

Publishing tax information for journalistic purposes

Balancing privacy and journalistic freedom of expression pursuant to Satakunnan
Markkinapörssi Oy and Satamedia Oy v. Finland

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1 Introduction

1.1 Presentation of the topic

The right to freedom of expression, including journalists' right to publish information in the public interest, is a prerequisite for the proper functioning of a democratic society¹. Journalists gather, analyze and ultimately publish information, allowing the public to participate in a democracy².

Journalists function as watchdogs of individuals and organizations who are in a position of power, in an effort to expose those who seek to abuse it. However, the information they publish may be highly sensitive for the individual whose personal details are exposed. There is an everlasting conflict between freedom of expression and the right to privacy. Therefore, journalists must continuously determine whether the public interest in the publication justifies an infringement upon the individual's right to privacy.

In the case of *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland*³ ("Satamedia"), the fourth chamber of the European Court of Human Rights ("ECtHR") ruled that a ban on publishing publicly available taxation data did not violate the two applicant companies' ("Satamedia") right to freedom of expression pursuant to article 10 of the European Convention on Human Rights ("ECHR")⁴.

The ruling may constitute an important precedence for future cases concerning balancing of the right to privacy with the right to freedom of expression. This balancing was the subject as the proceedings went through the Finnish courts, to a preliminary reference by the Court

¹ Wessel-Aas, Jon (2014). p. 8.

² Haak, Parks and Castells. p. 3.

³ Application no. 931/13, Case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland.

⁴ Convention for the Protection of Human Rights and Fundamental Freedoms.

of Justice of the European Union (“CJEU”), back for a second round through the Finnish courts, and ultimately ended up before the ECtHR.

Whereas the legal question for the ECtHR was the alleged violation of ECHR article 10⁵, the Finnish national courts considered whether the publishing of taxation data by Satamedia was exempted from the Finnish Data Privacy Act⁶. The act, which implements EU’s directive 95/46/EC (“DPD”)⁷, exempts several of its provisions when personal data is processed “solely for journalistic purposes”⁸.

This ruling by the ECtHR has been considered controversial by some. Firstly, the ban imposed upon Satamedia restricted publication of information which were publicly available from the Finnish tax authorities, and was lawfully obtained by Satamedia⁹. Critics argued there never was any infringement of anyone’s data privacy which justified the ban¹⁰.

Secondly, the ruling explicitly acknowledged and accepted the mere amount of information collected and published by Satamedia as the sole reason for the ban¹¹. Other Finnish news outlets had not been banned from publishing the same information, as they did not publish it to the extent as Satamedia had. As emphasized in the dissenting opinion by Judge Tsotsoria, establishing a “quantitative framework” for determining the notion of journalism, may have profound consequences for modern digital journalism¹².

⁵ The ECtHR also found a violation of article 6, but dismissed a complaint under article 14 as manifestly ill-founded.

⁶ Act 523/1999 Henkilötietolaki (Personal Data Act).

⁷ Directive 95/46/EC of the European Parliament and of the Council of October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data.

⁸ DPD, article 9.

⁹ 931/13, para. 66

¹⁰ Smith, Dominic and Batra, Rahul.

¹¹ 931/13, para. 68

¹² Ibid., dissenting opinion para. 10.

1.2 Research question

This thesis seeks to address how the ECtHR's ruling in *Satamedia* may impact balancing of data privacy and freedom of expression. Two aspects are emphasized as contentious and relevant for consideration.

The first is the extent to which dissemination of information already in the public domain should be subjected to restrictions based on a need to protect data privacy. The second aspect concerns how the ECtHR allows the notion of journalism to be determined by a quantitative criteria. The assessment in section 4 will elaborate on the potential impact of these aspects.

1.3 Overview

This first section introduces the thesis. The following section 1.4 presents the scope of the thesis, including the range of topics omitted from it. Section 1.5 contains methodological considerations.

Section 2 provides an introduction to the central concepts of the thesis. It constitutes a necessary backdrop for the subsequent presentation of the case and the following analysis. Section 2.1 outlines the differences and similarities of the CJEU and the ECtHR. Section 2.2 introduces the notion of freedom of expression conceptualized in article 10 of the ECHR. Section 2.3 presents the notion of data privacy. Subsequent to a brief deliberation on terminology, it introduces the relevant legal instruments.

Section 3 is dedicated to the case of *Satamedia*. This section presents the facts of the case (3.1), as well as the relevant deliberations from the CJEU (3.3), the Finnish Supreme Administrative Court (3.4) and finally from the fourth section of the ECtHR (3.5). This extensive elaboration on the legal proceedings is due to their complex factual and legal background. The case started in 2002 and the final outcome is as of writing still pending from

the Grand Chamber of the ECtHR¹³. It has involved national and EU law, as well as the ECHR. As such, a thorough review is necessary to provide sufficient detail and background for the subsequent analysis.

Finally, the fourth section includes an analysis of the ECtHR's ruling in *Satamedia*. Section 4.2 elaborates on the nature of publicly available tax information. Section 4.3 considers how a seemingly non-existing threat to data privacy justified a restriction on freedom of expression. The section explores the reasoning of the ECtHR, and argue why it should have reached an alternative conclusion. Section 4.4 discusses the potential implications upon modern methods of journalism when restrictions on the right to freedom of expression are determined solely on the quantity of information processed by a journalist.

1.4 Scope

The thesis omits several salient topics and discussions in an effort to provide a clear and concise analysis of the research question. Extended deliberations on the full extent of subject matters raised in this thesis is simply too extensive for the restricted time and scope.

Collecting and publishing information for journalistic purposes are governed by several sets of rules. This thesis considers the legal rules on protection of data privacy. As deliberated on further below in section 2.3.2, this aspect concerns the protection of information relating to natural individuals.

A delimitation must therefore be drawn towards rules governing physical aspects of the right to private life. Although such rules are also derived from article 8 of the ECHR, they protect the individual's physical sphere and bodily integrity, any not solely the information relating to the individual¹⁴.

¹³ Council of Europe press release, "Grand Chamber hearing concerning use of taxation information".

¹⁴ Bygrave (2014) Chapter 1, section A.

A second delimitation is also made towards rules governing protection of reputation and defamation of character, such as libel and slander. There is extensive case law from the ECtHR concerning the balancing of the right to privacy and the right to freedom of expression related such instances¹⁵. Although they carry resemblance and close affiliation with the issue in *Satamedia*, there was never any assertions or allegations relating to individuals' reputation in this instance¹⁶.

The thesis takes a pan-European approach to the research question. Therefore, it omits most deliberations related to the Finnish proceedings and the Finnish national rules. It also refrains from extensive elaboration on the relationship between the different courts, their sovereign jurisdictions and the legal systems they govern. However, some details on how the courts function and influence each other is necessary to provide sufficient background.

