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The 'media privilege' in data protection law: insights from the case law of the European Court of Human Rights and the European Court of Justice

O "privilégio de mídia" no direito da proteção de dados: reflexões a partir da jurisprudência do Tribunal Europeu de Direitos Humanos e do Tribunal de Justiça da União Europeia

Caroline Janssen[1]

[1] Doctoral Candidate at the Faculty of Law, Albert-Ludwigs-Universität Freiburg, and Attorney-at-Law at Scheja & Partner Rechtsanwälte GmbH & Co. KG, based in Bonn, Germany. E-mail: <caroline-janssen@posteo.de>.

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Abstract

This Art. examines the complex legal conflict between freedom of the press and the right to data protection, focusing on the European legal framework. The analysis explores the tension between these two fundamental rights within the context of the European Court of Human Rights (ECtHR) and the Court of Justice of the European Union (ECJ). A key element in this debate is the 'media privilege' under Article 85 of the General Data Protection Regulation (GDPR), which attempts to balance press freedom and data protection while leaving significant room for national legislations to interpret and implement this balance. Through a detailed examination of landmark cases such as Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland and Buivids, the article sheds light on the criteria courts use to weigh these competing rights. The study highlights how both courts navigate issues of journalistic activity in the digital age, emphasizing the potential challenges brought by new media formats. The conclusion reflects on the evolving nature of these rights within Europe's multi-level system, suggesting that a cohesive approach remains a work in progress.

Keywords: Data protection. European Court of Human Rights. European Court of Justice. Freedom of press. Media privilege.

Resumo

Este artigo examina o complexo conflito jurídico entre a liberdade de imprensa e o direito à proteção de dados, com foco no marco legal europeu. A análise explora a tensão entre esses dois direitos fundamentais no contexto do Tribunal Europeu de Direitos Humanos (TEDH) e do Tribunal de Justiça da União Europeia (TJUE). Um elemento-chave neste debate é o "privilégio da mídia" previsto no Artigo 85 do Regulamento Geral sobre a Proteção de Dados (RGPD), que tenta

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equilibrar a liberdade de imprensa e a proteção de dados, ao mesmo tempo que deixa margem significativa para que as legislações nacionais interpretem esse equilíbrio. Por meio de um exame detalhado de casos importantes, como Satakunnan Markkinapörssi Oy e Satamedia Oy v. Finlândia e Buivids, o artigo esclarece os critérios que os tribunais têm utilizado para ponderar esses direitos concorrentes. O estudo destaca como ambos os tribunais navegam por questões relacionadas à atividade jornalística na era digital, enfatizando os potenciais desafios trazidos por novos formatos de mídia. A conclusão reflete sobre a natureza evolutiva desses direitos dentro do sistema multinível europeu, sugerindo que uma abordagem jurisprudencial coesa ainda está em desenvolvimento.

Palavras-chave: *Proteção de dados. Corte Europeia de Direitos Humanos. Corte Europeia de Justiça. Liberdade de imprensa. Privilégio da mídia.*

Introduction

The conflict between press freedom and data protection

The question of balancing press freedom and the public's legitimate interest in information, on one hand, with the protection of personal data and privacy, on the other, has been central to data protection law since its inception. However, this inherent conflict has gained significant legal and social momentum in recent years. In the past, the saying "nothing is as old as yesterday's newspaper" offered reassurance, but with the rise of the internet, journalistic content now reaches a much broader audience, both in scale and duration. "Yesterday's newspaper" may well come back to haunt us and become news again. The potential timelessness of access to journalistic content, now available in Internet archives, re-signifies freedom of the press itself. At the same time, individual self-determination in data protection has been strengthened by extensive legislation, particularly within the European Union (EU). The so-called "media privilege", most recently formalized in Art. 85 of the General Data Protection Regulation (GDPR)[2], seeks to mediate between freedom of press and data protection. It reflects the longstanding constitutional tension between them and has become the legal basis for several landmark decisions by European fundamental rights courts.

This article begins (2.) by examining the conflict between data protection and press freedom within the European multi-level legal system[3], specifically focusing on the European Convention on Human Rights (ECHR) and the Charter of Fundamental Rights of the European Union (CFR), as well as on the roles of the European Court of Human Rights (ECtHR) and the European Court of Justice (ECJ). The analysis first explores the foundational principles of both rights, detailing the protections and limitations provided under international and EU law. Next (3.), it engages in a doctrinal review of key case law from the ECtHR and ECJ, with a particular emphasis on cases that illustrate the application of the "media privilege" in balancing these competing rights. In this context, landmark cases such as *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland and Buivids* are analysed to distil constitutional guidelines that courts have used to mediate the tension between press freedom and data protection. The article then broadens its analysis by evaluating how these legal doctrines adapt to new challenges posed by digital journalism and evolving media formats. By the end (4.), the discussion provides insights into how these rights continue to develop in Europe's complex multi-level legal system, offering reflections on future directions for achieving a coherent balance between them.

[2] Art. 85 (1) GDPR: "Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression".

[3] See: Voßkuhle European Constitutional Law Review 6 (2010) pp. 175-198.

Foundations in international and EU law

This section aims to identify the conflicting fundamental rights positions at the core of the "media privilege" within the framework of international and EU law. It offers an overview of the guarantees concerning data protection and press freedom, along with the justification requirements for the limitation of them in both the European Convention of Human Rights and the Charter of Fundamental Rights of the European Union. In addition to exploring parallel developments and substantive interconnections between these rights, particular attention is given to potential divergences and conflicting trends within the European multi-level system of fundamental rights.

I. The fundamental right to data protection

A. The right to protection of private life under Art. 8 ECHR

The Art. 8 of the ECHR, with its four guarantees – private life, family life, home, and correspondence – constitutes a comprehensive fundamental right safeguarding individual freedoms essential for the free development of personality[4]. While there are numerous overlaps, interdependencies, and connections among these guarantees, the distinct characteristics of each have been clarified, particularly due to the ECtHR's nuanced case law, some of which carry significant material implications. The protection of private life under Art. 8(1) is not merely a residual category for the other three guarantees, although the Court often opts for a combined analysis of the scope of protection, particularly in cases where private and family life intersect, in order to avoid questions of demarcation or conflict[5]. Despite this, the importance of private life protection is undisputed, especially in the context of the digital age, serving as a cornerstone for the emergence of a fundamental right to data protection in international law.

The scope of protection of Art. 8 ECHR

Despite the somewhat "cumbersome" phrasing of a "right to respect"[6] for private life, Article 8(1) of the ECHR is understood as a classic "right of defence" protecting individuals from unjustified state intrusions into their privacy through surveillance, observation, or investigation[7]. In addition to this defensive role, the provision imposes positive obligations on the state, as reflected in its wording, which requires the state to establish effective legal protections and implement measures to safeguard individuals' privacy[8].

The absence of a legal definition for "private life" has always complicated the determination of its material scope. Given the wide range of relevant circumstances and the unpredictability of emerging threats, a positive definition of the term is often regarded as impractical, if not outright impossible or unnecessary[9]. In line with this, the ECtHR abandoned early efforts to define privacy, opting instead to expand its scope incrementally through extensive case law[10]. Over time,

[4] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012, p. 226.
[5] *Wildhaber/Breitenmoser* in: Pabel/Schmahl (eds.), IntKommEMRK, EL 2 (April 1992), Art. 8 § 1; *Breitenmoser*, Der Schutz der Privatsphäre, 1986 pp. 102–106.
[6] *Wildhaber/Breitenmoser* in: Pabel/Schmahl (eds.), IntKommEMRK, EL 2 (April 1992) Art. 8 § 1; *Frowein/Peukert*, EMRK, 3rd ed. 2009, Art. 8 § 1; *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 226.
[7] *Marauhm/Thorn* in: Dörr/Grote/Marauhn (eds.), EMRK/GG, 2nd ed. 2013, ch. 16 § 27; *Pätzold* in: Karpenstein/Mayer (eds.), ECHR, 2012, Art. 8 § 4.
[8] *Meyer-Ladewig*, EMRK, 3rd ed. 2011, Art. 8 § 2.
[9] With further reference to *Märten*, Die Vielfalt des Persönlichkeitsschutzes, 2015 p. 252. For an overview of the conceptual approximations and definitions that have nevertheless been developed, see *Siemen*, Datenschutz als europäisches Grundrecht, 2006 pp. 58 et seq.
[10] *Breitenmoser*, Der Schutz der Privatsphäre, 1986 pp. 37 et seq. and later explicitly ECtHR, judgement of 16 Dec. 16.12.1992 – 13710/88 (*Niemietz/Germany*) § 29.

established categories of privacy protection under Art. 8(1) have come to include rights such as bodily autonomy, the right to a self-determined lifestyle, and more specialized areas, such as privacy in police, judicial, or criminal contexts. Of particular relevance to the media context is the right to informational self-determination, which ensures individuals can control how they are portrayed publicly[11]. Other manifestations of privacy protection include safeguarding reputation and honour, which relate to personal identity and intellectual integrity, as well as the right to one's image[12].

