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Introduction

To fulfil their function as watchdogs of democracy, "journalists" need to process personal data on a daily basis. They are therefore confronted with the application of the famous General Data Protection Regulation (hereinafter the "GDPR"). Such a situation places them at the heart of potential tensions between two fundamental human rights: on the one hand, freedom of expression, which includes both freedom of the press and the right of the public to receive and impart information, and, on the other hand, the right to privacy, which is linked to the right to data protection. In this respect, it is worth recalling that, according to the European Court of Human Rights, these two rights deserve in principle "equal respect"[2].

The European legislator has been concerned about the role of the press, which is essential to democracy. In particular, the GDPR provides the EU Member States with the possibility to introduce a derogatory regime in their national legislation for processing personal data for "journalistic purposes". The objective pursued here by the legislator is to facilitate the exercise of journalistic activities by offering the possibility to benefit from exemptions from certain provisions of the GDPR where necessary to reconcile the right to the protection of personal data with the freedom of expression and information.

In this chapter, after pointing out the changes in the media ecosystem that have enabled the emergence of new information players (point I), we will look at the beneficiaries of the derogatory regime for processing

[1] University of Namur, Faculty of Law, CRIDS. The research underlying these results received funding from the Belgian Federal Science Policy under the contract n° B2/191/P2/BESOCIAL.

[2] European Court of Human Rights (gd ch.), case of *von Hannover v. Germany (No. 2)*, 7 February 2012, n° 40660/08 and 60641/08, § 106; European Court of Human Rights (gd ch.), case of *Axel Springer AG v. Germany*, 7 February 2012, n° 39954/08, § 87.

personal data for "journalistic purposes" in this world where everyone can do "journalism" online. To this end, we will examine the boundaries of the notion of "journalistic purposes" in the light of the case law of the Court of Justice of the European Union and of the European Court of Human Rights, while paying attention to the relevant contributions offered by *soft law* on this matter (point II). We will then turn to Article 85 of the GDPR, which lists the provisions from which national legislators may derogate when necessary to strike a fair balance between the right to the protection of personal data and freedom of expression and information (point III). Finally, as the GDPR leaves the implementation of this derogatory regime totally on the Member States' shoulders, we will report on the choices made by the Belgian legislator in the Data Protection Act of 30 July 2018 complementing the GDPR (point IV). On the one hand, we will see that, unlike the GDPR, the Belgian Data Protection Act introduces, not without difficulty, a definition of "journalistic purposes". On the other hand, we will try and explain the derogations introduced by the Belgian legislator concerning consent, sensitive and criminal data, data subject's rights, obligations of data controller and processor, transborder data flows and powers of the supervisory authority.

I. The interconnected society and the advent of neo-journalism

Today, the Internet has become a truly essential democratic tool for the exchange of ideas and the communication of information between individuals[3]. The reduction in access costs, the high speed of naviga-

[3] In a judgement concerning the blocking of a website, the European Court of Human Rights observed that "the Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest". See European Court of Human Rights, case of *Ahmet Yildirim v. Turkey*, 18 December 2012, n° 3111/10, § 54. In the same sense, see also European Court of Human Rights, case of *Times Newspapers LTD (Nos. 1 and 2) v. The United Kingdom*, 10 March 2009, n° 3002/03 and 23676/03, § 27: "In the light of its accessibility and its capacity to store and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general". See also European Court of Human Rights, case of *Magyar Jeti ZRT v. Hungary*, 4 December 2018, n° 11257/16, § 66; European Court of Human Rights, case of *OOO Flavus and others v. Russia*, 23 June 2020, app. n° 12468/15, § 28. See also Recommendation CM/Rec(2018)2 of the Committee of Ministers to member States on the roles and responsibilities of internet intermediaries, adopted on 7 March 2018.

tion, the multiplication of free WIFI zones and the increased mobility offered by smartphones and by the development of mobile internet allow easy access for almost everyone to infinite possibilities of expression and information.

These considerations are all the more important as, thanks to the interactivity characterising the Web as we know it today, new information players have emerged. Indeed, with the Web 2.0[4], discussions forums, personal pages and websites, blogs, video sharing platforms and social media of all kinds have multiplied, giving rise to the phenomenon of "neo-journalism"[5]. A neo-journalist can be defined, in the framework of this chapter, as any person who, via the Web (social media platforms, blogs, websites…), carries out an activity of disseminating information on matters of general interest on a non-professional basis. It follows that on the various web platforms, countless number of Internet users are engaged in journalistic activities. It is therefore undisputed that the provision of information is no longer the sole work of press and media companies, which are often forced to compete with "information laymen". Information has now emancipated itself from traditional press: unlike the situation prevailing during the last century, thanks to the web, anyone can now disseminate information to a wide audience without the need for a publisher, a printer or a distributor. Since the advent of Web 2.0 and especially of social media, the adage "all journalists!"[6] has never been more true than today.

[4] By "Web 2.0", we mean in particular the transition from "fixed" web pages evolving from the sole will of their experienced creators to an extremely active role conferred on Internet users in the feeding of web pages. In this new perspective, users thus move from a passive role allowing them only to consult web pages to an active role allowing them to post all kinds of online content (articles, photos, videos, comments, etc.).

[5] Prior to "neo-journalism", "participatory journalism" such as Wikileaks, Rue89 or the Korean website OhMyNews were first developed. Participatory journalism combines the professional journalist, the expert and the amateur. Subsequently, "neo-journalism" was born. In this scheme, professional journalists lose their place.

[6] See A. Adam & J. Englebert, « Le néo-journaliste au regard de la jurisprudence de la Cour européenne des droits de l'homme », *R.D.T.I.*, 2/2013, n° 51, p. 10; Council of Europe, *Le journalisme ouvert, Iris plus*, 2013-2, Strasbourg, Observatoire européen de l'audiovisuel, 2013, available at www.obs.coe.int, p. 3; P.-F. Docquir, « Wikileaks et le premier Amendement », *R.D.T.I.*, 2013/2, n° 51, pp. 28 and 34; D. Domingo & A. Heinoven, « Weblogs and Journalism: A Typology to Explore the Blurring Boundaries », *Nordicom Review*, n° 29, 2008/1, pp. 3, 4, 7 and 8; J. Englebert, *La procédure garante de la liberté de l'information*, Limal, Anthémis, 2014, pp. 51, 207 and 208; J. Englebert, « La liberté d'expression à l'heure de l'Internet », in *Vie privée, liberté d'expression et démocratie dans la société du numérique* (sous la dir. de Y. Poullet), Collection du CRIDS, Bruxelles, Larcier, 2020, p. 143; B. Grevisse, *Déontologie du journalisme : enjeux éthiques et identités professionnelles*, 1er éd., Collection Info & Com, Bruxelles, de Boeck, 2010, pp. 51-52; S. Hoebeke et

This observation is obviously not without consequences. It raises issues about the personal scope of the guarantees and protections conferred on the press and, in particular, the nagging question of their extension to these new information players. In this chapter, we will focus on the derogatory regime established by Article 85 of the GDPR for the processing of personal data for journalistic purposes[7]. We will in particular identify the beneficiaries of this derogatory regime and present the exemptions granted by the Belgian Data Protection Act of 30 July 2018 complementing the GDPR[8].

II. The notion of "journalistic purposes"

In order to determine the beneficiaries of the derogatory regime, it is important to define what is meant by the notion of "journalistic purposes". Indeed, the European legislator has focused on the activity pursued (the "journalistic purposes") rather than on the quality of the information provider.

Unfortunately, like the Directive 95/46/EC[9], which was replaced by the GDPR, the latter does not offer any legal definition of the journalistic purposes[10]. At the very least, Recital No. 153 of the GDPR mentions, as a small consolation prize, that "in order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, *such as journalism*,

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B. Mouffe, *Le droit de la presse : presse écrite, presse audiovisuelle, presse électronique*, 3e éd., Limal, Anthémis, 2012, pp. 49, 50 and 775; N. Jurrat, « Mapping Digital Media: Citizen journalism and the Internet », April 2011, available at https://www.mappingdigitalmedia.org/, p. 6; E. Lievens & P. Valcke, *Media Law in Belgium*, The Netherlands, Wolters Kluwer, 2011, p. 57; M. Mathien, « ''Tous journalistes'' ! Les professionnels de l'information face à un mythe des nouvelles technologies », *Quaderni*, 72/2010, pp. 115-116; J.-F. Tétu, « Du ''public journalism'' au ''journalisme citoyen'' », *Questions de communication*, 13/2008, 1 July 2010, available at http://questionsdecommunication.revues.org/1681, p. 84; Q. Van Enis, *La liberté de la presse à l'ère numérique*, Bruxelles, Larcier, 2015, pp. 23, 101, 108 and 115.