The sections of the thesis relating to EU rules on data privacy are not assessed in light of the newly adopted "General Data Protection Regulation"¹⁷. The regulation will not become applicable law until 2018¹⁸, and its relevant provision on freedom of expression does not include any major developments¹⁹.

¹⁵ European Court of Human Rights, Factsheet on protection of reputation.

¹⁶ 931/31, para. 67.

¹⁷ Regulation 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

¹⁸ European Commission Press Release: «Joint Statement on the final adoption of the new EU rules for personal data protection».

¹⁹ Regulation 2016/679, recital 153 and article 85.

1.5 Methodology

The research for this thesis is based upon the majority ruling and the dissenting opinion in the ECtHR's case of *Satamedia*. However, examinations of the ruling by the CJEU is also provided in pursuance of providing the necessary background material in context of the EU rules on data privacy.

While there are vast amounts of material regarding data privacy and freedom of expression, there is very little commentary concerning this specific case. Most of the secondary material derives from legal blogposts commenting on the case. Although these are useful, they are often shallow and uniform in the perspectives they provide.

The legal proceedings of *Satamedia* went through the jurisdictions of Finland, the European Union and the Council of Europe (ECtHR). A challenge has been to ensure thorough elaboration on the questions raised by the case, while at the same time differentiating between different jurisdictions, courts and legal instruments.

2 Central concepts

2.1 Institutions

The case of *Satamedia* proceeded from the Finnish national courts to the CJEU before it finally reached the ECtHR. The multi-jurisdictional nature of these proceedings necessitate a brief elaboration on how these courts and their respective jurisdictions function and relate to each other.

The CJEU is the highest EU court ruling on EU law. This includes the directives and regulations enacted by the EU legislative authority, as well as the treaties upon which the EU is based²⁰. The CJEU ensures uniform application of EU law throughout the member states,

²⁰ Sejersted, Arnesen, Rognstad og Kolstad, section 3.2.1

and may be called upon to settle legal disputes between member states and EU institutions²¹.

The EU constitutes a supranational institution, whose autonomous authority derives from its founding treaties²². EU regulations are directly binding on the national individuals and organisations²³. EU directives however, such as the DPD, require implementation into national law before they become applicable²⁴.

The ECtHR is established within the framework of the ECHR²⁵. Its contracting states constitute the 47 member states of the Council of Europe²⁶. The ECtHR admits applications by individuals, groups of individuals and organizations who claim their rights pursuant to the ECHR has been violated by a contracting state²⁷. A precondition for lodging a complaint with the ECtHR is that all available national remedies has been exhausted²⁸.

The Finnish Supreme Administrative Court rules mainly on Finnish law. However, Finland is a contracting state to both the EU and the ECHR. It is therefore obliged to interpret its national provisions in accordance with its international obligations. This explains why the Finnish Supreme Administrative Court was able to request guidance from the CJEU, and why Satamedia could file a complaint to the ECtHR.

It is necessary to emphasize that the CJEU and the ECtHR are independent from each other. As such, the ruling of the ECtHR in *Satamedia* does not directly concern the DPD or its

²¹ Europa.eu, “Court of Justice of the European Union (CJEU)”.

²² Sejersted, Arnesen, Rognstad og Kolstad, section 3.1.

²³ Ibid., section 3.2.2.

²⁴ Ibid.

²⁵ ECHR, article 19.

²⁶ Coe.int, European Court of Human Rights (ECtHR).

²⁷ ECHR, article 34.

²⁸ Ibid., article 35.

implementation in Finnish law. However, it is clear that the CJEU and the ECtHR do to some extent align and refer to each other²⁹.

2.2 Freedom of expression

The following section provides an introduction to freedom of expression, as conceptualized in article 10 of the ECHR. The article reads as follows:

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. This Article shall not prevent States from requiring the licensing of broadcasting, television or cinema enterprises.
2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary.

Paragraph 1 establishes the right to freedom of expression as a right to “hold opinions and to receive and impart information and ideas”. This right is considered as one of the basic foundations for the functioning and progress of a democratic society, as well as essential for the self-fulfilment of individuals³⁰.

²⁹ Mihail, Stephanie. Section 3.

³⁰ Von Hannover v. Germany, para. 58.

According to the established case law of the ECtHR, the right protected under paragraph 1 applies equally to positive and favourable expressions as it does to those how are provocative and unfavourable³¹. As such, expressions that may offend, shock or disturb are equally protected under article 10³². This is seen as an expression of the articles' aim to promote pluralism, tolerance and broadmindedness in democratic societies³³.

Freedom of expression also includes the notion of press freedom, construed as the right and duty of the press to impart information, opinion and ideas which are in the public's interest and contribute to matters of public debate³⁴. There is extensive case law on violation of journalists' right to freedom of expression³⁵. Due to their role as "watchdogs" and duty to ensure dissemination of information, the press holds special status of the rights pursuant to article 10³⁶.

Paragraph 1 of article 10 imposes upon the contracting state both positive and negative obligations. Its negative obligation derives from the wording of paragraph 1, in which "everyone" has the right to enjoy freedom of expression without "interference from public authorities". As such, the contracting state must refrain from interfering with its citizens' right to hold opinions, and receive and impart information. An interference of the right to freedom of expression is construed in paragraph 2 as "formalities, conditions, restrictions or penalties" enacted upon the expression protected under paragraph 1.

³¹ Ibid.

³² Ibid.

³³ Ibid.

³⁴ 931/13, para. 60.

³⁵ Macovei, Monica, p. 11.

³⁶ Ibid.

The states' positive obligations entails it must actively ensure its citizens' are able to enjoy freedom of expression without interference from other individuals or organizations³⁷. At its core, the positive obligation entails a requirement on the state to ensure sufficient legal protection.

If an interference was made possible by national legislation or if the state fails to enforce known threats to freedom of expression, there is a high risk it has failed its positive obligations under article 10³⁸. Recent case law has further developed the positive obligation to include an obligation on the state to provide non-governmental organizations with state-held information in some instances³⁹.

An interference with the rights guaranteed in paragraph 1 may be justified pursuant to the requirements set out in paragraph 2. Upon determining whether an interference may be justified, the ECtHR applies a fixed assessment of three cumulative requirements. These are:

- i) Whether the interference is "prescribed by law";
- ii) If the interference aims at protecting one or more of the interests listed in paragraph 2;
- iii) Whether the interference is "necessary in a democratic society"⁴⁰.

The burden of proof lies upon the contracting state⁴¹. Should the ECtHR find that the three cumulative criteria are fulfilled, the interference with freedom of expression is considered legitimate, meaning there is no violation of freedom of expression pursuant to article 10⁴².

³⁷ Akandji-Kombe, Jean-Francois, p. 50.

³⁸ Ibid.

³⁹ See Magyar Helsinki Bizottság v. Hungary.

⁴⁰ Macovei, Monica, p. 29.