One key issue for the present study is whether and to what extent Art. 8 ECHR guarantees the protection of personal data, potentially establishing a fundamental right to data protection. The ECtHR's early approach to data protection was cautious, showing little engagement with the issue until the mid-1980s, even after the Council of Europe's 1981 Data Protection Convention. The Court's first major ruling on data protection came in Leander v. Sweden (1987)[13], where it held that the storage of information in a secret police file violated the applicant's right to privacy, particularly because the withheld data allowed inferences about his political opinions, impacting his personal identity[14].

Over the years, the ECtHR has expanded the scope of privacy protection in the area of personal data. This shift from a more rigid, "sphere-alike" view of privacy to a broader understanding – aligned with the general evolution of Art. 8[15] – was especially evident in *Niemietz v. Germany* (1992), where the Court extended privacy protection to professional activities previously considered part of the public sphere[16]. In *Amann v. Switzerland* (2000), the ECtHR confirmed this broader interpretation, applying it directly to the processing of personal data and finding support in the Council of Europe's Data Protection Convention[17].

Three months later, *Rotaru v. Romania* (2000)[18] marked another landmark judgment in the development of data protection. The case questioned whether information gathered by the Romanian secret service, concerning the complainant's public political activities, fell within the protection of Art. 8, despite being previously accessible to the public[19]. The Court held that even publicly available information could be protected under Article 8 if systematically collected and stored by the state[20]. However, it did not clarify whether the data at issue related to the applicant's private life. This ruling suggests that Article 8's protection may extend not only to cases where private life is directly impacted, but also to situations where the mere systematic collection and processing of data by public authorities is involved[21].

Yet, it remains debatable whether the ECtHR intended such a broad extension. *Marsch* observes that subsequent decisions following *Rotaru* have not abandoned the requirement of a connection to private life, even when systematic state collection and processing are involved[22].

[11] *Märten*, Die Vielfalt des Persönlichkeitsschutzes, 2015, p. 256.

[12] For an overview, see *Meyer-Ladewig*, EMRK, 3rd ed. 2011, Art. 8 §§ 27, 29. On the groundbreaking Caroline of Monaco case law with regard to the balancing of Art. 8 and Art. 10 ECHR.

[13] ECtHR, judgement of. 26 March 1987 – 9248/81 (*Leander v. Sweden*).

[14] ECtHR, judgement of. 26 March 1987 – 9248/81 (*Leander v. Sweden*), §§ 48, 56.

[15] *Marsch*, Das europäische Datenschutzgrundrecht, 2018 p. 10.

[16] ECtHR, judgement of. 16.12.1992 – 13710/88 (*Niemietz/Germany*).

[17] ECtHR, judgement of 16 Feb. 16.2.2000 – 27798/95 (*Amann v. Switzerland*), § 65, recently confirmed by ECtHR, Judg. v. 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v Finland*) § 133.

[18] ECtHR, judgement of 4 May 2000 – 28341/95 (*Rotaru v Romania*).

[19] ECtHR, judgement of 4 May 2000 – 28341/95 (*Rotaru v Romania*).

[20] ECtHR, judgement of 4 May 2000 – 28341/95 (*Rotaru v Romania*) § 43.

[21] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 231 f. and probably also *Pätzold* in: Karpenstein/Mayer (eds.), ECHR, 2012, Art. 8 § 28; *Burgkardt*, Grundrechtlicher Datenschutz, 2013 p. 257; Siemen, Datenschutz als europäisches Grundrecht, 2006 p. 113.

[22] *Marsch*, Das europäische Datenschutzgrundrecht, 2018 p. 12 ff.

In summary, the ECtHR's established case law holds that personal data fall within the protection of Art. 8(1) ECHR insofar as they affect the *private life* of the individual, *either* due to their content *or* the way they are collected and processed – particularly through systematic collection and storage by state authorities. As a result, Art. 8 ECHR affords broad protection for data privacy as a fundamental right.

Justifying Interference with Privacy under Art. 8 ECHR

According to the system of restrictions developed by the European Court of Justice and the European Commission, an interference with the protection afforded by Art. 8 ECHR is justified if it meets three conditions: (1) it is prescribed by law, (2) it pursues one of the legitimate aims listed in Art. 8(2) ECHR, and (3) it is necessary and proportionate in a democratic society[23].

In relation to personal data protection, several key principles for justifying such interferences can be derived from the ECtHR's case law. The legislator is granted broad discretion in selecting a legitimate aim; however, the Court imposes stricter requirements on the clarity and precision of the legal basis[24], particularly because state data processing often occurs without the data subject's knowledge[25]. Furthermore, when assessing necessity and proportionality, the Court emphasizes the "*margin of appreciation*", a form of *judicial self-restraint*. The balance between protecting personal data and competing public interests, such as criminal prosecution or freedom of the press, is crucial.

This balancing exercise also considers the type and category of data involved, as well as the methods of collection and processing. This ensures that the resolution of competing interests is tailored to the specifics of each case. For example, particularly sensitive data – such as medical records or information about an individual's sexuality – carries greater weight in the balance due to its proximity to the core of private life, compared to more innocuous or publicly accessible information[26].

B. Privacy Protections under Art. 7 and Art. 8 of the Charter of Fundamental Rights

In Europe, the protection of data under fundamental rights extends far beyond the traditional realm of international law. In particular, for the European Union and its member states, the guarantees provided by the CFR complement the existing protections of personal data within Europe's multi-level system. These safeguards operate alongside the fundamental rights protections enshrined in the ECHR.

Guarantees of the Charter of Fundamental Rights

Unlike the ECHR, the CFR provides two distinct normative foundations for data protection under fundamental rights: Art. 7 and Art. 8. While Art. 7 CFR establishes a right to the protection of private life, closely mirroring its counterpart in the ECHR (see above under 1), Art. 8 CFR introduces a separate, specific right to data protection (see below under 2), which has no equivalent in the ECHR. This raises not only the question of whether this distinction leads to a higher level of personal data protection compared to the ECHR, but also how the two potentially competing standards within the CFR relate to one another.

[23] *Wildhaber/Breitenmoser* in: Pabel/Schmahl (eds.), IntKommEMRK, EL 2 (April 1992) Art. 8 § 525.
[24] *Kühling/Klar/Sackmann*, Datenschutzrecht, 4th ed. 2018 p. 12; Meyer-Ladewig, EMRK, 3rd ed. 2011, Art. 8 § 104.
[25] ECtHR, judgement v. 25 March 1998 – 23224/94 (*Kopp v. Switzerland*) § 72; ECtHR, judgement of 4 May 2000 – 28341/95 (*Rotaru v. Romania*) §§ 50 et seq.
[26] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 251.

The scope of protection of Art. 7 CFR

According to its wording, Article 7 of the CFR protects the right to respect for private and family life, the home, and communications. This provision closely mirrors the language of Art. 8 of the ECHR, with its four sub-clauses. This alignment is not coincidental, as Art. 7 CFR was deliberately modelled on Art. 8 ECHR[27]. The only difference lies in the replacement of the term "correspondence" with "communication", which was seen as a more contemporary expression, without altering the substantive scope of protection[28].