[7] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR), *O.J.*, 4 May 2016, L 119/1, article 85, §§ 1 and 2.

[8] Belgian Data Protection Act of 30 July 2018 on the protection of individuals with regard to the processing of personal data, *M.B.*, 5 September 2018.

[9] 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, article 9.

[10] Unlike the new Belgian Data Protection Act of 30 July 2018 (see *infra*, point IV, A).

broadly"[11]. However, this clarification remains a source of ambiguity… While it is clear that restrictive interpretations[12] of the notion of journalism (and, *a fortiori*, of the notion of journalistic purposes) are excluded[13], the scope of the broad interpretation remains unclear. Indeed, as we will see, there are two trends among the broad interpretation of the notions of "journalism", "journalist" and "journalistic purposes".

A. The functional approach of the journalistic activity

Classically, journalistic activity consists of several phases: the collection, the verification, the processing, the writing and the dissemination of information. Contrary to what one might think, this activity is by no means reserved for the professional media elite. It can thus be much broader than its usual scope and also includes those engaged in journalistic activities outside an established media, on a purely amateur basis or without any regularity in the activities. In this respect, the UN Human Rights Committee has stated that "journalism is a *function* shared by a *wide range of actors*, including professional full-time reporters and analysts, as well as bloggers and others who engage in forms of self publication

[11] Recital No. 153 of the GDPR (we underline). This necessity of a broad interpretation has been repeated several times by the Court of Justice, notably in its judgement of 16 December 2008, *Satakunnan Markkinapörssi and Satamedia*, C-73/07, EU:C:2008:727, point 56. See also C.J. (2nd ch.), case of *Buivids*, 14 February 2019, C-345/17, point 51.

[12] We can exclude restrictive interpretations which limit the notion of "journalist" to persons who are professionals, who possess a particular diploma or who exercise journalistic activity with a certain regularity. See for instance for a restrictive interpretation: Parliament of the Wallonia-Brussels Federation, *Les États généraux des médias d'information au Parlement de la Fédération Wallonie-Bruxelles : constats, analyses, débats*, 19 February 2014, p. 12. For other interpretations which are against the adage "all journalists!", see E. Derieux, « Un public en action : du droit de réponse… à l'internaute donneur et receveur d'informations », in *Les médias et l'Europe* (sous la dir. de P. Auvret), Bruxelles, Larcier, 2009, pp. 259-270; A. Strowel, « Les agrégateurs d'actualités : la presse peut-elle survivre avec Google News ? », in *Quand Google défie le droit : Plaidoyer pour un Internet transparent et de qualité*, Bruxelles, Larcier, 2011, p. 65.

[13] In this respect, it is also interesting to mention the change of position of the Committee of Ministers of the Council of Europe concerning the notion of "journalist". Whereas this body initially adopted a restrictive interpretation by using the criteria of regular or professional activity, it now adopts a much broader approach encompassing a whole range of new media actors and thus considering the evolution of the ways in which information is disseminated. For the former restrictive interpretation, see Recommendation No. R (2000) 7 of the Committee of Ministers to member States on the right of journalists not to disclose their sources of information, adopted on 8 March 2000. For the new broader interpretation, see Recommendation CM/REC(2011)7 of the Committee of Ministers to member States on a new notion of media, adopted on 21 September 2011, §§ 5-7.

in print, on the internet or elsewhere [...]"[14]. We find here a functional approach of the notion of "journalism" which does not require any conditions of profession[15] or of regularity. The most important thing is the activity actually carried out and not the particular quality of the person disseminating the information.

Such an approach is also in line with the now well-settled case law of the European Court of Human Rights in relation to the personal scope of Article 10 of the European Convention on Human Rights[16]. Apart from the fact that this provision explicitly states that "everyone has the right to freedom of expression [which includes freedom of the press]", the Court has on many occasions granted the role of "watchdog of democracy" to actors located far from the professional media environment. The Court has conferred this role to an informal campaign group[17], an NGO[18], a human rights association[19], a historian[20], a blogger or a social media user[21]... For example, the Court stated in its judgement *Steel and Morris v. the United Kingdom* that "the Government have pointed out that the applicants were

[14] UN Human Rights Committee, General comment No. 34, "Article 19: Freedoms of opinion and expression", 102nd session, Geneva, CCPR/C/34, 12 September 2011, point 44 (emphasis added).

[15] On this point, it should be recalled that the UN Human Rights Committee considers that general systems of registration or licensing of journalists are contrary to the right to freedom of expression protected by Article 19 of the ICCPR: "[…] general State systems of registration or licensing of journalists are incompatible with paragraph 3. Limited accreditation schemes are permissible only where necessary to provide journalists with privileged access to certain places and/or events. Such schemes should be applied in a manner that is non-discriminatory and compatible with article 19 and other provisions of the Covenant, based on objective criteria and taking into account that journalism is a function shared by a wide range of actors". See UN Human Rights Committee, General comment No. 34, "Article 19: Freedoms of opinion and expression", 102nd session, Geneva, CCPR/C/34, 12 September 2011, point 44.

[16] European Convention for the Protection of Human Rights and Fundamental Freedoms, article 10, § 1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers […]".

[17] European Court of Human Rights, case of *Steel and Morris v. the United Kingdom*, 15 February 2005, n° 68416/06, § 89.

[18] European Court of Human Rights, case of *Vides Aizsardzības Klubs v. Latvia*, 27 May 2004, n° 57829/00, § 42.

[19] European Court of Human Rights, case of *Tarsasag a szabadsagjogokert v. Hungary*, 14 April 2009, n° 37374/05, § 27.

[20] European Court of Human Rights, case of *Karsai v. Hungary*, 1 December 2009, n° 5380/07, § 35.

[21] European Court of Human Rights, case of *Bartnik v. Poland*, 11 March 2014, n° 53628/10, §§ 26-27; European Court of Human Rights (gd ch.), case of *Magyar Helsinki Bizottsag v. Hungary*, 8 November 2016, n° 18030/11, § 168.

not journalists, and should not therefore attract the high level of protection afforded to the press under Article 10. The Court considers, however, that in a democratic society even small and informal campaign groups, such as London Greenpeace, must be able to carry on their activities effectively and that *there exists a strong public interest in enabling such groups and individuals outside the mainstream to contribute to the public debate by disseminating information and ideas on matters of general public interest* such as health and the environment"[22]. In its judgment in the *Buivids* case, the Court of Justice of the European Union followed the lead of the European Court of Human Rights. Without stating it explicitly, the judgment shows that in its view anyone can act as a "watchdog of democracy". The Court considers that a person who filmed a statement on police premises and then posted it on *YouTube* can, as such, engage in journalistic activities[23].

Nevertheless, in the jurisprudential and doctrinal trends defending the broad meaning of the notions of "journalism", "journalist" and of "journalistic purposes", two approaches have emerged: on the one hand, a very broad interpretation assimilating journalistic purposes to freedom of expression (point B below) and, on the other hand, a broad interpretation paying special attention to the existence of a public debate/general interest criterion (point C below).

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[22] European Court of Human Rights, case of *Steel and Morris v. the United Kingdom*, 15 February 2005, n° 68416/06, § 89 (emphasis added). Furthermore, the Court mentions that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of general interest is subject to the provision that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism, and *the same principle must apply to others who engage in public debate*" (§ 90) (emphasis added).

[23] See C.J., case of *Buivids*, 14 February 2019, C-345/17, points 48-69. See in particular points 55 and 56: "[…] the fact that Mr Buivids is not a professional journalist does not appear to be capable of excluding the possibility that the recording of the video in question and its publication on a video website, on which users can send, watch and share videos, may come within the scope of that provision [the one establishing the derogatory regime for personal data processing for journalistic purposes]. In particular, the fact that Mr Buivids uploaded the recorded video online on such an internet site, in this case www.youtube.com, cannot in itself preclude the classification of that processing of personal data as having been carried out 'solely for journalistic purposes', within the meaning of Article 9 of Directive 95/46". See also Recommendation CM/REC(2018)1[1] of the Committee of Ministers of the Council of Europe to member States on media pluralism and transparency of media ownership, adopted on 7 March 2018: "The media play an essential role in a democratic society, by widely disseminating information, ideas, analysis and opinions, acting as public watchdogs and providing forums for public debate. Traditional media continue to play these roles in the evolving multimedia ecosystem, but other media and non-media actors, from multinational corporations to non-governmental organisations and individuals, increasingly carry out such roles as well. All such actors should be accountable to the public in a manner appropriate to the roles they play in relation to the free circulation of information and ideas. Effective self-regulatory systems can enhance both public accountability and trust".