⁴¹ Ibid, p. 30.

The first criteria requires any interference with freedom of expression to have a basis in law. The lawfulness-criterion entails that the law must be adequately accessible and with sufficient precision to allow citizens to foresee the consequences of their actions⁴³.

According to the second criteria, the interference must serve to protect one or more of the aims listed in paragraph 2, such as national security, public safety or for the protection of the reputation or rights of others. The latter was the aim applied in the case of *Satamedia*.

The final criteria determines that the interference needs to be “necessary in a democratic society”. This assessment entails consideration of the proportionality between the aim and the means used to achieve that aim⁴⁴. In accordance with the case law of the ECtHR, the necessity of the interference must respond to a pressing social need⁴⁵.

Upon the determining whether an interference is necessary in a democratic society, the ECtHR grants the contracting state a margin of appreciation⁴⁶. This entails an independent room for manoeuvre enjoyed by the contracting state when fulfilling their obligations under the ECHR⁴⁷. The extent of this margin relies on, inter alia, whether similar interference is common in other contracting states, the nature of the interference and whether or not special technical expertise or detailed local knowledge is required⁴⁸.

⁴² Ibid.

⁴³ *Sunday Times v. The United Kingdom*.

⁴⁴ Macovei, Monica, p. 35.

⁴⁵ 931/13, para. 57.

⁴⁶ Ibid.

⁴⁷ Greer, Steven, p. 5.

⁴⁸ Ibid., p. 7.

2.3 Data privacy

2.3.1 Overview of section 2.2

The following section provides an introduction to the field of data privacy law. Subsection 2.3.2 will briefly present its historical origins and the nomenclature within this field of law. Subsection 2.3.3 outlines the applicable legal instruments for the scope of this thesis. These are article 8 of the ECHR, and the DPD.

Finally, subsection 2.3.4 deals specifically with a material exemption from the DPD. Pursuant to its article 9, several provisions of the directive are exempted for processing of personal data “solely for journalistic purposes”⁴⁹. The applicability of this exemption was the main legal question for the Finnish national courts and the CJEU. As such, subsection 2.3.4 constitutes an important backdrop for the subsequent sections.

2.3.2 Scope and terminology

There are several terms used to describe rules governing privacy-related violations. Further, the concept of privacy carries different connotations often varying between different cultures and legal traditions.

In their Harvard Law Review article from 1890, Warren and Brandeis defined the right to privacy as a right to be let alone⁵⁰. They saw this right as an extension of the right to protection of property, including intellectual property. Their article became famous, as US courts subsequently began to explicitly recognize a right to privacy⁵¹.

⁴⁹ 95/46/EC, article 9.

⁵⁰ Warren and Brandeis.

⁵¹ Melville B. Nimmer.

Warren and Brandeis argued it was the increasing “evil invasion” into private matters by newspapers that necessitated legal protection⁵². In their article, they wrote that the press was “overstepping in every direction the obvious bounds of propriety and of decency”⁵³.

Whereas Warren and Brandeis construed privacy as a right to be let alone, a second salient conceptualization sees the right to privacy in terms of information control. In his book “Privacy and Freedom”, Alan Westin defines the right to privacy as a claim of individuals to determine how much of their personal information is disclosed, to whom, and how it should be maintained and disseminated⁵⁴. This concept of informational self-determination has been a cornerstone in European jurisprudence⁵⁵.

The term “privacy” is a broadly sweeping term. It can encompass violations of an individual’s physical sphere, including a person’s home and immediate surroundings, as well as interference with family life and to support the protection of reputation. Article 8 of the ECHR, which ensures a right to respect for “private and family life”, “home” and “correspondence”, exemplifies the broad range of scenarios covered under the term “privacy”. Case law concerning article 8 range from instances of sexuality and gay rights⁵⁶, to deportation of foreigners⁵⁷ and instances of government surveillance⁵⁸.

⁵² Warren and Brandeis.

⁵³ Ibid.

⁵⁴ The New York Times, “Alan F. Westin, Who Transformed Privacy Debate Before the Web Era, Dies at 83”.

⁵⁵ E.g., European Commission, “A Comprehensive Approach on Personal Data Protection in the European Union”, section 2.1.3. This reliance on informational self-determination in European data privacy law has been subjected to criticism in relation to the newly adopted General Data Protection Regulation, see e.g., B.J. Koops (2014).

⁵⁶ E.g. X and Y v. Netherlands, and *Dudgeon v. UK*.

⁵⁷ E.g. *Khan v. Germany*

⁵⁸ E.g. *Klass and others v. Germany*, and *Malone v. UK*

For the purposes of this thesis, the more specific term “data privacy” will be applied. This corresponds with the terminology applied by Bygrave in most of his literature⁵⁹. In his view, the broader term “privacy” encompasses spatial, bodily and physiological dimensions that are not present in rules on data privacy⁶⁰. This distinction is important to address, as the terms privacy, data privacy and data protection are often uncritically applied. Several non-European countries refer to data privacy law simply as privacy law⁶¹.

The term “data privacy” describes the rules governing information relating to a natural individual, meaning information that allows for that individual to be identified⁶². These rules regulate the processing of such data, specifically how it is gathered, registered, stored, exploited and disseminated⁶³. The development of these rules responded to technological and organizational advancements in automated computer-driven processing of personal data, and the fears for fundamental rights and freedoms imposed by these developments⁶⁴.

These rules are characterized by their adherence to a universal set of principles⁶⁵. The exact number of principles and their content may vary between different legal instruments and jurisdictions. However, Bygrave outlines the following principles as characteristic to the field of data privacy⁶⁶:

- Personal data should be collected by fair and lawful means;

⁵⁹ E.g. Bygrave (2014)

⁶⁰ Bygrave (2014) Chapter 1, section A.

⁶¹ Ibid

⁶² Ibid.

⁶³ Ibid.

⁶⁴ Ibid., Chapter 1 section C. Both, inter alia, the preamble of Convention 108 and recital 2 of 95/46/EC reflect these concerns.

⁶⁵ Ibid, Chapter 1, section A.

⁶⁶ Ibid, Chapter 1, section A.

- the amount of data collected should be limited to the amount necessary in order to achieve the purpose for which the data is gathered and further processed;
- personal data should be collected for specified, legitimate purposes, and not used in ways that are incompatible with those purposes;
- personal data should be relevant, accurate, and complete in relation to the purposes for which it is processed;
- personal data should be protected against unauthorized attempts to disclose, delete, change, or exploit it.

Further, the term data privacy must be delimited against terms such as “data protection”, “data security” and “information security”⁶⁷. The term “data protection” has been widely adopted as the chosen nomenclature for this field in the European context⁶⁸. As emphasized by Bygrave, concepts of “data protection” and “data security” are certainly components of data privacy⁶⁹. They serve the interest of confidentiality, security and integrity of information within automated computer-based systems. These interests are certainly vital to ensure within the field of data privacy, but they also refer to a broader interest of protecting information unrelated to individuals, such as business secrets⁷⁰.