The material similarity between Art. 7 CFR and Art. 8 ECHR effectively synchronizes the meaning, scope, and judicial interpretation of the rights protected under both provisions[29]. Notably, significant elements of the scope of protection were already recognized as part of EU law, even before the CFR's adoption, through the ECJ jurisprudence based on the ECHR. However, Art. 7 CFR notably enhanced the protection of the right to family life within the EU legal framework[30]. As for the protection of personal data under Article 7 CFR, there is no substantive difference in the understanding of this guarantee compared to Art. 8 ECHR[31]. The ECJ also confirmed this substantive equivalence in its *Schecke and Eifert* decision in the Grand Chamber regarding data protection[32].

The scope of protection of Art. 8 CFR

With Art. 8 CFR, the European Union has already made a terminological shift from the analogue to the digital age. The fundamental right to data protection is rightly considered innovative[33]. However, the protection of personal data remains rooted in the traditional sphere of personality rights, making Art. 8 CFR comprehensible only in the context of Art. 7 CFR and Article 8 ECHR. The aim is not to protect data for its own sake but to safeguard the individual persons behind the data and their personal development[34].

The Art. 8(1) CFR, in its wording, encompasses the right to the protection of personal data concerning the individual holding the fundamental right. The terms used are drawn from the language of Directive 95/46/EC and the GDPR, reflecting the secondary legal framework for data protection. Under the GDPR, personal data includes all information relating to an identified or identifiable natural person, without requiring the data to be particularly sensitive or intimate[35]. It is irrelevant whether the data was or is publicly accessible or how it is stored[36]. As a result, Art. 8 CFR provides a broad scope of protection that is independent of the specific content of the data. This includes everything from health data, tax records, and IP addresses to biometric information, professional data, and even seemingly trivial information, such as public behaviour[37]. An individual is considered identified when they have been recognized by the data processor, while an identifiable

[27] *Knecht* in: Schwarze/Becker/Hatje *et al.* (eds.), EU-Kommentar, 4th ed. 2019, CFR Art. 7 § 1.

[28] This was primarily intended to take account of "technical developments", cf. explanations on the Charter of Fundamental Rights of 14 December 2007 – (2007/C303/02) on Art. 7 CFR.

[29] *Enders*, in: Handbuch der Grundrechte, § 89 § 86; *Folz* in: Vedder/Heintschel von Heinegg (eds.), Europäisches Unionsrecht, 2nd ed. 2018, GRC Art. 7 § 1; *Bernsdorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 7 § 14.

[30] *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, GRC Art. 7 § 6.

[31] Interestingly, data protection also played a completely subordinate role in the discussions in the Fundamental Rights Convention on Art. 7 CFR, see instructive *Berndorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 7 §§ 6 et seq.

[32] ECJ, judgement of 09.12.2010 – C92/09 and C93/09 (*Schecke and Eifert*) § 51 f.

[33] *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, GRC Art. 8 § 1.

[34] *See Grimm* JZ 2013, 585 (585).

[35] *Knecht* in: Schwarze/Becker/Hatje et al. (eds.), EU-Kommentar, 4th ed. 2019, Art. 8 § 5.

[36] *Jarass*, GRC, 3rd ed. 2016, Art. 8 § 5.

[37] For further details and case studies see *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, GRC Art. 8 § 12 and *Jarass*, GRC, 3rd ed. 2016, Art. 8 § 5 f.

individual is one who, though not yet identified, can be identified with reasonable effort or can reasonably be expected to be identified[38].

According to the prevailing interpretation, the protective scope of Art. 8 CFR initially establishes a classic defensive right against unjustified interference, along with a protective duty dimension[39], which particularly impacts data processing by private actors[40].

However, it remains unclear whether Art. 8 CFR modifies the scope of the European fundamental right to data protection, especially in comparison to Art. 8 ECHR and the parallel provisions of Art. 7 CFR[41]. Some German-language scholars appear to suggest a conceptual alignment with the nearly absolute "right to informational self-determination" in the Karlsruhe tradition[42], although this view is difficult to sustain upon closer analysis of the CFR's development[43]. Similarly, interpreting Art. 8 CFR as a norm-based fundamental right, enriched with substantive secondary law provisions, which would lead to an expansion of the guarantee's content relative to Art. 8 ECHR, is not convincing from a doctrinal perspective, given the hierarchy of norms[44].

Ultimately, this issue can only be definitively resolved by the evolving case law of the EU's highest courts in the area of data protection, which, despite growing boldness in recent years, has yet to clarify this specific point[45].

The relationship between Arts. 7 and 8 CFR: Distinct separation or a unified European fundamental right to data protection?

Closely tied to the question of the scope of protection is the issue of distinguishing between Art. 7 and Art. 8 CFR, which remains unresolved in both legal scholarship and the case law of the highest courts, largely due to the considerable overlap in their scope and purpose. A wide range of proposals from fundamental rights theory have emerged in the literature, which can be broadly categorized into three core positions, considering the stance of the European Court of Justice.

The prevailing view in German-language literature sees Art. 8 CFR as a more specific provision compared to Art. 7 CFR. Accordingly, the fundamental right to data protection under Art. 8 CFR takes precedence over the general right to respect for private life under Art. 7 CFR in the area of data protection, superseding it where their scopes overlap (lex specialis derogat legi generali)[46]. Proponents of this position argue primarily from the wording of the provisions and a legitimate desire for clear legal delineation between the two rights. However, at closer inspection, achieving this clarity remains doubtful given the persistent issues of boundary-setting. While this view holds that all data, regardless of its content, fall within the protection of Art. 8 CFR, it suggests that data protection questions touching on other fundamental rights, such as Art. 7 CFR in the realm of home life or Art. 16 CFR concerning the freedom to conduct a business, should be resolved exclusively

[38] *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, GRC Art. 8 § 13.

[39] *Knecht* in: Schwarze/Becker/Hatje et al. (eds.), EU-Kommentar, 4th ed. 2019, Art. 8 § 4.

[40] *Riesz* in: Holoubeck/Lienbacher (ed.), GRC, 2nd ed. 2019, Art. 8 § 34.

[41] *J.-P. Schneider* in: Brink/Wolff (eds.), BeckOK DatenschutzR, EL 32 (May 2020) Syst. B § 20.

[42] *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, GRC Art. 8 § 3 f.; critically, with further references, *J.-P. Schneider* in: Brink/Wolff (eds.), BeckOK DatenschutzR, EL 32 (May 2020) Syst. B § 20.

[43] *Marsch*, Das europäische Datenschutzgrundrecht, 2018 p. 130, who recalls that the concept of a right to informational self-determination based on German case law was discussed in the Fundamental Rights Convention and then deliberately rejected.

[44] *Bernsdorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 8 § 17 and Marsch, Das europäische Datenschutzgrundrecht, 2018 p. 130.

[45] See *Bernsdorff* in this regard in Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 8 § 18.

[46] *Kingreen* in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, Art. 8 § 1a; *Kühling/Raab* in: Kühling/Buchner (eds.), DS-GVO/BDSG, 2nd ed. 2018, Introductory § 26; *Bernsdorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 8 § 13; *Tettinger* in: Tettinger/Stern (eds.), Kölner GK – GRC, 2006, Art. 7 § 15; *Knecht* in: Schwarze/Becker/Hatje *et al.* (eds.), EU-Kommentar, 4th ed. 2019, Art. 8 § 5.

under those more specialized rights[47]. The risk here is that the demarcation problem would merely shift to another level, leading to a fragmented system of data protection under fundamental rights.

Alternatively, there is the exclusive interpretation of Art. 7 and Art. 8 CFR, according to which all automatic data processing operations would be exclusively protected by Article 8 CFR, while Art. 7 CFR would cover all remaining areas of private life[48]. Although this view offers a clear and practical legal doctrine, it is contradicted by the normative structure of the CFR itself. According to Article 52(3) CFR, Art. 7 CFR shares the "same meaning and scope" as its model, Art. 8 ECHR, which, as discussed, undoubtedly protects personal data linked to private life.