B. Assimilation of journalistic purposes to the freedom of expression

The first approach has been reflected in the case law of the Court of Justice of the European Union on the derogatory regime for personal data processing for journalistic purposes, still under the aegis of Article 9 of Directive 95/46/EC (which was the equivalent of Article 85 GDPR). In this context, after having specified that the beneficiaries of the derogatory regime were not limited to media undertakings but are extended to "every person engaged in journalism"[24], the Court of Justice defined the "journalistic purposes" in terms of an activity consisting of "the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them"[25]. Such an interpretation is very broad in scope, which means that one falls within the scope of the derogatory regime as soon as an information, idea or opinion is disclosed to the public, regardless of whether it is on a subject matter of general interest and/or contributing to a public debate[26]. This approach therefore assimilates journalistic activity with the pure and simple exercise of freedom of expression[27].

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[24] C.J. (gd ch.), case of *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16 December 2008, C-73/07, point 58; C.J. (2nd ch.), case of *Buivids*, 14 February 2019, C-345/17, point 52.

[25] C.J. (gd ch.), case of *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, 16 December 2008, C-73/07, point 61. There are also supporters of this very broad interpretation on the authors' side. For example, Quentin Van Enis presents the notion of "journalist" in an extremely broad sense to include "any person who intends to disclose ideas or information to the public". See Q. Van Enis, « La liberté d'expression des 'journalistes' et des autres 'chiens de garde' de la démocratie », in *Six figures de la liberté d'expression* (sous la dir. de A.-C. Rasson, N. Renuart et H. Vuye), Limal, Anthémis, 2015, p. 12.

[26] On this criterion of a contribution to a public debate, see European Court of Human Rights (gd ch.), case of *Fressoz and Roire v. France*, 21 January 1999, n° 29183/95, § 50; European Court of Human Rights, case of *Leempoel & S.A. ED. Ciné Revue v. Belgium*, 9 November 2006, n° 64772/01, §§ 68, 72, 79 and 82; European Court of Human Rights (gd ch.), case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 27 June 2017, n° 931/13, §§ 174-175. Over time, the Court has, at times, doubled the criterion of public debate with a condition of enrichment of this public debate. Thus, sometimes, although faced with a matter of general interest, the Court may refuse the increased protection conferred on the press where there is no added value for the debate of general interest. On this point, see V. Junod, « La liberté d'expression du *Whistleblower* », note sous Cour eur. D.H. (gde ch.), arrêt *Guja c. Moldavie*, 12 février 2008, *Rev. trim. dr. h.*, 77/2009, p. 237; Q. Van Enis, *La liberté de la presse à l'ère numérique*, Bruxelles, Larcier, 2015, pp. 184-193.

[27] C. de Terwangne, « Les dérogations à la protection des données en faveur des activités de journalisme enfin élucidées », obs. under C.J.U.E. (gd ch.), case of *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia OY,* 16 December 2008, C-73/07, *R.D.T.I.*, n° 38/2010, p. 139.

In our view, such a very broad definition of the scope of the derogatory regime for journalistic purposes is undesirable for several reasons. On the one hand, as we have indicated (see *supra* point II, A), the dissemination of information is only one of the phases making up journalistic activity and is not in itself sufficient to be akin to journalism. On another hand, it must be emphasised that what makes it possible to distinguish freedom of expression from freedom of the press[28] is precisely this public interest criterion. Moreover, in this respect, where freedom of the press is at stake, the European Court of Human Rights offers enhanced protection against interferences compared to the "mere exercise" of freedom of expression[29].

Bringing any communication to the public into the field of journalism is not without important legal implications from a data protection perspective. Anyone who disseminates information to the public would be granted the exemption regime that has been designed for those engaged in journalistic activities. The reason for granting such a derogation to those who work as journalists – or as "watchdog of democracy" – is to ensure a balance of rights, to respond to the public's right to information on matters of general interest and to allow the press to play its role as a "watchdog". This role would inevitably be hampered by elements of the data protection regime such as the transparency obligations vis-à-vis the persons on whom information is collected, the rights conferred to these data subjects, the limitations on the processing of sensitive data and of data relating to criminal convictions or the regime of transborder data flows (see *infra*, point III). In the general press regime, if specific rights are granted to "journalists", it is in order to enable them to exercise their

[28] Under Belgian Law, the freedom of the press is seen as the "corollary" of the freedom of expression. See Cass., 28 mars 1839, *Pas.*, 1839-1840, I, p. 55; Cass., 21 décembre 1903, *Pas.*, 1904, I, p. 85; Cass., 9 décembre 1981, *Pas.*, 1982, I, p. 482, cited by J. Englebert, *La procédure garante de la liberté de l'information*, Limal, Anthémis, 2014, pp. 176 and 190. See also C.A., case n° 91/2006 of 7 June 2006, B.11.2; Cass. (2d ch.), 22 February 1864, *Pas.*, 1864, I, p. 102; Cass. (1st ch.), 29 June 2000, *Pas.*, 2000, I, p. 1222; Cass. (3d ch.), 28 June 2004, *A&M*, 2005, p. 73; Brussels (4th ch.), 26 December 1863, *Pas.*, 1864, II, p. 53. In the same sense, see also Declaration of the Committee of Ministers of the Council of Europe on the protection of freedom of expression and freedom of assembly and association with regard to privately operated Internet platforms and online service providers, adopted on 7 December 2011; Recommendation CM/Rec(2018)1[1] of the Committee of Ministers to member States on media pluralism and transparency of media ownership, adopted on 7 March 2018.

[29] M. Afroukh, *La hiérarchie des droits et libertés dans la jurisprudence de la Cour européenne des droits de l'homme*, Bruxelles, Bruylant, 2011, pp. 351-354. European Court of Human Rights, case of *Tillack v. Belgium*, 27 November 2007, n° 20477/05, § 55; European Court of Human Rights, case of *Ressiot and others v. France*, 28 June 2012, n° 15054/07 and 15066/07, § 101. In the same sense, see also European Court of Human Rights (gd ch.), case of *Stoll v. Switzerland*, 10 December 2007, n° 69698/01, §§ 105-106.

role serenely and effectively. This applies, for example, to the right to confidentiality of journalistic sources. In return for these rights and protections, the beneficiaries have duties and responsibilities[30]. It would be wise to keep the notion of "journalistic purposes" linked to the role assumed by the press and by the ones assimilated to it. If not, this special protection would be granted to those who simply exercise their freedom of expression. However, it is justified to favour freedom of expression when matters of public interest are at stake and to allow data protection principles to be flouted for this purpose. This justification could fall out if there is no public interest in what is broadcast (when one publishes his friends' pictures on *Instagram*, posts a video of her teacher on *Facebook*, or reveals her boss' sexual orientation on *Twitter*, for example). It is clear that the weight in the balance of interests is not the same in the two cases.

C. The requirement of a public debate/general interest condition

The second approach is based on the case law of the European Court of Human Rights, which has also had to rule in the judicial saga of the *Satamedia* case[31] previously brought before the Court of Justice of the European Union[32]. According to the Strasbourg Court, the mere disclosure of information is not sufficient to fall under the scope of the press freedom; the link of the disseminated information with a subject matter of general interest is paramount in order to benefit from the enhanced

[30] European Court of Human Rights, case of *Handyside v. the United Kingdom*, 7 December 1976, n° 5493/72, § 49; European Court of Human Rights (gd ch.), case of *Fressoz and Roire v. France*, 21 January 1999, n° 29183/95, § 52; European Court of Human Rights, case of *Bergens Tidende and others v. Norway*, 2 May 2000, n° 26132/95, § 53; European Court of Human Rights (gd ch.), case of *Pedersen and Baadsgaard v. Denmark*, 17 December 2004, n° 49017/99, § 78.

[31] European Court of Human Rights (gd ch.), case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 27 June 2017, n° 931/13. For commentaries see D. Voorhoof, « No journalism exception for massive exposure of personal taxation data », *Strasbourg Observers*, 5 juillet 2017, available at https://strasbourgobservers.com/2017/07/05/no-journalism-exception-for-massive-exposure-of-personal-taxation-data/; Q. Van Enis, « Protection des données et liberté d'expression : (re)diffusion de données publiques ne rime pas (toujours) avec activités journalistiques », obs. under E.C.H.R. (gd ch.), case of *Satakunnan Markkinapörssi Oy et Satamedia Oy c. Finlande*, 27 juin 2017, *Rev. trim. dr. h.*, 2018, pp. 953-984; M. Jozwiak, « The Scale Matters: The ECtHR Grand Chamber Finds That Prohibition of Mass Publication of 'Raw' Taxation Data Does Not Infringe Right to Freedom of Expression », *EDPL*, 2018/1, p. 6; C. de Terwangne, « Internet et la protection de la vie privée et des données à caractère personnel », in Van Enis Q. & de Terwangne C. (ed.), *L'Europe des droits de l'homme à l'heure d'Internet,* Bruxelles, Larcier, 2019, pp. 358-361.