2.3.3 Legal instruments

Within the field of data privacy, the ECHR and the DPD are arguably the most influential instruments. Several factors contribute to their importance. First, the supranational status

⁶⁷ Bygrave utilized the term “data protection law” in his book “Data Protection Law: Approaching Its Rationale, Logics and Limits” from 2002. He has since transitioned from using this term to using “data privacy”, e.g. Bygrave (2014).

⁶⁸ Bygrave (2014), Chapter 1, section A. The first data privacy legislation adopted in Europe was the “Bundesdatenschutzgesetz” of the federal German state Hessen, in 1979. The name of the legislation translates to “Federal Data Protection Act”. The act is still applicable today.

⁶⁹ Ibid.

⁷⁰ Ibid.

and binding nature of the two instruments are essential. This contributes to their practical applicability in national law, as well as harmonisation of rules throughout the member states. Further, the increasing amount of case law from both the ECtHR and the CJEU ensures enforcement of the rules. The courts' dynamic interpretation of the rules as the world and society progress also retain the instruments relevance.

2.3.3.1 ECtHR article 8

The importance of article 8 of the ECtHR stems from its extensive case law, as well as the ECtHR's dynamic and progressive interpretation of the ECHR's provisions⁷¹. According to the ECtHR, its mandate is to apply the convention as a "living instrument (..) interpreted in the light of present-day conditions"⁷².

Article 8 reads as follows:

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

⁷¹ See e.g., *S and Marper v. UK* para 68-86, where the ECHR considered that processing of fingerprints, DNA profiles and cellular samples constituted an interference with the applicant's right pursuant to article 8.

⁷² *Tyrer v. UK*, para. 31.

As apparent in the wording of its first paragraph, article 8 concerns four different rights. The right to respect for “private and family life”, “home” and “correspondence”. They are non-exhaustive in their application, and it is often not possible nor wanted to draw a clear delimitation between them⁷³. Their common application is found in that they protect the individual’s private sphere⁷⁴.

Case law within the field of data privacy is usually based upon the right to “respect for (...) correspondence”. The term clearly covers traditional notions of postal-based communication, but has also been interpreted to include modern methods of communication⁷⁵.

As previously stated, the ECHR is completely autonomous from the other legal instruments presented in this thesis, such as the DPD⁷⁶. Nevertheless, Bygrave argues that the introduction of data privacy legislation by national states and the EU has instigated application of the common data privacy principles into the interpretation and application of Article 8⁷⁷.

The aim of article 8 is to “protect the individual from arbitrary action by the public authorities”⁷⁸. This constitutes an expression of the negative obligations imposed upon the member state, to abstain from interfering with the private life of its citizens⁷⁹.

Further, the member state is subjected to positive obligations in order to ensure “respect” for the rights within Article 8⁸⁰. Failure by the state to affirmatively safeguard these rights

⁷³ Kilkelly, section 1.1.

⁷⁴ Møse, p. 400.

⁷⁵ See e.g., *Klass and Others v. Germany* (telephone) and *Copland v. UK* (monitoring of e-mail and internet traffic).

⁷⁶ Bygrave 2008, section 4.1.

⁷⁷ Ibid.

⁷⁸ *Kroon and others v. the Netherlands*, para. 31.

⁷⁹ Bygrave 2008, section 4.1

⁸⁰ *Kroon and others v. the Netherlands*, para. 31.

may lead to violation of the ECHR. In *X and Y v. the Netherlands*, the ECHR held that “these [positive] obligations may involve the adoption of measures designed to secure respect for private life even in the sphere of the relations of individuals between themselves”⁸¹.

The ECtHR determines violations of article 8 in the same manner as they would pursuant to article 10⁸². Subsequent to determining whether there exists an interference with the rights in paragraph 1, the ECtHR deploys its fixed assessment of the three cumulative criteria.

In determining whether an interference is “necessary in a democratic society” pursuant to article 8 (2), the ECtHR may deploy the notion of “reasonable expectations of privacy”⁸³. This assessment has especially been used in cases concerning the balancing of privacy and freedom of expression⁸⁴.

2.3.3.2 Directive 95/46/EC

The DPD is the main legal instrument governing protection of data privacy within the EU. Its main aim is to safeguard data-processing systems’ respect for fundamental human rights, and to balance this with “economic and social progress, trade expansion and the well-being of individuals”⁸⁵.

By establishing a harmonised, minimum level of protection through the EU, the DPD allows for free flow of personal data between the member states. As recognized in the preamble, free flow of personal data is necessary in order to realize the EU’s internal market⁸⁶.

⁸¹ *X and Y v. the Netherlands*, para. 23.

⁸² Confer section 2.2 above.

⁸³ *Von Hannover v. Germany*, para. 51.

⁸⁴ E.g., *Von Hannover v. Germany* and *Peck v. UK*.

⁸⁵ DPD, recital 2.

⁸⁶ *Ibid.*, recital 3.

The DPD regulates the “processing” of personal data, defined as “any operation or set of operations which is performed upon personal data”⁸⁷. This definition encompasses more or less any action where personal data is involved. For example, how personal data is gathered, registered, stored, exploited and disseminated⁸⁸.

The notion of “personal data” constitutes the threshold criteria for applying the DPD⁸⁹. Information not construed as “personal data” is not protected by the DPD. “[P]ersonal data” is defined as “any information relating to an identified or identifiable person”⁹⁰. An identifiable person is someone who may be identified “directly or indirectly”⁹¹. This identifiable person constitutes the “data subject”⁹².

The application of the DPD to information which may indirectly identify a data subject ensures that the DPD enjoys a broad material scope⁹³. Erdos describes this scope as “breath taking”⁹⁴. Bygrave warns that the broad material scope may subject the DPD to “regulatory overreach”, which risks impeding the DPD’s ability to govern⁹⁵.

However, there are some material limitations on the scope of the DPD. Article 3 (2) excludes any processing in “the course of activity which falls outside the scope of Community law”. One example is the processing of personal data conducted for maintaining national

⁸⁷ DPD, article 2 (b).

⁸⁸ Bygrave (2014), Chapter 1, section A.

⁸⁹ DPD article 3 (1).

⁹⁰ Ibid., article 2 (a).

⁹¹ Ibid.

⁹² Ibid.

⁹³ A recent ruling from the CJEU held that a dynamic IP address constitutes personal data within the meaning of the DPD, merely on the fact that internet service providers have some ability to identify the subscriber to the IP address, cf. C-582/14.

⁹⁴ Erdos, p. 3

⁹⁵ Bygrave (2014b), p. 274.

security. Further, article 3 (2) also excludes processing conducted in “the course of a purely personal or household activity”.