The ECJ, in its data protection case law, appears to operate under a combined understanding of Arts. 7 and 8 CFR, although it has not explicitly addressed the relationship between the two provisions. Instead, the Court consistently cites the two articles together in its established jurisprudence[49]. This approach could be classified as "ideal competition" in fundamental rights theory, where both provisions coexist on equal footing. By following this method, the ECJ sidesteps the unresolved competition issue and maximizes coherence with both its pre-CFR case law and the jurisprudence of the European Court of Human Rights[50]. From a legal systems perspective, this allows the ECJ to apply Art. 7 CFR as the equivalent of Art. 8 ECHR, bringing Art. 52(3) CFR into play and maintaining continuity with its earlier data protection rulings. This approach also fosters a richer dialogue between the ECJ and the ECtHR within Europe's multi-level legal system.

The wording of Arts. 7 and 8 CFR does not preclude such an interpretation. Moreover, this position is convincing from a teleological perspective: even a formal separation of Arts. 7 and 8 CFR cannot sever the substantive connection between data protection and the safeguarding of personality rights and individual privacy, which are essential for personal fulfilment. Ultimately, the purpose of protection remains focused on the individual's privacy, not the data itself.

Justifying interference with Arts. 7 and 8 CFR

The requirements for justifying interferences with the guarantees under Arts. 7 and 8 CFR depend on the broader understanding of the relationship between these norms, as previously discussed. If the provisions are considered separately, the following framework emerges:

For Art. 7 CFR, the explanations of the Charter of Fundamental Rights indicate that the limitation rule of Art. 8(2) ECHR applies[51]. This regulatory intent is codified in Art. 52(3) CFR. Therefore, any interference with Art. 7 CFR must have a legal basis, pursue one of the public interests listed in Art. 8(2) ECHR, and meet the necessity requirement. It remains debated whether the general limitation rules under Art. 52(1) CFR also apply, or if Art. 8(2) ECHR is simply a specific manifestation of the general principle of proportionality[52]. However, the practical difference is negligible due to the similarity of the requirements in both provisions.

The Art. 8 CFR, on the other hand, is one of the few Charter provisions with its own specific limitation framework in paragraph 2. In addition to the general requirement for a legal basis, it

[47] *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, Art. 8 § 14 and *Knecht* in: Schwarze/Becker/Hatje *et al.* (eds.), EU-Kommentar, 4th ed. 2019, Art. 8 § 5.

[48] *Eichenhofer Der Staat (55) 2016* pp. 41 (61).

[49] ECJ, judgement of 09.12.2010 – C92/09 and C93/09 (*Schecke and Eifert*) § 51; exemplary for the joint "examination" of both interference and justification as well as the reference to the case law of the ECtHR: ECJ, judgement of 08.04.2014 – C293/12 and C594/12 (*Digital Rights Ireland*) §§ 32 et seq., 38 et seq. as well as ECJ, judgement of 13.05.2014 – C131/12 (*Google Spain*) § 69, 80. 13 May 2014.

[50] *Marsch*, Das europäische Datenschutzgrundrecht, 2018 p. 45.

[51] *Berndorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 7 § 18, 57 et seq.

[52] *Wolff* in: Pechstein/Nowak/Häde (eds.), Frankfurter Kommentar EUV/GRC/AEUV, 2017, Art. 7 § 38; *Weber* in: Stern/Sachs (eds.), GRC, 2016, Art. 7 § 22.

includes conditions derived from secondary data protection law, such as compliance with the purpose limitation principle, good faith in data processing, and the need for effective consent. Moreover, the necessity of data processing must also be evaluated in light of proportionality. Nevertheless, the interplay between these regulations raises several complex legal questions regarding restrictions, largely due to the ECJ's case law and the (inadvertent) dual codification of data protection in EU primary law[53].

According to the prevailing view in the literature[54], the limitation rules for Art. 8 CFR are derived from its paragraph 2 in conjunction with the general limitation clause in Art. 52(1) CFR. Direct recourse to Art. 8(2) ECHR via Art. 52(3) CFR is excluded, as there is no correspondence between the provisions. However, concerns arise due to the additional codification of data protection in Art. 16 TFEU, which guarantees the right to data protection using the same wording as Art. 8(1) CFR, but without recognizing any limitation clause. This opens up the application of Art. 52(2) CFR, creating uncertainty about whether this might block the reservations in Arts. 8(2) CFR and 51(1) CFR.

Given this confusing legal framework, the ECJ long remained conspicuously reticent. It was only recently that the ECJ rejected the application of Art. 16 TFEU in conjunction with Art. 52(2) CFR in its opinion on the EU Passenger Name Record Agreement[55] concerning infringements of fundamental rights related to data protection. Instead, the ECJ regularly refers to Arts. 8(2) CFR, 51(1) CFR, and 52(3) CFR in conjunction with Art. 8(2) ECHR as the standard for justifying interferences, although without offering further explanation[56]. This approach has been criticized as dogmatically unsatisfying and seen as a subtle negation of the CFR's regulatory system[57].

However, the substantive requirements for justification themselves are not contested. This is likely because the core requirements of Art. 8(2) ECHR are virtually identical to those of Art. 8(2) CFR[58]. Thus, whether justification is assessed simultaneously, separately, or exclusively under either Art. 8(2) CFR or Art. 8(2) ECHR would make little practical difference. To summarize, under the concept of a combined fundamental right to data protection, the requirements for justification arise equally from Art. 8(2) CFR, Art. 51(1) CFR, and Art. 52(3) CFR in conjunction with Art. 8(2) ECHR.

C. Summary of Findings: Consolidating data protection in Europe's multilevel legal system

Data protection as a fundamental right is deeply rooted in both international and European Union law. Historically, the European Court of Human Rights has played a leading role in shaping European data protection, serving as the first source of inspiration, and its influence remains unmistakable today. The right to privacy, enshrined in Art. 8 of the ECHR and consolidated through case law, has been extended to encompass the protection of personal data, particularly where such data has the potential to impact an individual's private life. The level of protection established by the ECHR is not only reflected in Art. 7 CFR, which is modelled on Art. 8 ECHR, but is also strengthened by the explicit recognition of the right to data protection in Art. 8 CFR.

Furthermore, due to the ECJ's combined interpretation of Arts. 7 and 8 CFR, along with recourse to Art. 52(3) CFR, the protection of data under EU fundamental rights law remains

[53] *J.-P. Schneider* in: Brink/Wolff (eds.), BeckOK DatenschutzR, EL 33 (August 2020), Syst. B § 24.
[54] *Kingreen* in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, CFR Art. 8 §14.
[55] Opinion 1/15 of the Court of Justice (Grand Chamber) of 16 July 2017, § 120; J.-P. *Schneider* in: Brink/Wolff (eds.), BeckOK DatenschutzR, EL 33 (August 2020) Syst. B. § 24.
[56] ECJ, judgement of 09.12.2010 – C92/09 and C93/09 (*Schecke and Eifert*) §§ 48–52.
[57] J.-P. *Schneider* in: Brink/Wolff (eds.), BeckOK DatenschutzR, EL 33 (August 2020) Syst. B. § 25.
[58] This refers to the sufficient legal basis and proportionality.

closely aligned with the principles developed by the ECtHR. As of now, no significant divergence or contradiction in the level of protection between the two courts is apparent. However, whether this alignment will continue remains uncertain, given the increasingly bold and innovative rulings of the ECJ in the area of data protection.

II. The fundamental right to freedom of the press

A. The protection of freedom of expression under Art. 10 ECHR

The protection of freedom of expression has a long-standing tradition in the history of human rights and is part of the Enlightenment's triad of freedoms – thought, conscience, and belief. In a modern democracy governed by the rule of law, freedom of expression takes on a constitutive role in the political process, and this essential function must be adequately reflected within the framework of fundamental rights guarantees.