[32] See *supra*.

protection of the press freedom[33]. This position is also in line with the opinion of Advocate General Kokott, which had not been followed by the Court of Justice in the *Satamedia* case. Indeed, Advocate General Kokott believes that the journalistic purpose is met when someone aims "to communicate information and ideas on matters of public interests"[34].

In the same way, attention should be drawn to the noticeable shift in the interpretation of the notion of "journalistic purposes" that has taken place recently in the judgment of the Court of Justice in the *Buivids* case. In this context, the Court had to consider, among other things, whether the derogatory regime for personal data processing for journalistic purposes could be applied in a situation where someone films police officers while taking statements at a police station and then publishes it on a video-sharing platform (*Youtube*)[35]. While in paragraph 53 of the judgment the Court of Justice takes up the definition of journalistic purposes established in the *Satamedia* case[36], it subsequently makes an interesting clarification in this regard. Indeed, according to the Court, "the view cannot be taken that all information published on the internet, involving personal data, comes under the concept of 'journalistic activities' and

[33] European Court of Human Rights (gd ch.), case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*, 27 June 2017, n° 931/13, §§ 174-178. According to Quentin Van Enis, "The criterion of contribution to a debate of public interest, which is central to the reasoning of the Grand Chamber, was probably the least appropriate one to apply in the circumstances of this case, since the Finnish legislature itself seemed to have decided that public access to tax data best served the public interest…" (Q. Van Enis, « Protection des données et liberté d'expression : (re)diffusion de données publiques ne rime pas (toujours) avec activités journalistiques », *op. cit.*, p. 983). But for Cécile de Terwangne, "It is interesting to note that while the publication of the tax data in question is organised by law in Finland, where it is socially accepted and originally based on dissemination in paper newspapers, the introduction of electronic services exploiting this publication and giving it a completely different dimension has probably upset the balance of values previously achieved and led to the rejection of dissemination by the plaintiffs and, ultimately, by the Finnish Supreme Administrative Court. This judicial episode illustrates the caution that must be exercised when considering "modernising" services for the provision or dissemination of information by shifting them from traditional media (print or otherwise) to the Internet or digital applications. Such a switchover inevitably entails the need to reconsider the balance achieved so far between rights and interests sacrificed for the benefit of other values." (C. de Terwangne, « Internet et la protection de la vie privée et des données à caractère personnel », *op. cit.*, pp. 360-361).

[34] Opinion of the Advocate General Kokott delivered on 8 May 2008 in the case C-73/07 *Tietosuojavaltuutettu v. Satakunnan Markkinapörssi Oy and Satamedia Oy*, ECLI:EU:C:2008:266, points 68 and 106.

[35] C.J. (2nd ch.), case of *Buivids*, 14 February 2019, C-345/17, point 48.

[36] *Ibid.*, point 53: "It follows from the Court's case-law that 'journalistic activities' are those which have as their purpose the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them".

thus benefits from the exemptions or derogations provided for in Article 9 of Directive 95/46"[37]. The Court further states that, to check whether the recording and the publication of the video had for sole purpose "the disclosure to the public of information, opinions or ideas"[38], the referring court "may, in particular, take into consideration the fact that, according to Mr Buivids, the video in question was published on an internet site *to draw to the attention of society* alleged police malpractice which, he claims, occurred while he was making his statement"[39]. Through these statements and notably the words "to draw to the attention of society", it could be derived that the definition of "journalistic purposes" adopted by the Court of Justice should no longer be equivalent to the sole disclosure of information, opinion or idea to the public, but would be coupled by a condition of "public debate". In this way, the person exercising a journalistic activity by disclosing information to the public should pursue the objective of drawing society's attention to a particular issue.

It is interesting to note that, at the level of journalistic self-regulation, the same approach has been followed by the Council for Journalistic Deontology of the Belgian French-speaking and German-speaking media. Indeed, in the *Code of Journalistic Ethics* adopted by this self-regulatory body, "journalist" is defined as "any person who contributes directly to the collection, editorial processing, production and/or dissemination of information, through a media outlet, intended for the public *and in the interest of the public*"[40].

III. Exemptions for personal data processing for journalistic purposes

According to Article 85 of the GDPR, data processing carried out solely for journalistic purposes (or for purpose of academic, artistic or literary expression) benefit from partial exemptions and derogations to the data protection rules. Article 85 of the GDPR states:

"Processing and freedom of expression and information

[37] *Ibid.*, point 58.
[38] *Ibid.*, point 59.
[39] *Ibid.*, point 60 (emphasis added).
[40] CDJ's Code of Journalistic Ethics, adopted by the Council of Journalistic Ethics (CDJ) on 16th October 2013, https://www.lecdj.be/wp-content/uploads/CDJ-code-deontologie-anglais.pdf (emphasis added).

> 1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.
> 2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations from Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organisations), Chapter VI (independent supervisory authorities), Chapter VII (cooperation and consistency) and Chapter IX (specific data processing situations) if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information
> 3. [...]".

A series of provisions may not be applied to such processing if necessary to ensure a balance with the protection of freedom of expression[41]. As this balance may vary regarding cultural divergences, the European legislator has left it to each national legislator to weigh up the competing fundamental rights and determine the point of balance.

The only indication given by the European legislator lies in Recital No. 153 of the GDPR stating that reconciling the right to the protection of personal data with the right to freedom of expression and information requires to provide the necessary derogations or exemptions "in particular [for] the processing of personal data in the audiovisual field and in news archives and press libraries". This clarification does not shed as much light as desired, given that the limits of the notion of "the audiovisual field" are unclear in a world of technological convergence where new players and new services have emerged; moreover, "news archives" as well as "press libraries" echo realities with blurred lines, as the world of news

[41] If the first paragraph of Article 85 of the GDPR does not mention the "necessity test" to reconcile both competing rights, "even without the express mention of a necessity requirement, since it is always a question of balancing two fundamental rights of equal value, non-hierarchical and concomitantly enshrined in the Charter, proportionality would in any case have continued to guide the search for an adequate balance between freedom of expression and data protection" (Q. Van Enis, « La conciliation entre le droit à la liberté d'expression et le droit à la protection des données à caractère personnel dans le RGDP », in C. de Terwangne et K. Rosier (ed.), *Le Règlement général sur la protection des données (RGPD/GDPR). Analyse approfondie*, Bruxelles, Larcier, Collection du CRIDS, 2018, p. 773) (free translation). See also, S. Van Drooghenbroeck, « Article 52-1. Limitations aux droits garantis », in F. Picod et S. Van Drooghenbroeck, *Charte des droits fondamentaux de l'Union européenne – Commentaire article par article*, Bruxelles, Bruylant, 2018, p. 1100, n° 30.

and press is now defined more by content than by (professional) players (see *supra* point I).

As a result, there is no homogeneity in this area in the European Union. According to Recital No. 153 of the GDPR, "where such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply".

Persons engaged in journalistic activities are thus included in the scope of the GDPR, but they benefit from an easing of certain rules. These are rules the application of which would jeopardise the proper achievement of the journalistic purpose. Article 85, § 2 allows Member States to provide for a very broad regime of exceptions since this regime may derogate from all the principles of protection, the rights of the data subjects, the obligations of the controller and of the processor, the regime for transborder data flows, the powers of supervisory authorities and specific regimes.

The only limit is that only those exemptions which are genuinely necessary to reconcile the right to protection of personal data and freedom of expression and information are allowed[42].

According to Quentin Van Enis, "even if the exercise was a delicate one, the European legislator could have gone further in the search for a lowest common denominator between the different Member State"[43]. In this minimum common denominator, exemption should for example be given from the transparency duties[44] to allow effective investigative journalism. Such exemptions or restrictions could have been uniformly provided by the European legislator instead of leaving the task on Member States shoulders.

A final thought will conclude this analysis of the system of exemptions of the GDPR. It focuses on the first paragraph of Article 85, which appeared during the legislative elaboration of the GDPR. While the initial proposal of the Commission mentioned only the exemptions and derogations that Member States had to provide "for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression"[45], the

[42] Article 85, § 2, *in fine*, of the GDPR.

[43] Q. Van Enis, « La conciliation entre le droit à la liberté d'expression et le droit à la protection des données à caractère personnel dans le RGDP », *op. cit.*, p. 788 (free translation).