Article 9 of the DPD also exempts some provisions from processing of personal data conducted “solely for journalistic[,] (..) artistic or literary” purposes, in an effort to reconcile data privacy with freedom of expression. The exemption for journalistic purposes is the subject of section 2.3.3.3 below.

Liability for non-compliance with the DPD falls upon the “controller”, defined as the natural or legal person who “determines the purposes and means of the processing”⁹⁶. The controller is responsible for acquiring adequate legal basis for the collection of personal data, e.g., by obtaining the data subject’s consent⁹⁷. The DPD also calls upon the controller to process personal data in compliance with the data privacy principles presented above⁹⁸.

In addition, the controller must facilitate compliance with the several rights granted to the data subject. The data subject has, inter alia, a right to demand access to the collected data⁹⁹, as well as rectification or erasure of data in certain instances¹⁰⁰. The controller is also obliged to inform the data subject about the processing upon the initial collection of the data¹⁰¹.

Transfers of personal data to entities outside the EU and the European Economic Area are subjected to its own set of restrictions¹⁰². Transfers to entities in the United States has been

⁹⁶ DPD, article 2 (d).

⁹⁷ Ibid., article 7 (a).

⁹⁸ Ibid., article 6.

⁹⁹ Ibid., article 12.

¹⁰⁰ Ibid., section 4.

¹⁰¹ Ibid.

¹⁰² Ibid.

a contentious topic in the recent years, as the legal instrument safeguarding these transfers was invalidated by the CJEU following revelations of US mass surveillance¹⁰³.

Finally, the DPD provides a framework for establishing supervisory authorities, referred to as Data Protection Authorities (“DPA”)¹⁰⁴. Bygrave refers to these authorities as “hallmarks of modern data privacy law”¹⁰⁵. The DPA’s are called upon to oversee the implementation of the DPD, monitor compliance of public and private entities, provide guidance and function as a first instance for claims¹⁰⁶. In the case of *Satamedia*, it was the Finnish DPA which instigated the legal proceedings.

2.3.3.3 Article 9 - “Processing of personal data and freedom of expression”

Article 9 of the DPD recognizes the conflict between data privacy and freedom of expression¹⁰⁷. It seeks to reconcile this conflict by exempting several of the DPD’s most important provisions for processing of personal data “carried out solely for journalistic purposes”¹⁰⁸.

Chapters 2, 4 and 6 of the DPD are exempted. These chapters respectively regulate the general rules on lawfulness of processing, transfer to third countries, and the rules on the establishment and functioning of the DPA’s. Exempting these provisions from its scope, the DPD recognize they inhabit an ability to restrict journalists’ ability to conduct collection, interpretation and publication of information in the public interest. An example of this will be provided below.

¹⁰³ The Guardian, October 2015.

¹⁰⁴ DPD, chapter 6.

¹⁰⁵ Bygrave (2002), p. 3.

¹⁰⁶ Ibid.

¹⁰⁷ Recital 37 of the DPD explicitly recognizes the need to reconcile its provisions with Article 10 of the ECHR, referring to the “right to receive and impart information” guaranteed by that article.

¹⁰⁸ DPD, article 9.

The exemption applies only to the extent “necessary to reconcile the right to privacy with the rules governing freedom of expression”¹⁰⁹. As such, article 9 calls for an assessment of proportionality to be conducted in each instance. In their preliminary reference to the Finnish Supreme Administrative Court, the CJEU emphasized that any derogation to protection of data privacy were only to be applied “in so far strictly necessary”¹¹⁰. Article 9 calls upon the member states to ensure proportionality, and to specify the extent of derogations. Section 2 (5) of the Finnish implementation reads as follows¹¹¹:

“Unless otherwise provided in section 17, only sections 1—4, 32, 39(3), 40(1) and (3), 42, 44(2), 45—47, 48(2), 50, and 51 of this Act apply, where appropriate, to the processing of personal data for purposes of journalism” (authors underlining)¹¹².

The need for the exemptions provided by article 9 may be illustrated by assessing some of the provisions of the DPD’s chapter 2. The data subject is granted several user rights which he or she may call upon the controller to facilitate and comply with. In the instance where a journalist is conducting an investigation of tax fraud, the journalist would be the processor while the subject of the alleged fraud would be the data subject.

Article 11 provides the data subject with a right to be informed when the controller collects personal data from another source than the data subject itself. In such instances, the con-

¹⁰⁹ DPD, article 9.

¹¹⁰ C-73/07, para. 56.

¹¹¹ Interestingly, the Norwegian Data Privacy Act does not include any references to proportionality, cf. section 7: “*The processing of personal data exclusively for artistic, literary or journalistic purposes shall only be governed by the provisions of sections 13-15, 36-41, cf. Chapter VIII.*”

¹¹² Act 523/1999.

troller is obliged to inform the data subject of its identity, the purposes of processing and which categories of personal data has been collected¹¹³.

The user rights are expanded in article 12, which grants the data subject a right to rectify, erase or even block the processing altogether in some instances¹¹⁴. Further, the data subject has a right to access the collected personal data, and to be informed about the source of it¹¹⁵.

Therefore, it is not hard to fathom the consequences such user rights may have upon journalistic investigations. Their ability to conduct their work would undoubtedly be seriously hampered if they were subjected to a legal obligation to reveal their findings, the purpose of the investigation, and their source.

Article 9 plays a vital role in reconciling data privacy and freedom of expression within the EU. However, striking a fair balance between these two competing interests is not always easy, as the case of *Satamedia* illustrates. Prioritizing data privacy may hamper legitimate journalistic efforts and their contribution to a democratic society, whereas prioritizing freedom of expression may cause violations of an individuals' right to private life.

¹¹³ DPD, article 11 (1) a), b) and c).

¹¹⁴ Ibid., article 12 b).

¹¹⁵ Ibid., article 12 a), second indent.

3 Processing of personal data for journalistic purposes – the case of *Satamedia*

3.1 Facts of the case

The case of *Satamedia* concerned two Finnish companies, Satakunnan Markkinapörssi Oy (“Satakunnan”) and Satamedia Oy (“Satamedia”)¹¹⁶. The two companies had been working together, and were owned by the same persons¹¹⁷. Since 1994, Satakunnan had been publishing the magazine “Veropörssi”, which provided information on individuals’ tax information¹¹⁸.

Information on natural persons’ taxable income and assets is public information in Finland, subject to the law on public disclosure of tax information¹¹⁹. This applies to anyone of legal age with a yearly salary above 10.000 Euros¹²⁰. Those who wish to consult the lists of the Finnish tax authority are subjected to a surcharge of 0.36 Euro per line of information¹²¹.

In 2003, the two companies established a text-messaging service in cooperation with a Finnish telecommunications provider¹²². The service provided access to the entire database of tax information previously published in Veropörssi¹²³. At that time, this constituted tax information on 1.2 million individuals, amounting to roughly one third of the Finnish population¹²⁴.