Guarantee of Freedom of Expression, with Focus on Press Freedom under Art. 10 ECHR

Art. 10 ECHR protects the so-called communicative freedoms in all their diverse forms. Beyond the explicitly listed rights – freedom of expression, freedom of information, and freedom of broadcasting – it also covers unenumerated freedoms such as artistic and scientific freedom and freedom of the press.

At the core of the substantive guarantee is freedom of expression. This includes both the internal freedom to form, hold, and change opinions, as well as the external freedom to express them[59]. Notably, it safeguards individuals from state indoctrination or targeted manipulation[60]. The protection of manifestation of opinion extends to the dissemination of views, regardless of the method of communication, whether through speech, writing, images, or other symbolic forms[61]. In principle, no value judgment is made on the content of the statement, nor is a distinction drawn between opinions and facts; both fall equally within the scope of Art. 10 ECHR[62]. However, uncertainties remain regarding deliberately false statements or those falling under the abuse prohibition in Art. 17 ECHR. For instance, the ECtHR has ruled that certain anti-Semitic expressions, such as Holocaust denial, do not fall under the protection of Art. 10 ECHR[63]. Nevertheless, in principle, false, offensive, provocative, tasteless, racist, or "anti-democratic" opinions are still covered by the norm; any solution must be found within the framework of proportionality, with the possibility of considering Art. 17 ECHR in the analysis[64].

Freedom of the press is protected as a specific form of freedom of expression. Its scope covers the entire press process, from research and creation to editing, publication, and distribution of journalistic work[65]. The ECtHR's understanding has evolved from a primarily objective

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[59] *Cornils* in: Gersdorf/Paal (eds.), BeckOK Informations- und Medienrecht, 29th ed. 2020, ECHR Art. 10 § 14; *Mesching* in: Karpenstein/Mayer (eds.), ECHR, 2012, Art. 10 § 8; according to current opinion, the so-called negative freedom, i.e. not having an opinion or not having to express it, is recognised but not yet decided by the ECtHR, see *Grote/Wenzel* in: Dörr/Grote/Marauhn (eds.), EMRK/GG, 2nd ed. 2013, ch. 18 § 39.

[60] *Müller-Riemenschneider*, Pressefreiheit und Persönlichkeitsschutz, 2013 p. 129.

[61] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 308.

[62] *Grote/Wenzel* in: Dörr/Grote/Marauhn (eds.), EMRK/GG, 2nd ed. 2013, ch. 18 §§ 29 et seq.; see also *Gering*, Pressefreiheit in regionalen Menschenrechtssystemen, 2012 p. 59 et seq.

[63] ECtHR, judgement of. 23.11.1998 – 24662/94 (*Lehideux and Isorni v. France*) § 47; see in this context on the rightly criticised decision ECtHR, Judg. v. 12.12.2013 – 27510/08 (*Perinçek v. Switzerland*) also *Breitenmoser/Weyeneth*, Europarecht, 3rd ed. 2017 § 11 § 1336.

[64] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 308.

[65] *Gering*, Pressefreiheit in regionalen Menschenrechtssystemen, 2012 pp. 80–86.

concept[66] – initially focused on periodically published print works – to a more activity-based concept[67] that includes new forms of journalistic practice in the changing media landscape, such as audiovisual and online publications. Protections extend to press activities like the protection of sources, publication of confidential government information, dissemination of third-party statements, and decisions on format, such as photojournalism[68].

The ECtHR consistently highlights the press's role as a *public watchdog* in a constitutional democracy, a theme that runs through its case law on press freedom. As a crucial link between politics and the public, and between the state and society, only a free press can facilitate the communication of independent, critical information necessary for a robust democratic exchange of opinions[69]. Journalism's role extends beyond the neutral transmission of information to include political analysis, evaluation, and interpretation[70]. This important function is reflected in the positive obligations placed on Member States to protect the media not only from excessive state interference but also from third-party obstruction of its activities, in addition to the classic defence against state encroachments[71].

Justifying Interference with Press Freedom under Art. 10 ECHR

Contrary to the seemingly "absolute" wording of Art. 10(1) ECHR, restrictions on freedom of expression and freedom of the press are permissible, but only under strict conditions. Such limitations are governed exclusively by Art. 10(2) ECHR; there is no room for the application of intrinsic limitations[72]. As with Art. 8 ECHR, the justification for restrictions follows a three-step process: (1) there must be a sufficient legal basis, (2) the interference must pursue one of the legitimate aims listed in Art. 10(2), and (3) the restriction must be necessary in a democratic society.

In the context of media privilege, two aspects are particularly important when it comes to restrictions: the *legitimate aim of protecting the reputation or rights of other*s, and the *necessity or proportionality of the interference*. The former includes the legal rights set out in Art. 8(1) ECHR, such as the right to private life and the right to personal data protection. When assessing proportionality, the ECtHR balances the press's special role and its essential function in a constitutional and democratic society. The degree of deference granted to Member States varies depending on the importance of maintaining a free press in each specific case[73].

The distinction between value judgments and factual statements plays a role in this balancing process. The ECtHR tends to give greater weight to freedom of expression and press freedom[74] when factual statements can be proven true, or in cases of value judgments[75]. Additionally, the Court has elaborated on the journalistic duty of care, requiring journalists to consider the potential harm to individuals affected by their reporting. Furthermore, they are prohibited from inciting hatred or violence in their publications[76].

[66] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 310.
[67] *Brings-Wiesen* in: Spindler/Schuster (eds.), Recht der elektronischen Medien, 4th ed. 2019, Part I.A. § 27.
[68] *Mensching* in: Karpenstein/Mayer (eds.), ECHR, 2012, Art. 10 § 15.
[69] ECtHR, judgement of 08.08.1986 – 9815/82 (*Lingens v. Austria*) § 42; ECtHR, judgement of 26 November 1991 – 13585/88 (*Observer and Guardian/Great Britain*) § 59; ECtHR judgement of 23 April 1992 – 11798/85 (*Castells v. Spain*) § 43.
[70] *Mensching* in: Karpenstein/Mayer (eds.), ECHR, 2012, Art. 10 § 13.
[71] *Mensching* in: Karpenstein/Mayer (eds.), ECHR, 2012, Art. 10 § 16.
[72] *Müller-Riemenschneider*, Pressefreiheit und Persönlichkeitsschutz, 2013 p. 137.
[73] Brings-Wiesen in: Spindler/Schuster (eds.), Recht der elektronischen Medien, 4th ed. 2019, Part I.A. § 47.
[74] By their nature, value judgements are not open to proof.
[75] *Grote/Wenzel* in: Dörr/Grote/Marauhn (eds.), EMRK/GG, 2nd ed. 2013, ch. 18 § 121.
[76] *Grabenwarter/Pabel*, Europäische Menschenrechtskonvention, 5th ed. 2012 p. 336.

B. Media freedom under Art. 11 CFR

As with the protection of private life, the protection of freedom of expression and freedom of the press under the ECHR finds its counterpart within the European Union in the Charter of Fundamental Rights. In this instance as well, the drafters of the CFR drew on the ECHR as a model for shaping the protection of freedom of communication. The inclusion of freedom of expression and freedom of the press as essential components of a democracy governed by the rule of law was never in question; the primary focus of discussion was on the precise wording of these provisions in the Charter[77].

The Guarantee of Media Freedom in Art. 11 CFR

Art. 11 of the CFR encompasses freedom of opinion and expression, freedom of information, and freedom of the media, including freedom of the press, broadcasting, and film. Art. 11(1) CFR serves as the normative basis for the first two freedoms and mirrors the wording of Art. 10(1) sentences 1 and 2 of the ECHR without deviation. However, media freedom has been given independent status in Art. 11(2) CFR, without an equivalent in the ECHR.

According to the wording of Art. 11(2) CFR, the freedom and pluralism of the media ("media and their plurality") shall be respected. The term "media" is understood broadly to encompass all mass media characterized by the selection, preparation, and dissemination of content to an indeterminate number of people[78]. As a result, the scope of protection includes not only activities traditionally covered by press freedom, but also all forms of broadcasting and radio. It remains unsettled whether books and other non-periodical publications fall under paragraph 2 or, as in the interpretation of the ECHR, are protected solely under the freedom of expression in paragraph 1[79]. However, "new media", including internet-based media-specific content, is undoubtedly included in the scope of media freedom[80]. The reference to pluralism further emphasizes the objective legal dimension of media freedom, requiring institutional guarantees by Member States to ensure its protection[81].