[44] *Ibid.*

[45] 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), COM/2012/011 final - 2012/0011 (COD), Article 80(1).

final version of Article 85 contains an additional paragraph (which has become paragraph 1) requiring Member States to reconcile the right to the protection of personal data with the right to freedom of expression and information. In addition to the specific exemptions to be provided for journalistic, artistic, literary or academic expression (Article 85, § 2), exemptions from certain data protection rules have to be provided in national law where needed when individuals exercise their freedom of expression and information (Article 85, § 1). One can see in that legislative approach a "nesting system"[46] addressing the necessary reconciliation of the fundamental rights in paragraph 1 before focusing in paragraph 2 on specific expressions. Hence, one can deduce that "there are other hypotheses of exercise of freedom of expression than journalistic and academic, artistic or literary expression which could justify an adjustment in the rules it establishes"[47]. We can think for example of cases where an individual expresses himself on *Facebook* or *Twitter* without this falling into the category of journalistic expression (for example, a comment on the last book he read or on the Prime Minister's new hairstyling) or where he gives his opinion on the services of a professional (hairdresser, by star rating and comment on Google search, for example). The GDPR regime is unlikely to pose a problem in these cases, except in particular for the obligation to inform the data subjects (author of the book, Prime Minister or hairdresser) mentioned in the comments. Such a requirement would certainly have a chilling effect on the author of the comments. So certain exemptions from the data protection rules, notably the obligation to inform data subjects, would be justified in such cases even if they would not be as wide as for expressions linked to matters of public interest. Member States are invited by Article 85, § 1 of the GDPR to provide for the exemptions necessary to reconcile the right to data protection with the right to freedom of expression and information also for non-journalistic expression. If certain Member States have made the double listing of exemptions depending on whether data processing is for journalistic purpose or not[48], other Member States do not provide any

[46] Q. Van Enis, « La conciliation entre le droit à la liberté d'expression et le droit à la protection des données à caractère personnel dans le RGDP », *op. cit.*, p. 782.

[47] *Ibid.*, p. 784.

[48] See for example the Finnish law Section 27 on the Processing of personal data for journalistic, academic, artistic or literary purposes: "With a view to safeguarding freedom of expression and information, Article 5(1)(c)–(e), Articles 6 and 7, Articles 9 and 10, Article 11(2), Articles 12–22, Article 30, Article 34(1)–34(3), Articles 35 and 36, Article 56, Article 58(2)(f), Articles 60–63 and Articles 65–67 GDPR shall not apply to the processing of personal data for journalistic purposes only, or for academic, artistic or literary creation.

Article 27 GDPR shall not apply to the processing of personal data in relation to activities covered by the Act on *freedom of expression* in mass communications (460/2003)

exemptions in case of the use of freedom of expression or information not covered by the journalistic-purpose category. Belgium is one of these States, as well as France, Luxembourg, the Netherlands, the United Kingdom, etc.

IV. Belgian Data Protection Act

A. Definition of processing for journalistic purposes

In Article 24, § 1, of the Belgian Data Protection Act of 30 July 2018 on the protection of individuals with regard to the processing of personal data, the Belgian legislator has proposed a definition of "processing for journalistic purposes"[49].

The legislator had initially expressly linked the notion of journalistic purpose with the general interest. Thus, the draft bill included in the definition of "data processing pursuing a journalistic purpose" any "processing intended to collect, edit, produce or disseminate information of general interest, through the media, for the benefit of the public"[50]. However, this wording was criticised by the Belgian Council of State, which pointed

[Act applicable to "information, an opinion or some other message provided to the public by means of [...] an electronic communications network"]. Articles 44–50 GDPR shall not apply if their application would violate the *right to freedom of expression or freedom of information*.

With a view to safeguarding freedom of expression and information, Article 5(1)(a) and (b), Article 5(2), Articles 24–26, Article 31, Articles 39 and 40, Article 42, Articles 57 and 58, Article 64 and Article 70 GDPR shall apply only where relevant in the case of processing of personal data exclusively for journalistic purposes or for academic, artistic or literary creation."

[49] It should be pointed out that there is no legal definition of the notion of "journalist" in the Belgian Law of 30 December 1963 on the recognition and protection of the quality of professional journalist. This law simply lists the five cumulative conditions to be fulfilled in order to benefit from the quality of "professional journalist". It should in no way be interpreted as containing a legal definition of the notion of "journalist" which would be limited to professionals. Moreover, the Belgian Council of State was careful to make it clear that the creation of such a quality of "professional journalist" did not confer any monopoly or particular advantage and remained without influence on the right of every person to write in a newspaper. See the Belgian Act of December 1963 on the recognition and protection of the quality of professional journalist, *M.B.*, 14 January 1964, art. 1; Belgian Council of State, Opinion of 11 December 1962 on a preliminary draft law on the protection of the quality of professional journalist, *Doc. parl.*, Sénat, 1962-1963, p. 6.

[50] Preliminary draft law on the protection of individuals with regard to the processing of personal data, *Doc.*, Chambre, 54-3126/001, p. 272.

out, in line with the European Court of Human Rights' case law[51], that the increased protection of freedom of expression afforded to journalists was justified when they deal with subjects of general interest or when they make a contribution to a public debate on a matter of general interest[52]. According to the Council of State, it does not follow from this case law that the information itself must be of direct general interest: "This does not mean, however, that only the processing of information which is itself directly of "general interest" is involved in the exercise of journalistic activity"[53].

The legislator has consequently modified its definition. Under the terms of Article 24, § 1, of the Data Protection Act, "processing of personal data for journalistic purposes" should be understood as "the preparation, collection, drafting, production, dissemination or archiving [of personal data] for the purposes of informing the public, using any media and where the controller imposes rules of journalistic ethics on him/herself"[54].

Although the notion of general interest is no longer explicitly present in the definition of journalistic purposes, it is nevertheless hidden behind the text through the reference made in the preparatory works of the Act to the case law of the European Court of Human Rights referred to above. Moreover, according to these preparatory works, the reference to the general interest is to be found through the rules of journalistic ethics. Indeed, the legislator mentions the Code of Journalistic Ethics adopted by the Council for Journalistic Deontology of the Belgian French-speaking and German-speaking media, specifying that this Code "defines the purpose of journalistic processing as being 'the duty to inform the public about matters of public interest'"[55]. It adds that information of general interest is "information that raises one or more issues for society as a whole or for one of its components"[56].

To sum up, a reading of the Belgian Act enlightened by its preparatory works leads to consider a processing as pursuing journalistic purposes where the processing consists in the collection, drafting, production,

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[51] Among many decisions, see European Court of Human Rights (gd ch.), case of *Jersild v. Denmark*, 30 September 1994, n° 15890/89, § 31; European Court of Human Rights (gd ch.), case of *Fressoz and Roire v. France*, 21 January 1999, n° 29183/95, § 50.

[52] Council of State, Opinion n° 63.192/2 of 19 April 2018 on the preliminary draft law on the protection of individuals with regard to the processing of personal data, *Doc. parl.*, Chambre, 2017-2018, Doc 54-3126/001, p. 429.

[53] *Ibidem*, p. 429.

[54] Free translation.

[55] Preliminary draft law on the protection of individuals with regard to the processing of personal data, Explanatory Memorandum, 2017-2018, 54-3126/001, p. 50.

[56] *Ibid.*

dissemination or archiving of personal data for the purpose of informing the public, through any media, on a subject of general interest or for the purpose of contributing to a public debate on a matter of general interest, and where the controller imposes rules of journalistic ethics on him or herself.

It is important to consider who is bound by the standards of journalistic ethics. There is no doubt that the news professionals are subject to it. On the other hand, the question of whether it is desirable that non-professionals, such as neo-journalists and all the new information actors, comply with these ethical rules seems uncertain. The question is controversial among authors: while some are in favour of extending the scope of journalistic ethics to all persons who exercise a journalistic activity and not only professionals[57], others consider that only professionals should be subject to these rules[58]. In our opinion, the decisive criterion to determine the persons who have to comply with journalistic ethics should be the activity actually carried out and not the possible status/quality of "professional". It follows from this that all persons exercising journalistic activity have to respect all the duties and responsibilities that go hand in hand with the granting of the enhanced rights and protections conferred on press freedom, regardless of the status of the person or the medium of dissemination used. In this respect, it is interesting to

[57] J. Demarteau & L. Duwaerts, *Droits et devoirs du journaliste*, Bruxelles, Maison de la presse, 1952, pp. 14-15; S. Hoebeke et B. Mouffe, *Le droit de la presse : presse écrite, presse audiovisuelle, presse électronique*, 3e éd., Limal, Anthémis, 2012, p. 843; Q. Van Enis, *La liberté de la presse à l'ère numérique*, Bruxelles, Larcier, 2015, pp. 436-456. Stéphane Hoebeke and Bernard Mouffe qualify their position by stating that it is obvious that an ordinary citizen will never have to comply with ethical standards internal to an established media, unlike a professional journalist who would be linked to this media, but that he/she must nevertheless "follow the basic rules of prudence related to the public dissemination of information or criticism". In addition, the OSCE Representative on Freedom of the Media expressed the wish that new actors in the field of information could become involved in journalistic self-regulation. See D. Mijatovic, « Shaping policies to advance media freedom: OSCE Representative on Freedom of the Media Recommendations from the Internet 2013 Conference », rec. n° 5, available at www.osce.org/fom/100112: "Anyone involved in the production of information of public interest, including bloggers, web portals, etc., shall be allowed and encouraged to participate in self-regulatory mechanisms".