¹¹⁶ Collectively referred to as «Satamedia» hereafter.

¹¹⁷ 931/13, para. 8.

¹¹⁸ Ibid., para. 6.

¹¹⁹ Act No. 1346/1999.

¹²⁰ Tax Justice Network.

¹²¹ Ibid.

¹²² 931/13, para. 8.

¹²³ Ibid.

¹²⁴ Mihail, section 1.

By sending a text message, anyone could inquire the database¹²⁵. The Veropörssi service is still functional as of writing¹²⁶. The user of the service is charged a variable fee, depending on how many people he or she requests information on. For example, information on one person costs 5 euros, whereas information on 40 people costs 100 euros¹²⁷.

3.2 National and European court proceedings

In 2002, the two companies were advised by the Data Protection Ombudsman (“DPO”) to stop publishing the tax data¹²⁸. Upon refusal to do so, the Data Protection Board (“DPB”) was requested by the DPO to issue a ban on the two companies’ collection and publishing of the tax data, both in the Veropörssi magazine and by the SMS-service¹²⁹.

However, this request was dismissed by the DPB. The board found that the activities of the two companies applied for the exemption for journalistic purposes in the Finnish Data Protection Act¹³⁰. The DPO appealed the decision of the DPB to the Helsinki Administrative Court, which in turn sided with the DPB¹³¹. In short, the Administrative Court considered the activities of the two companies to have a journalistic purpose, emphasizing the fact that the tax data was publicly available under national legislation¹³².

In October 2005, the ruling of the Helsinki Administrative Court was appealed to the Supreme Administrative Court. It decided to stay its proceedings in order to request a referral

¹²⁵ 931/13, para. 6 and 8.

¹²⁶ veroporssi.com.

¹²⁷ Ibid.

¹²⁸ 931/13, para. 9.

¹²⁹ Ibid., para. 10.

¹³⁰ Ibid., para. 11.

¹³¹ Ibid., para. 13.

¹³² Ibid.

from the CJEU on the interpretation of the DPD, including its article 9¹³³. The referred questions and the details of the CJEU's ruling is the subject of section 3.3 below.

Following the ruling of the CJEU, the Supreme Administrative Court reversed the ruling of the Helsinki Administrative Court¹³⁴. The further deliberations of the Supreme Administrative Court are presented in section 3.4 below. The case was referred back to the DPB, with an instruction to issue a ban on the two companies' publishing of tax data to the extent they had published in 2002¹³⁵.

In November 2009, the DPB issued its ban towards the two companies¹³⁶. Satakunnan was forbidden to publish and forward taxation data to the extent they had done in 2002, whereas Satamedia was forbidden to collect, save or forward any information received from Satakunnan's registers¹³⁷.

In December 2009, the two companies received a letter from the DPO. The letter requested the two companies to indicate what measures they would take to comply with the ban issued by the DPB¹³⁸. The two companies replied by asking the DPO under which conditions they would be allowed to continue publishing at least to some extent¹³⁹. At that time, other Finnish newspapers were still publishing taxation information, although not to the same extent as Satamedia¹⁴⁰.

¹³³ Ibid., para. 14 and 15.

¹³⁴ Ibid., para. 17.

¹³⁵ Ibid., para. 17.

¹³⁶ Ibid., para. 19.

¹³⁷ Ibid.

¹³⁸ Ibid, para. 20.

¹³⁹ Ibid.

¹⁴⁰ Mihail, section 2.1

The DPO responded by referring to the Supreme Administrative Courts' ruling and the subsequent ban issued by the DPB, stating the two companies did not have the necessary legal right to neither maintain their database nor publish it in the magazine or distribute it through the SMS-service¹⁴¹.

In February 2010, the two companies decided to appeal the decision of the DPB to the Helsinki Administrative Court, which transferred the case to the Turku Administrative Court¹⁴². They asserted the DPB's decision violated the prohibition of censorship in the Finnish constitution, as well as their right to freedom of expression¹⁴³.

The Turku Administrative court reject the appeal, claiming they were not competent to decide on matters the Finnish Supreme Administrative Court previously had excluded from their ruling¹⁴⁴. The Turku Administrative Court referred to the fact that the Supreme Administrative Court had explicitly stated that the case did not concern the public nature of the taxation information, nor the right to publish this information¹⁴⁵.

The case was again appealed to the Finnish Supreme Administrative Court, which upheld the Turku Administrative Court's decision in June 2012¹⁴⁶. Subsequent to these two consecutive sets of proceedings in the national courts, the two companies complained Finland to the ECtHR on December 18th 2012. The Fourth Chamber of the ECtHR gave its ruling on July 21st 2015.

¹⁴¹ 931/13, para. 20.

¹⁴² 931/13, para. 21.

¹⁴³ Ibid.

¹⁴⁴ Ibid., para. 22.

¹⁴⁵ Ibid.

¹⁴⁶ Ibid., para. 24.

3.3 Deliberations from the Court of Justice of the European Union

3.3.1 Questions referred

The CJEU delivered its judgement on December 16th 2008, after the Finnish Supreme Administrative Court had requested guidance on the interpretation and application of the provisions of the DPD¹⁴⁷.

The Supreme Court referred four questions. With their first question, they requested a clarification on whether the activities of the two companies constituted processing of personal data pursuant to article 3 (1) of the DPD¹⁴⁸. The CJEU quickly concluded that the DPD did apply to those activities¹⁴⁹. The Court did not find it necessary to consider the third question, regarding security of processing operations pursuant to article 17 of the DPD¹⁵⁰.

The Supreme Administrative Court also required the CJEU to clarify whether personal data files solely containing unaltered information already published in the media, should fall outside the scope of the directive¹⁵¹. The CJEU found that the DPD applied equally to all personal data, regardless of whether it had previously been published or not¹⁵².

The CJEU emphasized that a general derogation from the DPD for information already in the public domain would deprive the DPD of its effect. It would be sufficient for any member state to simply publish the personal data in order for it to be deprived of the protection afforded by the DPD¹⁵³.

¹⁴⁷ C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy, Satamedia Oy.

¹⁴⁸ C-73/07, para. 34 (1).

¹⁴⁹ Ibid., para. 37.

¹⁵⁰ Ibid., para. 64.

¹⁵¹ Ibid., para. 34 (4).

¹⁵² Ibid., para. 49.

¹⁵³ Ibid., para. 48.

By its second question, the Finnish Supreme Administrative Court sought guidance on whether the two companies' collection and publishing of publicly available taxation data, both in print and by an on-demand text messaging service, would be exempted pursuant to article 9 of the DPD¹⁵⁴.

The outcome of this question relied on whether the activities of the two companies had to be considered as processing of personal data “solely for journalistic purposes”, pursuant to article 9 of the DPD¹⁵⁵. If the CJEU were to find that these activities had a journalistic purpose, article 9 would exempt the two companies from a majority of the central provisions of the DPD.

