465/83), §87.

enforcement framework or other appropriate measures.³⁰³ Regarding positive obligations, the ECtHR has held that due to the diverse practices amongst the Contracting Parties the requirements for positive obligations will vary.³⁰⁴ Hence, to ensure compliance with the ECHR, the Contracting Parties enjoy a wide margin of appreciation.³⁰⁵

Regardless of the margin of appreciation allowed, the articles of the Convention must be interpreted as to guarantee practical and effective rights.³⁰⁶ Regarding the conflict between the right to private life and the right to freedom of expression, the ECtHR has developed principles when seeking to balance the opposing rights. Firstly, the ECtHR takes into account whether the information in question contributes to a debate of general interest³⁰⁷, how well-known the person concerned is and the subject of the report³⁰⁸, the prior conduct of the person concerned³⁰⁹, the method of obtaining the information and its veracity³¹⁰, the content, form and

³⁰³ See e.g. European Court of Human Rights Judgment of 26 March 1985 *X and Y v. the Netherlands* (appl. no. 8978/80) Series A no. 91, §23; and European Court of Human Rights Judgment of 26 May 2011 *R.R. v. Poland* (appl. no. 27617/04) ECHR 2011 (extracts), §§ 183f.

³⁰⁴ See e.g. European Court of Human Rights (GC) Judgment of 28 October 1998 *Osman v. United Kingdom* (appl. no.(87/1997/871/1083), §116.

³⁰⁵ See e.g. European Court of Human Rights (GC) Judgment of 29 April 1999 *Chassagnou and Others v. France* (appl. nos. 25088/94, 28331/95 and 28443/95) §113.

³⁰⁶ See e.g. European Court of Human Rights Judgment of 25 November 2008 *Armonienė v. Lithuania* (appl. no. 36919/02), §38; European Court of Human Rights Judgment of 25 November 2008 *Biriuk v. Lithuania* (appl. no. 23373/03), §37.

³⁰⁷ European Court of Human Rights Judgment of 24 June 2004 *Von Hannover v. Germany* (appl. no. 59320/00) ECHR 2004 - VI, §60; European Court of Human Rights Judgment of 9 November 2006 *Leempoel & S.A. ED. Ciné Revue v. Belgium*, (appl. no. 64772/01), § 68; and European Court of Human Rights Judgment of 4 June 2009 *Standard Verlags GmbH v. Austria (no. 2)*, (appl. no. 21277/05), §46.

³⁰⁸ See e.g. European Court of Human Rights Judgment of 24 June 2004 *Von Hannover v. Germany* (appl. no. 59320/00), §63, ECHR 2004 - VI; European Court of Human Rights Judgment of 30 March 2010 *Petrenco v. Moldova* (appl. no. 20928/05), §55; European Court of Human Rights Judgment of 4 June 2009 *Standard Verlags GmbH v. Austria (no. 2)*, (appl. no. 21277/05), §47;

³⁰⁹ See e.g. European Court of Human Rights Judgment of 23 July 2009 *Hachette Filipacchi Associés (ICI PARIS) v. France* (appl. no. 12268/03) §§52-53.

³¹⁰ See e.g. European Court of Human Rights (GC) Judgment of 21 January 1999 *Fressoz and Roire v. France* (appl. no. 29183/95), §54, ECHR 1999-I; European Court of Human Rights Judgment of 17 December 2004 *Pedersen and Baadsgaard* (appl. no. 49017/99), §78; and European Court of Human Rights (GC) Judgment of 10 December 2007 *Stoll v. Switzerland* (appl.no. 69698/01) ECHR 2007-V, §103.

consequences of the publication³¹¹ and the severity of the sanction imposed.³¹²

Under the circumstances at hand in *Google Spain*, the claimant is not a person of public interest. The principle of content, form and consequences of the publication could however be applicable in this case as the publication of the article on the Spanish newspaper's webpage is lawful, its content true and not slander or defamation. The severity of the sanction imposed would in this case be the obligation of Google to remove the search results, and although the principles are to be applied on a case-by-case basis, one could argue that the sanctions imposed in *Google Spain* in the future may have a severe effect on the freedom of expression as well as imposing on the search engines the onerous obligation to assess the enormous amount of applications to de-list search results. In sum, the approach of the ECtHR is a perhaps more nuanced one than the CJEU approach. It is not very likely that the ECtHR would have come to the same conclusion if it had to judge on similar circumstances as in *Google Spain*. This based on the approach of the ECtHR with regards to assigning the right to private life and the freedom of expression and information equal legal value. The interest of 'the debate of a general public' is moreover traditionally a principle used by the ECtHR in conflicts between the right to privacy and the freedom of expression. In this case, the implications of *Google Spain* and the removal of search results may have a chilling effect on the accessibility of information found through Google searches. Moreover, seen from the recent case-law of the ECtHR, there is a proportionality aspect allowing even

³¹¹ See e.g. European Court of Human Rights Judgment of 13 December 2005 *Wirtschafts-Trend Zeitschriften-Verlagsgesellschaft m.b.H. v. Austria* (no. 3) (appl. nos. 66298/01 and 15653/02), §47; European Court of Human Rights Judgment of 15 January 2009 *Reklos and Davourlis v. Greece* (appl. no. 1234/05), §42; and European Court of Human Rights Judgment of 6 April 2010 *Jokitaipale and Others v. Finland*, (appl. no. 43349/05), §68.