[58] J. Ceuleers, "Van journalisten en journalisten", *A&M*, 2008/4, p. 275; J. Ceuleers, "Anonieme bronnen: een gevaar voor het journalistieke bronnengeheim", *A&M*, 2013/6, pp. 441-445; D. Cornu, *Tous connectés ! : Internet et les nouvelles frontières de l'info*, Genève, Labor et fides, 2013, pp. 47 and 52; Remarks held by D. Cornu during the Conference-Discussion « La déontologie des journalistes en question », with D. Cornu in dialogue with M. de Haan, B. Delvaux and J.-J. Jespers, 1 February 2012, CDJ Brussels, p. 8. These authors believe that non-professionals can, however, comply with ethical standards out of personal conviction, but that no constraints exist.

note that in Belgium, for the media of the French and German-speaking Communities[59], the Council for Journalistic Deontology describes its field of action in a similar approach, stating that "for journalists, the ethical obligation arises from the exercise of an activity that has an impact on the society. It is therefore not the fact of being a professional of journalism that forces to respect ethics, nor the fact of being a member or not of a professional association; it is the fact of disseminating information of journalistic nature to the public [...] The CDJ is therefore interested in all people who do journalism, whether it is their main occupation or not. The CDJ intends to cover all journalistic activities, including all acts and behaviour in the different stages of the process of providing information"[60]. Moreover, the Belgian case law has already had the occasion to hold that press councils are competent to rule on compliance with the rules of journalistic ethics by non-professionals engaged in journalistic activities (i.e. a blogger)[61]. The Brussels Court of Appeal has thus considered that the fact that the blogger was neither a professional nor a member of a journalists' association was irrelevant and that the *Raad voor de journalistiek* (i.e., the press council in Belgium for media of the Flemish-speaking Community) could freely express itself on the journalistic quality of the articles written and disseminated by a blogger[62]. The Court further adds that "given the importance that the *Raad voor de journalistiek*

[59] It should be noted that for the media of the Flemish community in Belgium, the *Raad voor de journalistiek* adopts a similar reasoning to that of the *Conseil de Déontologie Journalistique* in the preamble to its rules of procedure. See https://www.rvdj.be/node/64. The *Raad voor de journalistiek* has already had to deal with a case in which a blogger who was neither a professional journalist nor a member of a journalists' association was accused of violating ethical standards. See Opinion of the *Raad voor de journalistiek*, case *Wuyts v. Verbeeck*, 9 July 2009. See also Opinion of the *Raad voor de journalistiek*, case of *Pyis v. Ernst*, 13 March 2008; Opinion of the *Raad voor de journalistiek*, case *D.S. v. Morsum-Magnificat.be and Verbeeck*, 14 January 2016; Opinion of the *Raad voor de journalistiek*, case of *Lenssens v. Deconsument.com*, 11 February 2016.

[60] See Council of Journalistic Ethics, « Définition & Champ d'action du CDJ », available at https://www.lecdj.be/fr/deontologie/definition-champ-daction-du-cdj/.

[61] Brussels (1st ch.), 28 October 2014, *A&M*, 2015/2, p. 199. It should be noted that, in the same case, the blogger had initially applied to the President of the Court of First Instance of Brussels in summary proceedings to prevent the publication of the future opinion of the *Raad voor de journalistiek*, which was accepted. See Pres. of the Court of First Instance of Brussels, 24 June 2009, *A&M*, 2009/4, p. 448. This interim order was strongly criticised by the authors, in particular for being contrary to the case-law of the European Court of Human Rights relating to Article 10. See D.Voorhoof, « Rechter legt bommetje onder de Raad voor de Journalistiek », 1 July 2009; D. Voorhoof, « 'Onafhankelijk' web-journalist kan Raad voor de Jounalistiek niet het zwijgen opleggen », obs. under Brussels (1e ch.), 28 October 2014, *Juristenkrant*, 2015, liv. 303, pp. 4-5; E.Werckers, « De omgang van de pers met gebruikersinhouden : ''de bluts met de buil'' ? », *A&M*, 2010/1, pp. 19-20.

[62] Brussels (1st ch.), 28 October 2014, *A&M*, 2015/2, p. 199.

represents in the media world in terms of respect for journalistic ethics and the pressure at European level to act on self-regulation, a limitation of the *Raad*'s right to freedom of expression would not be proportionate to the objective pursued"[63].

Furthermore, we could consider resolving the debate as to the personal scope of application of the rules of journalistic ethics by analogy to the "general standard of prudence" of extra-contractual liability. We agree with Jacques Englebert when he considers that the essence of the rules of journalistic ethics is in practice not different from that of the general obligation of prudence contained in Articles 1382 and 1383 of the Belgian Civil Code: the journalistic ethics that "journalists" must respect have a content similar to the rules of civil liability under ordinary law which apply to everyone[64]. There is therefore no doubt that journalistic ethics merge with the regime of extra-contractual liability. Indeed, the standards of journalistic ethics contain a series of prescriptions which can be analysed in the light of the paradigm of the "normally prudent and diligent *bonus pater familias*": seek and respect the truth; verify information; rectify any information disseminated which proves to be inaccurate; exercise prudence, honesty and loyalty in the dissemination of information; not use unfair methods such as plagiarism and criminal offences (harassment, false identity, deception, ...); and also respect the rights of others. In the same vein, the Brussels Court of First Instance stated that "journalists' obligations arising from Article 1382 of the Civil Code also find their counterpart in the obligations imposed by Codes of ethics on a journalist" and that "the investigation into a possible infringement of these ethical rules, insofar as they are relevant, therefore does not differ in all cases from the investigation into a possible infringement of Article 1382 of the Civil Code"[65].

Finally, the European Court of Human Rights also considers that anyone exercising the role of "watchdog of democracy" by the dissemination of information and ideas on matters of general public interest and wishing to benefit from the high level of protection conferred by Article 10 of the Convention must observe the rules of journalistic ethics. It thus declared in a judgement *Steel and Morris v. the United Kingdom* that "the safeguard afforded by Article 10 to journalists in relation to reporting on issues of

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[63] *Ibid.*, p. 200.

[64] J. ENGLEBERT, « Le statut de la presse : du « droit de la presse » au « droit de l'information » », *Rev. dr. U.L.B.*, 2007/1, pp. 284-286. See also B. MOUFFE, *La responsabilité civile des médias*, Waterloo, Kluwer, coll. Pratique du droit, n° 57, 2014, p. 1; P. VALCKE et D. VOORHOOF, *Handboek mediarecht*, 4e ed., Bruxelles, Larcier, 2014, p. 719.

[65] Civ. Brussels (20e ch.), 13 December 2011, *A&M*, 2012/6, p. 598; Civ. Brussels (20e ch.), 27 March 2012, *A&M*, 2012/6, p. 603.

general interest is subject to the provision that they act in good faith in order to provide accurate and reliable information in accordance with the ethics of journalism, and *the same principle must apply to others who engage in public debate*"[66]. With this last clarification, the Strasbourg Court is crystal clear as to the personal scope of the rules of journalistic ethics: it extends to anyone exercising the role of "watchdog of democracy".

B. Exemptions and Derogatory Regime

As mentioned above, the possibilities for exemptions and derogations are largely open by Article 85 of the GDPR, although only those necessary to reconcile the right to protection of personal data and freedom of expression and information are admitted.

Article 24 of the Belgian Data Protection Act therefore contains a series of exemptions to the protection regime. Exemptions concern the conditions for consent and specifically for a child's consent, the rules related to the processing of sensitive and criminal data, the rights granted to the data subject, the obligations of the controller and processor, the transborder data flows, and the power of supervisory authorities. While the exemptions concerning consent, sensitive data and the data subject's rights are formulated as systematic exemptions, the ones relating to the obligations, the transfers of data and the powers of supervisory authorities apply only in certain circumstances. As Article 24 of the Belgian Data Protection Act must respect Article 85 of the GDPR, the exemptions it provides should apply only "if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information".