In relation to this question, the Finnish Supreme Administrative Court also sought guidance on whether the fact that the data already existed in the public domain would have any impact on this assessment¹⁵⁶.

3.3.2 Guidance on “solely for journalistic purposes”

The CJEU emphasized that the notion of freedom of expression must be interpreted broadly¹⁵⁷. The CJEU also provided the following guidelines. First, the exemptions and limitations provided for by article must not only apply to traditional notions of established media, but to every person engaged in journalism¹⁵⁸.

Secondly, the fact that the processing activities were conducted for profit-making purposes did not by itself preclude it from being undertaken solely for journalistic purposes pursuant

¹⁵⁴ Ibid., para. 34 (2).

¹⁵⁵ Ibid., para. 50.

¹⁵⁶ C-73/07, para. 34 (2).

¹⁵⁷ Ibid., para. 56.

¹⁵⁸ Ibid., para. 58.

to article 9¹⁵⁹. Thus, the CJEU recognised that commercial viability was legitimate and to some extent necessary in order to engage in journalistic activities.

Thirdly, the CJEU found that the medium used to transmit the personal data is irrelevant¹⁶⁰. The CJEU referred to the evolution of technological means of disseminating information, and thus emphasised the importance of a technology neutral interpretation of the DPD.

In support of the right to privacy, the CJEU found that the derogations and limitations provided for in article 9 were only to be applied in so far as they were strictly necessary¹⁶¹. As such, the CJEU considered each of the derogations and limitations provided for in article 9 to be subjected to a necessity assessment.

Subsequent to these deliberations, the CJEU found that the activities of Satamedia could be classified as journalistic activity pursuant to article 9 of the DPD¹⁶². According to the court, the deciding factor was whether the “sole object of [the companies’] activities [was] the disclosure to the public of information, opinions or ideas”¹⁶³.

Whether that was the case was left up to the Finnish Supreme Administrative Court to determine¹⁶⁴.

¹⁵⁹ Ibid., para. 59.

¹⁶⁰ Ibid., para. 60.

¹⁶¹ C-73/07, para. 56.

¹⁶² Ibid., para. 61.

¹⁶³ Ibid., para. 62.

¹⁶⁴ Ibid., para. 62.

3.4 Deliberations from the Finnish Supreme Administrative Court

Upon receiving ruling of the CJEU, the Supreme Administrative Court reversed the decision of the Administrative Court and instructed the DPB to ban the processing activities of Satamedia, to the extent they had published tax data in 2002¹⁶⁵.

The Supreme Administrative Court agreed with the CJEU regarding the need for a broad interpretation of journalism, while at the same maintaining that any derogations from the protection of privacy had to be kept to what was strictly necessary¹⁶⁶.

The decisive factor for the Supreme Administrative Court was whether the publication of the tax information had contributed to a public debate, or whether it had solely intended to satisfy the curiosity of the readers¹⁶⁷. This assessment adheres to the established case law of the ECtHR, which will be further elaborated on below¹⁶⁸.

The Supreme Administrative Court found that the public interest in the tax information did not justify the publication of the entire database¹⁶⁹. As such, the Court did not consider the activities of Satamedia to constitute journalistic activity¹⁷⁰. The exemption in the national implementation of the DPD was therefore not applicable to them.

As mentioned above, the ban issued subsequent to the Supreme Administrative Court first ruling was eventually appealed back to the Supreme Administrative Court. The two companies asserted this time that the ban imposed upon them amounted to censorship, and that

¹⁶⁵ Ibid., para. 17.

¹⁶⁶ Ibid.

¹⁶⁷ 931/13, para. 17.

¹⁶⁸ See e.g., *Von Hannover v. Germany* (2004).

¹⁶⁹ 931/13, para. 17.

¹⁷⁰ Ibid.

their right to freedom of expression had been illegally restricted¹⁷¹. The Turku Administrative Court had dismissed these allegations, a ruling which the Supreme Administrative Court agreed with¹⁷². As such, the second appeal to the Supreme Administrative Court was dismissed.

3.5 Deliberations from the European Court of Human Rights

The fourth section of the ECtHR delivered its ruling on July 21st 2015. Satamedia complained Finland had violated their rights in accordance with articles 6, 10 and 14. The following sections elaborates on the proceedings related to article 10, as well as the dissenting opinion of Judge Tsotsoria.

The proceedings regarding articles 6 and 14 fall outside the scope and purpose of this thesis. As such, it suffices to mention that the ECtHR found a violation of the right to fair trial enshrined in article 6 due to the lengthy proceedings before the national courts¹⁷³. The complaint concerning discrimination pursuant to article 14 was however declared as “manifestly ill-founded” and therefore rejected by the ECtHR as inadmissible¹⁷⁴.

3.5.1 Article 10

Satamedia complained the Finnish government had violated their right to freedom of expression pursuant to article 10 of the ECHR¹⁷⁵. In their view, the ban had constituted an interference with this right. Further, this interference could not be considered necessary in a democratic society, as the published information was already in the public domain pursuant to national legislation¹⁷⁶.

¹⁷¹ Ibid., para. 21.

¹⁷² Ibid., para. 23 and 23.

¹⁷³ 931/13, para. 92.

¹⁷⁴ Ibid., para. 107

¹⁷⁵ Ibid., article V, section I.

¹⁷⁶ Ibid., para. 35.

Whether there was an interference

Pursuant to the ECtHR's fixed assessment, it first considered whether the ban imposed by the DPD constituted an interference with the two companies' right to freedom of expression pursuant to article 10¹⁷⁷. Satamedia asserted they were banned from processing taxation information¹⁷⁸. Such a ban had meant they were proactively prohibited from publishing, and this constituted censorship in violation of the Finnish constitution¹⁷⁹. The Finnish government contested this assertion¹⁸⁰.

The ECtHR found that the ban issued by the DPB had not prevented the two companies from publishing the taxation data altogether¹⁸¹. However, it had restricted them from publishing the data to the extent they had been able to in prior years¹⁸². As such, the ECHR found that the ban imposed upon the two companies had constituted an interference with the two companies' right information pursuant to article 10¹⁸³.

Whether the interference was prescribed by law and pursued a legitimate aim

The ECHR accepted the Finnish governments view that the interference was based on the Finnish Personal Data Act, and that the issue for the domestic courts had been whether its exemption for processing of personal data for journalistic purposes had been applicable for this instance¹⁸⁴. Therefore, the ECHR accepted that the interference was "prescribed by law", and that it pursued the legitimate aim of protecting the reputation or rights of others, pursuant to article 10 (2)¹⁸⁵.

¹⁷⁷ Ibid., section 5.02 (b) (i).

¹⁷⁸ Ibid., para. 42.

¹⁷⁹ Ibid..

¹⁸⁰ Ibid., para. 46.