³¹² See e.g. European Court of Human Rights Judgment of 6 April 2010 *Jokitaipale and Others v. Finland*, (appl. no. 43349/05), §77; and European Court of Human Rights Judgment of 17 December 2004 *Pedersen and Baadsgaard* (appl. no. 49017/99), §93.

unlawful information to be published on the internet, in the interest of avoiding a limitation of the freedom of expression.

6.2.2. Has Google Spain struck a fair balance between the right to privacy and the freedom of expression?

By nature, there is a tension between the right to private life and the right to freedom of expression. As none of them are absolute, they may be subjected to restrictions. In *Google Spain*, the freedom of expression seem to have been regarded secondary to the right to data protection, as the CJEU on several occasions held that data protection override, as a rule, the interest of the general public of receiving information.³¹³ Firstly, the interest of the general public to receive information is included in the right to freedom of expression which is protected under the Charter as well as under the ECHR. Secondly, the CJEU seem to delimit the interests in tension with data protection to the economic interest of the search engine operator and the interest of the internet users.³¹⁴ This approach may be subjected to challenge as it omits to mention the right to freedom of expression of the publisher of a webpage. As seen in *Satamedia*, the notion of ‘journalistic purposes’ in Article 9 of Directive 95/46, enabling for an exemption from e.g. Article 12 and 14 of the directive, is to be interpreted broadly.³¹⁵ The publisher of information concerning personal data to a webpage may be included in the notion of ‘journalistic purposes’ and thus exempted from some of the provisions on data protection, held the CJEU in *Google Spain*. The CJEU however did not find the operator of a search engine able to rely on the media exemption.³¹⁶ The CJEU examines the publisher in relation to the media exemption but not in relation to the right of freedom of expression. A publisher of information on the internet has a freedom of expression under the ECHR, as have been acknowledged by the ECtHR.³¹⁷

³¹³ *ibid*, paras 81, 97 and 99.

³¹⁴ *ibid*.

³¹⁵ C-73/07 *Satamedia*, para 62.

³¹⁶ C-131/12, *Google Spain*, para 85.

³¹⁷ See European Court of Human Rights Judgment of 22 May 1990 *Autronic AG v. Switzerland* (appl. no. 12726/87), § 47.

In *Google Spain*, the CJEU strongly safeguards the right to data protection. However, it does so by restricting the freedom of expression. The balancing of rights may be held insufficient as it does not properly acknowledge all rights-holders of the right to freedom of expression, leaving out the publisher of the information. Moreover, the Court states in principle that the right to private life trumps the right to freedom of expression by firstly stating that the right to data protection ‘override, as a rule, not only the economic interest of the operator of a search engine but also the interest of the general public of having access to that information upon a search based on the data subject’s name’.³¹⁸ This statement is bewildering, as it openly contradicts the case-law of the ECtHR, stating that the rights as a matter of principle deserve equal respect. This raises the question of the horizontal clauses of the Charter and the interpretation of the Charter rights in conformity with the ECHR.

6.4. Concluding remarks

Conflicts between fundamental rights are an area of law that allows for case-by-case reasoning as the whole concept is based on the notion of ‘balancing’. However, balancing raises questions as to the relationship between the Charter and the ECHR if the interpretations of the two courts result in non-conformity between the rights in the Charter corresponding to those in the ECHR. An inconsistency between the European fundamental rights courts would affect the European States as well as individual claimants. Allowing for a more extensive protection within the EU fundamental rights system is a welcome EU law development. However, with regards to conflicts between *a priori* equal fundamental rights this makes little sense. A more extensive interpretation of one right will inevitably lead to a restriction of the other, resulting in a hierarchy of rights. Restricting the freedom of expression in favor of the right to private life under the circumstances at hand in *Google Spain* must be considered far-reaching. As just as it may seem to prioritize data protection in this day and

³¹⁸ C-131/12, *Google Spain*, para 81.

age, the judgment, as argued above, is not in line with the freedom of expression as provided for in the ECHR. Article 52(3) of the Charter entails a 'minimum-standard' held by the ECHR, and the possibility for the EU Charter provisions to be interpreted as providing more extensive rights cannot be regarded as allowing more restrictive rights than the ECHR.

Although one should reiterate that the right to be forgotten only applies to a name search, it is still a far-reaching development of the area of law that is EU data protection. The right to freedom of information has been completely neglected in Google Spain, referred to as an 'interest' rather than a right, and held to be inferior with regards to the right to private life. This leaves the question of whether or not we should accept the hierarchy of rights constructed by the CJEU in Google Spain, or if the rights should be considered as equal as they are both non-absolute and acknowledged as equal under the ECHR. At the very least, one could argue that when faced with conflicts between fundamental rights, the judiciary should include substantial legal reasoning in the judgment in order to allow the reader to understand the weighing that has been made. Omitting to mention the right at hand must be considered as an insufficient act of balancing. There is furthermore the question of different approaches by the two courts creating a larger problem. Two sets of fundamental rights systems in Europe entails for decreased legal certainty for the European States as Members of the EU and Contracting Parties to the ECHR, as well as for individuals. The Courts have a history of mutual courtesy that may change if the two sets of fundamental rights in Europe, upheld by the two courts diverge rather than converge, especially in the light of the delayed accession by the EU to the ECHR. The overlapping systems protect fundamental rights best by evading a development of diverging sets of rights that could potentially entail clashes between the two courts.

The long-term implications of Google Spain are yet to be discovered, whether with regards to the relationship between the ECHR and the Charter or with regards to Google and other search engines being responsible for, to some extent, balancing two of Europe's most essential fundamental rights. Moreover, there are still questions to be answered as to the application of the global territorial reach of the judgment and the relationship with the U.S.

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