It should be noted that the very important Articles 5 and 6 of the GDPR, which set out all the protection principles (Article 5) and list the legal bases that the processing of personal data must have (Article 6), remain applicable.

1. Consent

Articles 7 and 8 of the GDPR do not apply to the processing of personal data carried out for journalistic purposes[67]. These two articles deal with consent (Article 7) and children's consent with regard to information society services (Article 8).

[66] European Court of Human Rights, case of *Steel and Morris v. the United Kingdom*, 15 February 2005, n° 68416/06, § 90 (emphasis added).

[67] Article 24, § 2, of the Belgian Data Protection Act of 2018.

In fact, this derogation from Articles 7 and 8 of the GDPR was introduced at the request of the Council of State, which pointed out that the legal basis for data processing carried out for journalistic purposes could be, in certain cases, the data subject's consent, in particular during interviews[68]. The Council of State then declared, without explaining why this was justified, that it was necessary to introduce a derogation from the common law regime and in particular, to abolish the application of Article 7 of the GDPR to the processing carried out for journalistic purposes. This means that the right to withdraw the consent given for data processing provided at article 7, § 3, of the GDPR, no longer exists in the case of processing for journalistic purposes. This observation must be tempered by the fact that Article 17 of the GDPR remains applicable. It provides that the data subject has the right to obtain the erasure of personal data concerning him or her if (s)he withdraws consent on which the processing is based[69] and if maintaining the data is not necessary for exercising the right of freedom of expression and information[70]. This means that, in cases where the public's right to information does not override the data subject's interest to have his/her personal data removed, this data will have to be deleted if they were processed with the consent of the data subject who now requests their deletion.

2. Special categories of personal data

Article 24, § 2, of the Belgian Data Protection Act provides that Articles 9 and 10 of the GDPR concerning sensitive and criminal data do not apply to the processing of personal data carried out for journalistic purposes.

This derogation is broader than the similar derogation under the previous Belgian Data Protection Act (the Privacy Act of 8 December 1992). The previous Privacy Act provided that the articles relating to sensitive, medical and criminal data did not apply to the processing for journalistic purposes but only when the processing related to data made manifestly public by the data subject (the political opinion of a candidate for election disclosed by himself during an election campaign, for example) or to data closely related to the data subject's public nature (politician, religious leader, sports personalities, celebrities...) or to the public nature of the

[68] Council of State, Opinion n° 63.192/2 of 19 avril 2018 on a preliminary draft law on the protection of individuals with regard to the processing of personal data, *Doc. parl.,* Ch. repr., 2017-2018, Doc 54-3126/001, p. 430, point 4.2.

[69] Article 17(1)(b) of the GDPR.

[70] Article 17(3)(a) of the GDPR.

fact in which he/she is involved (e.g. judicial news). These restrictions on the derogation reflected a search for a nuanced and subtle balance between competing rights. They are no longer included in the 2018 Act. The preliminary draft bill explicitly included these restrictions. They were dropped without any explanation in the version of the bill tabled in Parliament. One can guess that the legislator preferred to suppress them altogether in reaction to a remark by the Council of State, pointing out the lack of time it had been given to check the compatibility of these limitations on derogations with the case law of the European Court of Human Rights.

This regime therefore now allows anyone who speaks out on a subject of public interest to process sensitive data and criminal data as ordinary data. The application of Articles 5 and 6 of the GDPR still provides a framework for the use of sensitive data in these contexts, but the level of protection for the individuals concerned by the data in question will inevitably be lower. If a blogger reveals information about a data subject's health, sexuality, religious beliefs or past criminal convictions, claiming to rely on his right to freedom of expression to do so (Article 6(1)(f) of the GDPR), the data subject will have to prove that the right to privacy and data protection prevails in order to have such a publication declared unlawful. And since the data subject will no longer benefit (see the following point below) from the right to object, the right to rectify (in case, moreover, it is false), the right to limit the processing (but still the right to erasure, to a certain extent), his/her case will not be made easier...

3. Data subject's rights

For all the data subject's rights, with the exception of the right to erasure (right to be forgotten) – because for the latter, the GDPR itself provides for an exemption when the processing is necessary for the exercise of the right to freedom of expression and information – derogations are provided for in the case of processing for journalistic purposes. Article 24, § 2, of the Belgian Data Protection Act states that "Articles 7 to 10, 11.2, 13 to 16, 18 to 20 and 21.1 of the Regulation do not apply to the processing of personal data carried out for journalistic purposes and for purposes of academic, artistic or literary expression".

The fate of those rights is therefore not the same depending on whether the right to erasure or any other right is involved. The adjective 'necessary' in Article 17 of the GDPR establishing the right to erasure implies that a balance of interests must be struck between the two fundamental rights so that the limitation to the right to erasure is only admitted to the

extent strictly necessary for the right to freedom of expression[71]. Read in isolation, Article 24, § 2, of the Belgian Data Protection Act gives an absolute priority to freedom of expression and information over all the other rights. The systematic nature of such pre-eminence is highly questionable. In what way should all these rights be systematically suppressed for any processing for journalistic purposes? Article 24, § 2, of the Belgian Data Protection Act should undoubtedly be read in conjunction with Article 85, § 2 of the GDPR, which allows Member States to provide for exemptions or derogations from Chapter III (rights of the data subject), "if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information".

The Belgian Data Protection Act exempts the data controller for journalistic purposes from the obligation to impart information to data subjects when collecting data from them (Article 13 of the GDPR) or from a third party (Article 14 of the GDPR). The Explanatory Memorandum states that Article 24, § 2 of the Belgian Data Protection Act "reproduces Article 3(3)(b) [of the 1992 Privacy Act], which is intended to allow investigations to be carried out anonymously, such as investigations under cover of a fictitious identity or investigations in which the purpose of the report is not stated"[72]. Surprisingly, the drafters of the Act state that they have taken over the content of the 1992 Act, but they do not explain the reason why they have not taken over the limitation of the exemption previously provided for in the 1992 Act (where the obligation to provide information was suppressed but only in cases where providing the compulsory information might compromise the collection of data or a planned publication or give indications of the sources of information[73]). This limitation also applied to the right of access to data and is neither included in the Belgian Data Protection Act of 2018.

For the right of rectification of inaccurate data, the right of reply legally protected in the media field[74] could be considered by some as an alterna-

[71] Belgian Privacy Commission, Opinion n° 33/2018 of 11 April 2018 on the preliminary draft law on the protection of individuals with regard to the processing of personal data, p. 55, n° 188. The CJEU stated that "the protection of the fundamental right to privacy requires that the derogations and limitations in relation to the protection of data (...) must apply only in so far as is strictly necessary" (Case C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy, ECLI:EU:C:2008:727 § 56; see also judgment in *Digital Rights Ireland and Others*, C-293/12 and C-594/12, EU:C:2014:238, § 52).

[72] Preliminary Draft Law, Explanatory Memorandum, *op. cit.*, p. 53.

[73] Article 3, § 3, b), 2, of the Belgian Privacy Act of 8 December 1992.

[74] There also exists an ethical duty to rectify erroneous facts published by the press (e.g. Article 6 of the "Code de déontologie journalistique" adopted by the Council for Journalistic Deontology of the Belgian French-speaking and German-speaking media) which is not to be assimilated to the right of reply. Among several divergences, this ethical duty, similarly to

tive way, even if the result is not identical to the one resulting from the exercise of the right of rectification under article 16 of the GDPR[75]. The Council of State claimed that it should not be left to the data protection legislation "to be the seat of a modification of the subtle balance established by the legislator for many years between freedom of information and the right of any person concerned by this information to request the publication of a reply, all the more so as, in the written press, the right of reply, open to any person concerned, is not a right of rectification"[76]. In its presentation of the bill to the Parliament, the government agreed that "insofar as the right to request the publication of a reply is acquired, allowing the right of rectification under certain conditions could undermine the balance between freedom of information and the right of reply"[77]. It is understandable that any confusion between these rights must be

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the right of rectification of Article 16 of the GDPR, refers to inaccurate factual information to the exclusion of opinions and value judgements. As for the right of reply, it applies both to erroneous facts and to opinions and value judgments. The *raison d'être* of this ethical duty arises essentially from the search for and respect for the truth, while that of the right of reply focuses on the protection of the person holding this right. The duty to rectify and the right of reply are held by different persons: while the rectification may be requested by any person, even if he or she has no interest whatsoever, the right of reply belongs to the person named or implicitly designated by the publication or broadcast in question. Moreover, these two prerogatives belong to different authors: while the journalist writes the correction himself, the right of reply is written by the person concerned, who thus delivers his or her own version. Finally, while the rectification enjoys a very flexible regime in its implementation, the conditions of the right of reply are strictly provided for by law. See *Recommandation sur l'obligation de rectification*, adopted by the Council for Journalistic Deontology on 21 June 2017, *Les carnets de la déontologie n° 10*, point 8, https://www.lecdj.be/wp-content/uploads/Carnet-rectification-versionavec-cover.pdf.