Justifying Interference with Media Freedom under Art. 11 CFR

The question of whether media freedom should be considered an independent fundamental right or merely a special form of freedom of expression remains unresolved, particularly regarding the legal requirements for justifying restrictions on media freedom. For a long time, based on the explanations of the Convention's presidency, it was assumed that Art. 11 CFR – without distinguishing between its paragraphs – corresponded to Art. 10 ECHR, meaning that media freedom would also fall under the scope of Art. 52(3) CFR, with the limitation rule of Art. 10(2) ECHR applying[82].

However, recent scholarly opinion has increasingly favoured the autonomy of media freedom. This shift implies that Art. 52(3) CFR would no longer govern media freedom, and instead, the limitations would arise exclusively from Art. 51(1) CFR[83]. The argument for media freedom's

[77] *Bernsdorff* in: Meyer/Hölscheidt (eds.), CFR, 5th ed. 2019, Art. 11 § 5.
[78] *Jarass*, GRC, 3rd ed. 2016, Art. 11 § 17.
[79] *Jarass*, GRC, 3rd ed. 2016, Art. 11 § 17; *Calliess* in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, GRC Art. 11 § 23.
[80] *Bernsdorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 11 § 18.
[81] *Schladebach/Simantiras* EuR 2011, 784 (791); *Skouris* MMR 2011, 423 (426).
[82] *Oster/Wagner* in: Dauses/Ludwigs (eds.), Handbuch des EU-Wirtschaftsrechts, 2019, E.V. § 34.
[83] *von Coelln* in: Stern/Sachs (eds.), GRC, 2016, Art. 11 § 57; *Bernsdorff* in: Meyer/Hölscheidt (eds.), GRC, 5th ed. 2019, Art. 11 § 22; *Brings-Wiesen* in: Spindler/Schuster (eds.), Recht der elektronischen Medien, 4th ed. 2019, Part I.B § 21; *Calliess* in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, Art. 11 §§ 30–34.

autonomy is twofold: first, its distinct placement in a separate paragraph is noteworthy from both a grammatical and systematic perspective; second, concerns have been raised that the case law developed by the ECtHR lacks the nuance required to be effectively applied to the wording of Art. 11(2) CFR[84].

To date, the ECJ has not taken a definitive stance on this issue. On the one hand, the Court stresses the alignment of Art. 11 CFR with Art. 10 ECHR without differentiating between the paragraphs, relying on Art. 52(3) CFR and referencing the provisions of the ECHR and ECtHR case law. On the other hand, it also applies the general limitation rule of Art. 51(1) CFR without further explanation[85]. As a result, the requirements for justifying restrictions continue to follow the familiar triad: a sufficient legal basis, pursuit of one of the legitimate aims listed in Art. 10(2) ECHR, and the necessity or proportionality of the interference in a democratic society.

C. Summary of findings: *From freedom of the press to freedom of the media*

Similar to data protection law, the Charter of Fundamental Rights adopts modernized terminology, but these updates bring only marginal changes in content; the level of protection remains largely identical. The somewhat ambiguous explanations provided by the Convention on Fundamental Rights have contributed to ongoing uncertainty regarding the applicable framework for limitations within the CFR. Despite this, the European Court of Justice has consistently sought to align its case law with that of the European Court of Human Rights.

III. Interim conclusion: Equally important fundamental rights

Both the protection of personal data and the protection of a free press have a long-standing tradition in Europe. These fundamental rights are enshrined in the ECHR and the CFR and benefit from guarantees that have been strengthened by years of case law. However, it is not possible to establish a clear priority between these two legal positions through abstract legal reasoning.

Media Privilege In the Jurisprudence of Europe’s Fundamental Rights Courts

The “media privilege” codified in Art. 85 of the GDPR does not provide a definitive solution to the (trans-)constitutional conflict between freedom of press and data protection. Despite its name, it does not grant the free press absolute priority over data protection. The concept of “privilege” – in either direction – is not embedded in the norm. Instead, Art. 85 GDPR delegates the responsibility of resolving this conflict to the Member States of the European Union. However, national legislation enacted under Art. 85 remains fully subject to review against EU law standards. As a result, European fundamental rights case law will play a crucial role in balancing data protection and press freedom moving forward.

The opening clause in Art. 85, which affords Member States significant discretion in implementation, departs from the GDPR’s overarching goal of full harmonization. This gap could potentially be filled by EU case law on fundamental rights, with the ECJ acting as a driving force behind the development of a “minimum harmonization” for media privilege across Member States.

In this section, I focus on two pivotal cases – *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland and Buivid*s – to illustrate the application of the “media privilege” in balancing press

[84] *Callies* in: Calliess/Ruffert (eds.), EUV/AEUV, 5th ed. 2016, Art. 11 § 33.
[85] E.g. in ECJ, judgement of 04/05/2016 – C-547/14 (*Brands*) §§ 147, 149.

freedom and data protection. These cases were selected for their landmark status in European jurisprudence. *Satamedia* is significant because it has been addressed by both the European Court of Justice and the European Court of Human Rights, providing an invaluable perspective on how both courts approach the conflict between these rights. Buivids, on the other hand, highlights the evolving challenges of digital journalism and the scope of media privilege in the context of new media. Together, these cases offer a comprehensive lens through which to understand the balance of these competing rights in contemporary legal settings.

I. The Satakunnan Markkinapössi Oy and Satamedia Oy/Finland case

The analysis of case law begins with a legal case that has been addressed by both European fundamental rights courts over a span of 13 years. The fact that both the ECJ and the ECtHR ruled on the same case offers a valuable jurisprudential insight into the stance of Europe's highest courts regarding media privilege. This dual treatment makes the case especially significant for understanding how these courts navigate the balance between press freedom and other rights.

A. Proceedings before the ECJ

The legal process began with a preliminary ruling procedure under Art. 267 TFEU (formerly Art. 234 EC Treaty) before the European Court of Justice (ECJ) in Luxembourg. This procedure allows national courts to refer questions concerning the interpretation or validity of EU law to the ECJ, making it a key mechanism for ensuring uniform application of EU law across Member States.

Facts of the case and course of the proceedings

The case centers around a distinctive aspect of Finnish tax law, which makes income and capital tax information generally accessible to all citizens. This feature formed the basis of the business model for two Finnish media companies that further simplified access to this tax data for interested citizens. First, they published the tax data of the 1.2 million highest-earning Finns, organized by municipality and sorted alphabetically, in a regional magazine called *Veropörssi*[86]. Second, they introduced a text messaging service, allowing mobile phone users to obtain tax information for a specific individual by paying around 2 euros[87].

This approach – almost unimaginable in other European countries due to stricter legal protections on tax secrecy – prompted the Finnish Data Protection Commissioner to seek a ban on this practice from the responsible Finnish authority in 2004. However, the authority refused to impose the ban, and an initial appeal to the Finnish Administrative Court also failed, confirming the legality of the media service[88].

It was only when the Finnish Supreme Administrative Court raised significant data protection concerns that the case took a different turn. The court suspended the proceedings and referred a question to the European Court of Justice (ECJ) for a preliminary ruling under Art. 267 TFEU. The key question was whether the described practice constituted processing carried out exclusively for journalistic purposes within the meaning of Art. 9 of Directive 95/46/EC (the predecessor of the GDPR)[89].

[86] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) §§ 25 f.
[87] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) § 29.
[88] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) § 32.
[89] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) § 34.