[75] For a presentation of the legal protection of the right of reply in Belgium and the shortcomings of this protection on the Internet, see Belgian Senate, Information Report on "Le droit de réponse sur Internet", 29 March 2019, https://www.senate.be/informatieverslagen/6-465/Senat_rapport_droit_de_reponse_sur_internet-2019.pdf, in particular: "the legislation on the right of reply is outdated on several points and does not take account of digital developments" (p. 18), "An extensive application of the Law of 23 June 1961 [Right of Reply Act] to the new media does not seem adequate in several respects, e.g. the requirement of periodicity of the medium may be problematic for the exercise of the right of reply on the Internet. This is also the case as regards the time limit for exercising the right of reply (Articles 1 and 8 of the Act of 23 June 1961), the conditions relating to the publication of the reply (Article 1) and the time limit for publishing the reply. An update of the legislation in this area is more than necessary given the instantaneous, global and universally accessible nature of the Internet" (p. 12). See also M. Isgour, « Le droit de réponse sur Internet : Rapport d'information du Sénat du 29 mars 2019 », *R.D.T.I.*, n° 75/2019, pp. 97-100.

[76] Belgian Council of State, Opinion n° 63.192/2 of 19 April 2018 on the preliminary draft law on the protection of individuals with regard to the processing of personal data, *Doc. parl.*, Ch. repr., 2017-2018, Doc 54-3126/001, p. 432, point 4.6.

[77] Preliminary Draft Law, Explanatory Memorandum, *op. cit.*, p. 54.

avoided and that the balance existing behind the right of reply should be preserved. However, the right of reply does not offer the same conditions of application as the right of rectification under Article 16 of the GDPR. It therefore does not fully compensate for the outright suppression of the application of Article 16 of the GDPR.

As Article 18 of the GDPR, which establishes the right to limit processing, could lead to the controller being obliged to suspend its publication for the time needed to check the accuracy of the data while "information is a perishable commodity and delaying its publication, even for a short period, is likely to deprive it of all value and interest"[78], the legislator considered that this provision "is therefore not compatible with the freedom of expression and information and the controller should be exempted from it for journalistic purposes"[79].

As for the right to object to the processing, the legislator warned that this last right amounts to the implementation of censorship since it can lead to a prior ban on the publication of information[80]. Such a remark is only true if one considers the right to object before the publication of the data. There can be no question of censorship once the data are published. As a consequence, the right to object should not be suppressed for published data on the grounds of the rejection of censorship. The Privacy Commission stressed that it would be disproportionate to derogate from this right without any limit and it recommended that, as it was previously provided for in the Privacy Act of 1992, the exemption to the right of opposition should only apply if the exercise of this right is likely to jeopardise a planned publication. The Government has stated that it would follow this advice of the Privacy Commission... and yet there is no trace of this limitation in the new Belgian Data Protection Act of 2018.

4. Obligations of the controller or processor

Certain obligations do not apply to processing for journalistic purposes where their application would compromise a planned publication or constitute a prior checking measure for the publication of an article[81]. This concerns the obligation to make the internal records of processing operations available to the supervisory authority, the cooperation with

[78] European Court of Human Rights, case of *RTBF v. Belgium*, 29 March 2011, § 108.

[79] Preliminary Draft Law, Explanatory Memorandum, *op. cit.*, p. 55. It is surprising that such a definitive and universal assertion, which is undoubtedly true for processing for journalistic purposes but certainly not in all cases concerning academic or artistic purposes, should have led to the removal of the right to limit processing for all the targeted purposes.

[80] *Ibid.*

[81] Article 24, § 3 of the Belgian Data Protection Act.

the supervisory authority, the notification of data breaches to the supervisory authority (but notification of data breaches to the data subject still applies to processing for journalistic purposes) and the prior consultation of the supervisory authority. So, in contrast to the derogatory regime for the data subject's rights, exceptions for these obligations are presented in the law as limited to the sole situations where the obligations would jeopardise a project for publication or would lead to the supervisory authority controlling an article prior to its publication or taking a measure that prevents a publication. This would indeed constitute acts of censorship prohibited by Article 25 of the Constitution.

5. Transborder data flows

The provisions on transborder transfers of personal data (Articles 44-50 of the GDPR) do not apply to transfers of personal data for journalistic purposes to third countries or to international organisations[82]. Article 24, § 4, of the Belgian Data Protection Act specifies that this exemption applies only to the extent necessary to reconcile the right to protection of personal data with the freedom of expression and information.

6. Powers of the supervisory authority

Finally, a drastic reduction in the powers of the supervisory authority is planned in order to preserve freedom of expression and the confidentiality of sources[83]. Indeed, the supervisory authority's investigative powers do not apply to the processing of personal data carried out for journalistic purposes where this would lead to the provision of information on the sources of information or would constitute a measure of prior checking prior to the publication of an article.

Conclusion

When drafting the GDPR, the European legislator did not manage to sketch out a common minimum derogatory regime that reflects the balance to be achieved between the right to data protection and the right to freedom of expression and information. It gave this responsibility to the national legislators. These ones are the most enlightened in formulating restrictions to the rules of protection inspired by their own cultural

[82] Article 24, § 4 of the Belgian Data Protection Act.
[83] Article 24, § 5 of the Belgian Data Protection Act.

values. However, this situation is damaging when one considers the royal road today for disseminating information to the public: the Internet. In this area of maximum sharing, information knows no boundaries. Systems that are too divergent from one Member State to another can prove highly problematic for the issuer of information who wishes to remain in compliance with data protection rules.

The authors of the GDPR indicated that exemptions should necessarily relate at least to processing for journalistic purposes and the purposes of academic, artistic or literary expression[84]. The European legislator, however, refrained from defining what is covered by the "journalistic purposes", other than to indicate that these purposes should be interpreted broadly. The Court of Justice, as the guardian of the authentic interpretation of European Union texts, has stated that processing of personal data carried out for journalistic purposes should be understood as an activity consisting of the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them[85]. In its *Buivids* judgement[86], the Court has brought supplementary elements that have shed a remarkable light on the scope of the concept of "journalistic purposes". According to the Court, all information published on the internet involving personal data do not come under the concept of "journalistic activities". A person may be considered as pursuing journalistic purposes when disclosing information to the public in view of drawing the attention of society to a particular issue[87]. This comes more in line with the case law of the European Court of Human Rights, according to which the concept of journalistic or press activities implies the contribution to the public debate by the dissemination of information or ideas on matters of general public interest[88].

On the other hand, a functional approach to journalism is now being adopted by both European high Courts: anyone – and not only (professional) journalists[89] – can be considered to be engaged in journalistic activity regardless of his or her quality or status.

Each national legislator had to formulate the exceptions to the GDPR rules that they considered necessary to protect freedom of expression and

[84] Article 85, § 2 of the GDPR.

[85] C.J., case of *Satamedia*, point 53; C.J., case of *Buivids*, 14 February 2019, C-345/17, point 48.

[86] C.J., case of *Buivids*, 14 February 2019, C-345/17, point 58-60.

[87] *Ibid.*, point 60.

[88] European Court of Human Rights, case of *Steel and Morris v. the United Kingdom*, 15 February 2005, n° 68416/06, § 89.

[89] As provided for in the French Law (Article 80 of the 17 June 2019 Act on data processing, data files and liberties).

information (Article 85 of the GDPR). A double set of exceptions should be provided for in national laws depending on whether data processing is carried out in view of general freedom of expression or for journalistic purposes. Moreover, as the GDPR stipulates that only those exemptions necessary to reconcile the right to the protection of data with freedom of expression and information are allowed, a necessity test should be applied in all circumstances.

The Belgian legislator has given careful thought to the balance to be achieved in designing its derogatory regime. This concern is reflected in the preparatory works of the 2018 Act. However, on two points – the sensitive data regime and the rights of the data subject – the legislator abandoned the conditions that had previously been deemed necessary[90] to establish a fair balance between data protection and freedom of expression. On these points, derogations have become automatic. However, by application of the hierarchy of norms, Belgian law must be read in conjunction with Article 85, § 2, of the GDPR, which only allows for the exemptions or derogations that are necessary to reconcile conflicting rights.

[90] See Article 3, § 3, of the Belgian Privacy Act of 8 December 1992.