ECJ Considerations

The ECJ's judgment is notable for its unusually restrained approach, particularly given the Court's reputation for delivering decisive rulings. Nevertheless, it has become a frequently cited leading decision for understanding media privilege under Art. 9 of Directive 95/46/EC and Art. 85 of the GDPR. The Court's central statement on media privilege is distilled into a single, pivotal paragraph, in which the ECJ emphasizes the inherent tension between fundamental rights. It asserts that to adequately respect the importance of freedom of expression and the press in a democratic society, the concept of journalism "must be interpreted broadly". Simultaneously, the Court underscores that to achieve a balance between the two fundamental rights, the derogations and limitations concerning data protection must apply only in so far as it is strictly necessary[90].

The Court also briefly – maybe too briefly – clarifies the understanding of "journalism": journalistic activity is not limited to media companies but includes all individuals engaged in journalism, regardless of the means of communication, whether it be print, radio, or electronic media[91]. Even the intention to make a profit from journalistic activity would not exclude its classification under Art. 9 of Directive 95/46/EC, as "a certain commercial success [...] is also an indispensable prerequisite for the continued existence of professional journalism". This broad interpretation underscores the ECJ's intention to afford media privilege expansive protection, while also maintaining a cautious balance with data protection rights.

Legal Opinion of Advocate General Kokott

The statements made by the *Kokott* highlight the extent to which the ECJ retreated in its legal assessment. Whether this restraint reflects the Court's deference to Member States' discretion under Art. 9 of Directive 95/46/EC or stems from a lack of consensus among the judges regarding further elaboration remains speculative.

Notably absent from the decision were considerations that seemed pertinent in this case, such as whether a minimum level of editorial processing is required to qualify an activity as journalistic. This question, which has been debated in legal literature[93], was dismissed by *Advocate General Kokott*[94]. Referring to the case law of the European Court of Human Rights, Kokott argued that information serves a public interest if it relates to a genuine public debate. However, if the information merely satisfies public curiosity about private lives without any broader social function, the assessment would differ[95].

Moreover, the ruling did not address the more abstract arguments surrounding the interpretation of Art. 9 of Directive 95/46/EC, which favoured a narrow application of the exception for press freedom. This approach would prevent the erosion of data protection in the context of (online) journalism, an issue that was not fully explored in the final judgment.

B. Proceedings before the ECtHR

In the later stages of the proceedings, after the ECJ's referral, the Finnish Supreme Administrative Court ultimately prohibited the media companies' publication practices. In

[90] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) § 56.
[91] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) §§ 58, 60.
[92] ECJ, judgement of. 16 December 2008 – C-73/07 (*Satakunnan Markkinapörssi and Satamedia*) § 59.
[93] *Buchner/Tinnefeld* in: Kühling/Buchner (eds.), DS-GVO/BDSG, 2nd ed. 2018, Art. 85 § 24.
[94] GA Kokott, Opinion in C-73/07 § 67.
[95] GA Kokott, Opinion in C-73/07 §§ 73 f., 77.

response, the two media companies appealed to the European Court of Human Rights[96]. The Strasbourg Chamber issued its first judgment in 2015, upholding the restrictions on freedom of expression. However, this decision was significant in that, for the first time, the Court established criteria for balancing the involved fundamental rights – criteria that are central to understanding media privilege.

This balancing framework provided by the ECtHR laid the groundwork for future jurisprudence by offering a clearer method for resolving conflicts between freedom of expression and the right to privacy or data protection. It marked an important step in defining the limits of media freedom in relation to other fundamental rights within European legal systems.

The ECtHR Chamber's Judgment (July 21, 2015)

The Chamber's decision begins by thoroughly outlining the conflict between freedom of expression and freedom of the press under Art. 10 ECHR, and the right to privacy under Art. 8 ECHR[97]. Unlike the ECJ, the ECtHR goes beyond merely identifying this tension and presents a comprehensive set of considerations that must guide the balancing of these rights. These criteria all stem from the case law established in *Caroline von Hannover and Axel Springer*, developed during the same period. Their significance for understanding the protection of personality rights in relation to press freedom remains paramount to this day[98]. With the *Satamedia* decision, these principles have now become directly applicable to European media privilege.

According to these principles, when a conflict arises between the protection of personal data and freedom of the press, the following factors must be considered[99]:

1. Whether the published data contributes to a debate of public interest;
2. The public profile or notoriety of the person and the subject of the reporting;
3. The individual's prior conduct and whether it is relevant to the story;
4. The method by which the information was obtained;
5. The content, form, and impact of the publication; and
6. The potential t,anctions should not be ignored.

In this case, the court found these criteria to be relatively unproblematic. What is notable, however, is the introduction of a new line of reasoning by the Chamber. Rather than questioning the journalistic nature of the activity based on the method of publication (such as the SMS service), the Chamber expressed doubt due to the sheer volume and scope of the published data. Nevertheless, the judgment leaves it somewhat unclear whether the court ultimately denied the classification of the activity as journalistic or merely decided that the balance tipped in favour of privacy protection[100].

In any event, the Chamber concluded that Finland's decision to prioritize privacy over freedom of expression was consistent with the ECHR as a whole. This ruling underscore the

[96] ECtHR, judgement of. 21 July 2015 - 931/13 (*Satakunnan Markkinapörssi and Satamedia/Finland*) § 17 et seq. with reference to ECtHR, judgement of 7 February 2012 – 306600/08 and 60641/08 (*von Hannover/Germany*) §§ 109–113 and ECtHR, judgement of 7 February 2012 – 39954/08 (*Axel Springer/ Germany*) §§ 89–95.

[97] In this respect, please refer to Part II of the paper.

[98] Cf. instead of many only Märten, Die Vielfalt des Persönlichkeitsschutzes, 2015 pp. 291 ff.; *Müller-Riemenschneider*, Pressefreiheit und Persönlichkeitsschutz, 2013 p. 141 ff.; *Haug*, Bildberichterstattung über Prominente, 2011, pp. 34 ff.

[99] ECtHR, Judgement of. 21 July 2015 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v Finland*) § 62.

[100] ECtHR, judgement of. 21 July 2015 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*) §§ 68, 70.

importance of carefully weighing both privacy and press freedom, particularly in cases involving extensive dissemination of personal data.

Dissenting opinion by Judge Tsotsoria

Criticism of the judgment quickly emerged within the ECtHR itself, reflected in two dissenting opinions. Judge *Tsotsoria's* dissent, in particular, offered a thorough critique of the Chamber's balancing of freedom of the press and data protection in the context of media privilege. *Tsotsoria* argued that the Chamber failed to adequately consider the fact that the data published by the complainants was already publicly accessible, making any alleged violation of privacy questionable. She further contended that preventing the press from publishing publicly available data amounted to a form of censorship[101].

Additionally, *Tsotsoria* took issue with the Chamber's use of the quantity of published information as a criterion for determining journalistic activity. She emphasized that the ability to obtain and publish information is fundamental to journalism, and this must remain sufficiently protected[102]. *Tsotsoria's* dissent highlights concerns that the judgment could set a troubling precedent for restricting press freedom, particularly when dealing with information that is already accessible to the public. Furthermore, the transfer of the *Caroline von Hannover* case law has been questioned, though without providing substantial justification for this scepticism[103].

Grand Chamber judgment (July 27, 2017)

At the request of the parties, the case was referred to the *Grand Chamber* of the ECtHR. In its final decision, the *Grand Chamber* not only upheld the necessity of the restriction imposed but also confirmed the criteria previously outlined by the Chamber for balancing freedom of the press with data protection[104]. Similar to the ECJ, the ECtHR emphasized the fundamental equivalence of these competing rights, as reflected in Art. 85 of the GDPR[105]. However, the Grand Chamber introduced several new considerations for assessing the delicate balance between press freedom and data protection, particularly with regard to internet-based "new media".

First, it reinforced *Advocate General Kokott's* argument regarding the lack of journalistic processing, such as commentary, evaluation, or analysis. The Court questioned whether the mere provision of data, without further editorial treatment, could be considered a meaningful contribution to public debate, thus casting doubt on whether such activities constituted "journalism"[106].

Second, the Court distinguished between genuine public interest and sensationalism or voyeurism. It concluded that the publication was more aligned with the latter, rather than serving any substantive civic purpose or state oversight role[107].

Third, the Court highlighted the issue of "inferential information", a concept drawn from German administrative law[108]. It raised concerns that the absence of certain names in the published tax data conveyed information about those individuals, as it implied, they had not exceeded a

[101] ECtHR, Judgement of. 21 July 2015 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*), Special Opinion Tsotsoria §§ 7 f.
[102] ECtHR, Judgement of. 21 July 2015 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*), Special Opinion Tsotsoria §§ 7 f., 9.
[103] ECtHR, Judgement of. 21 July 2015 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*), Special Opinion Tsotsoria § 4.
[104] ECtHR, judgement of. 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*) §§ 165; 198 f.
[105] ECtHR, judgement of. 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v Finland*) § 123.
[106] ECtHR, judgement of. 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*) §§ 151, 174 et seq.
[107] ECtHR, judgement of. 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v Finland*) § 177.
[108] See *Schoch*, Informationsgesetz, 2nd ed. 2016, introduction §§ 272, 352.

certain income threshold. This raised additional privacy concerns, as individuals' financial statuses could be inferred from what was not disclosed.

Finally, the *Grand Chamber* also addressed the scope of the publication. Even if the content itself was lawful, the Court found that the sheer volume and scale of the published data exceeded what would be expected from a journalistic endeavour, further questioning the activity's qualification as journalism[109].

These new considerations expanded the framework for evaluating the balance between freedom of the press and data protection, particularly in the context of emerging media formats.

C. Summary of findings: *The ECtHR as a driving force*

The *Satamedia* case offers valuable insights into the understanding of media privilege and the resolution of tensions between fundamental rights. It is particularly noteworthy in how the ECtHR, which has often been criticized for its rudimentary approach to data protection under Art. 8 ECHR[110], demonstrates with this judgment that such criticism is misplaced. In contrast to the ECJ, the ECtHR successfully lays out clear criteria for balancing fundamental rights positions. The Court's extension of the *Caroline von Monaco* case law to the realm of "new media" is both logical and convincing.

Moreover, the ECtHR hints at the gradual development of a distinct fundamental right to data protection, which is increasingly aligning with the ECJ's understanding of a combined right under Arts. 7 and 8 CFR[111]. This demonstrates a growing convergence between the two courts on the role and scope of data protection in the European legal framework.

The ECJ's more cautious approach in this case can be attributed not only to the general reluctance of constitutional courts to rule on more than is strictly necessary for the resolution of a case, but also to the broader challenges posed by defining "press" and "journalism" in the digital age. The rapid evolution of journalistic practices under the influence of new media technologies makes it difficult to establish fixed boundaries for these concepts.

However, the use of "scope" or "scale" as a criterion for distinguishing journalistic activity raises important questions. If this characteristic were strictly applied, it could lead to the exclusion of large-scale data publications, such as those in the style of *WikiLeaks*, from being considered journalistic under press law. This fails to account for the fact that the internet has fundamentally altered the conditions of publication. The limitations of traditional journalism—such as the inability to publish large volumes of data due to resource and cost constraints—no longer apply in the digital world. As such, the definition of journalistic activity should evolve in line with these technological advancements, recognizing that large-scale online publications can still fulfil a journalistic function.

In this sense, the *Satamedia* case challenges courts to reconsider traditional notions of journalism considering new media realities, while balancing the competing interests of press freedom and data protection in a modern democratic society.

II. The Buivids case

A 2019 decision by the ECJ demonstrates that the principles established in the *Satamedia* proceedings remain crucial for future legal interpretations. This decision not only reinforces the

[109] ECtHR, judgement of. 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*) §§ 151, 172 et seq.
[110] *Albrecht/Janson* CR 2016, 500 (508).
[111] "Art. 8 ECHR thus contains a right to a form of informational self-determination" s. ECtHR, judgement of 27 June 2017 – 931/13 (*Satakunnan Markkinapörssi and Satamedia v. Finland*) § 135.

importance of balancing press freedom with data protection but also highlights the ongoing, successful dialogue between two confident supreme courts – the ECJ and the ECtHR. This interplay between the courts exemplifies how their jurisprudence can evolve collaboratively, contributing to a more cohesive approach to fundamental rights protection within Europe.

A. The facts of the case

The case involved a complainant who filmed his interrogation at a Latvian police station during misdemeanour proceedings and subsequently posted the video on an online video platform[112]. The Latvian data protection authority deemed this act a violation of national data protection laws and ordered the complainant to remove the recording. This decision triggered court proceedings, ultimately leading to a referral to the ECJ for a preliminary ruling. The Latvian court sought clarification on whether the complainant's actions could be classified as "journalism" under Art. 9 of Directive 95/46/EC (the predecessor to the GDPR).

This question was central to determining whether the complainant's publication could benefit from the journalistic exception to data protection rules. The case presented an opportunity for the ECJ to explore the boundaries of journalistic activity in the context of modern media practices, particularly regarding the definition of journalism in relation to personal data processing and online platforms. The Court's ruling would further shape the understanding of media privilege under EU law, building on principles established in previous cases like *Satamedia*.

B. ECJ judgment analysis

In its reasoning, the ECJ reiterates the definition of journalistic activity established in the *Satamedia* decision. According to settled case law, "journalistic activities" are those aimed at disclosing information, opinions, or ideas to the public, regardless of the medium used for transmission[113]. Neither the fact that the complainant is not a "professional journalist" nor that the video was posted on an online platform without further commentary precludes its classification as journalistic in principle[114]. The key factor was the promotion of public debate, which, in this case, was suggested by the complainant's critique of allegedly unlawful police interrogation methods.

However, the Court goes further by providing the Latvian court with criteria to consider in its subsequent decision. With explicit reference to the ECtHR's *Satamedia* case law, the ECJ adopts the criteria previously discussed and confirms their relevance to the European context of media privilege[115].

C. *Summary* of Findings: Is Every Publication "Journalism"?

Inspired by the case law of the ECtHR, the ECJ is returning to its assertive approach in matters of data protection. The balancing criteria developed by the ECtHR have now been adopted and endorsed by the highest fundamental rights court at the EU level, illustrating that the longstanding dialogue between the two courts in the realm of data protection continues to yield positive results. Equally noteworthy is the ECJ's broad interpretation of journalism. The *Buivids* decision clarifies that, according to the ECJ, not only regular bloggers and media professionals, but theoretically

[112] ECJ, judgement of. 14 February 2019 – C-345/17 (*Buivids*) §§ 16 f.
[113] ECJ, judgement of. 14 February 2019 – C-345/17 (*Buivids*) § 53.
[114] ECJ, judgement of. 14 February 2019 – C-345/17 (*Buivids*) §§ 55 et seq.
[115] ECJ, judgement of. 14 February 2019 – C-345/17 (*Buivids*) § 66.

any citizen with a mobile phone camera and a YouTube account could qualify as a journalist under Art. 85 GDPR.

While the ECJ's openness to "new media" is generally commendable, there will need to be future efforts to avoid equating every form of publication with journalism. One possible solution could be requiring a minimum level of content commentary, analysis, or categorization to meet the threshold of journalistic activity.

Conclusion

A review of the constitutional foundations reveals that both the ECHR and the CFR provide comprehensive, well-established protections for press freedom and data protection within Europe. Although there are some differences in detail, the two frameworks are closely interlinked, and the level of protection is fundamentally equivalent. Notably, Art. 85 GDPR stands out as an unusual "opening clause", delegating regulatory authority back to Member States—a rarity in an otherwise harmonized GDPR framework. However, "minimum harmonization" could still be achieved through the ECJ, acting as the competent fundamental rights court.

The ongoing dialogue between the ECtHR and the ECJ on media privilege is particularly noteworthy. In the *Satamedia* judgment, the ECtHR demonstrated that the doctrinal principles it had developed under Art. 8 ECHR remain valid in the digital age, despite criticism. Meanwhile, the ECJ has fostered European coherence by embracing the balancing criteria inspired by the ECtHR, which have proven to be largely convincing in content. This collaboration between the courts continues to play a key role in shaping a unified and cohesive approach to media privilege and data protection across Europe.

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