¹⁸¹ 931/13, para. 53.

¹⁸² Ibid.

¹⁸³ Ibid.

¹⁸⁴ Ibid., para. 55.

¹⁸⁵ Ibid., para. 55.

Whether the interference was necessary in a democratic society

Finally, the ECHR considered whether the ban imposed upon the two companies had been “necessary in a democratic society”¹⁸⁶. In their submission, Satamedia emphasized that publishing tax data had been common, frequent and expressly accepted by the Finnish legislator¹⁸⁷. In their view, there had not been a pressing social need that justified the restriction imposed upon them while other publishers had not been subjected to any restrictions¹⁸⁸. Finally, the exemption for journalistic purposes could not be influenced by the amount of information published¹⁸⁹.

The Government did not contest the fact that the tax information was publicly available as such. However, they asserted the publishing had mainly satisfied the curiosity of the readers, which was in conflict with the Personal Data Act¹⁹⁰. In the opinion of the Finnish government, the fact that the information was public did not by itself entail that it could be published, especially when such publishing did not serve the public interest¹⁹¹.

Subsequent to a review on the contents of case law on the necessity-criterion, the ECtHR presented the criterion developed in the Von Hannover 2 and Axel Springer cases as relevant in the applicable instance¹⁹². The ECHR considered these relevant as the prior cases also had considered balancing the right to freedom of expression with the right to private life¹⁹³.

¹⁸⁶ Ibid., section 5.02 (b) (iii).

¹⁸⁷ Ibid., para. 44.

¹⁸⁸ Ibid.

¹⁸⁹ 931/13, para. 45.

¹⁹⁰ Ibid., para. 48.

¹⁹¹ Ibid.

¹⁹² Ibid., para. 62.

¹⁹³ Ibid.

These criteria are:

- i) contribution to a debate of general interest;
- ii) how well-known is the person concerned and what is the subject of the report;
- iii) prior conduct of the person concerned;
- iv) method of obtaining the information and its veracity/circumstances in which the photographs were taken;
- v) content, form and consequences of publication; and
- vi) severity of the sanction imposed

The ECtHR emphasised that the necessity of the ban imposed upon the two companies had to be established convincingly by the Finnish Government¹⁹⁴. Whether or not the assessment by the national courts have adhered to the established case law of the ECtHR, i.e., adhered to the principles presented above, is material to the ECtHR's assessment¹⁹⁵. The ECtHR therefore continued its deliberation by assessing the facts of the case in light of these criteria.

First, the ECtHR swiftly concluded the taxation data itself constituted a matter of public interest in Finland¹⁹⁶. This was due to its publicly available nature as determined by the Finnish legislator¹⁹⁷. The ECtHR therefore found that there were justified grounds for the two companies to publish this information¹⁹⁸.

¹⁹⁴ 931/13, para. 64.

¹⁹⁵ Ibid.

¹⁹⁶ 931/13, para. 65.

¹⁹⁷ Ibid.

¹⁹⁸ Ibid.

The ECtHR did not elaborate on the second and third Von Hannover criteria¹⁹⁹. It restricted itself to mention that the persons concerned in the applicable instance were both publicly known and private individuals²⁰⁰.

In its consideration of the fourth criteria, the ECtHR determined there was nothing to fault the Satamedia for regarding the method of how they obtained the information²⁰¹. In fact, the ECtHR acknowledged that the entire database of tax information had been received directly from the Finnish tax authorities²⁰². Further, the ECtHR recognized there had never been any dispute between the parties as to the accuracy of the information²⁰³. Thus, the publication of the tax information did not entail any risk of false allegations, misrepresentation or bad faith²⁰⁴.

Subsequent to its initial review, the ECtHR reiterated the guidance provided by the CJEU on the interpretation of “journalism” in article 7 of the DPD²⁰⁵. It then considered the deliberations of the Finnish Supreme Court, finding that it had “examined the case on the basis of principles embodied in Article 10 and the criteria laid down in the Court’s case-law”²⁰⁶.

The ECtHR did note that the only issue for the national courts was the mere extent of the information published by Satamedia, and that to such an extent could not be considered as journalism but rather as mere processing of personal data²⁰⁷. The Finnish Supreme Court’s

¹⁹⁹ 931/13, para. 66.

²⁰⁰ Ibid.

²⁰¹ Ibid.

²⁰² Ibid.

²⁰³ 931/13, para. 67.

²⁰⁴ Ibid.

²⁰⁵ 931/13, paras. 68 and 69.

²⁰⁶ Ibid., para. 71.

²⁰⁷ Ibid., para. 68.

rationale for issuing the ban on this sole purpose was that it did not consider the public interest to require publication to such an extent²⁰⁸. Based on this, the ECtHR noted that the Finnish Supreme Court found it necessary to interpret Satamedia's right to freedom of expression strictly in order to protect the right to privacy²⁰⁹.

The ECtHR did not explicitly examine the Finnish Supreme Court's decision to ban publishing solely on the issue of the extent of the published data. Rather, it decided to simply conclude that the Finnish Supreme Court had made an effort to balance the right to privacy with the right to freedom of expression pursuant to the established case-law of the ECtHR, leaving the Finnish authorities and courts a broad margin of appreciation by concluding that the "reasons relied on (...) were both relevant and sufficient to show that the interference complained of was "necessary in a democratic society"²¹⁰.

3.5.2 Dissenting opinion of Judge Tsotsoria

Subsequent to the ruling by the fourth chamber, a dissenting opinion was submitted by Judge Tsotsoria²¹¹. In her view, the ban imposed by the Finnish DPO was not proportionate to the legitimate aim pursued. Therefore, the interference amounted to a violation of Article 10²¹². Subsequent to a brief introduction on the importance of press freedom as well as a remark to the applicability of the Von Hannover-criterion, Tsotsoria presented several reasons for her dissent.

First, she emphasised and aligned herself with the majority's conclusion that there was never any doubt regarding the applicant companies' "compliance with the standards of re-

²⁰⁸ Ibid., para. 70.

²⁰⁹ Ibid., para. 71.

²¹⁰ 931/13, paras. 72 and 74.

²¹¹ Judge Nicolaou presented a separate, concurring opinion, in which he comments on whether the economic losses sustained by the two companies constituted a sanction against them, cf. concurring opinion para. 5.

²¹² 931/13, dissenting opinion, para. 1 and 5.

sponsible journalism and their good faith”²¹³. She identified that it was solely the mere extent of the published information which served as the basis for whether the companies had conducted journalism or processing of personal data²¹⁴. In her view, the ruling did not sufficiently ascertain that the ban was “necessary for the protection of the right to privacy of either specific individual(s) or of society as a whole”²¹⁵.

Further, Tsotsoria considered the judgment to deviate from established case law finding violations of Article 10 in instances where national governments have conducted measures to limit the publication of publicly available information²¹⁶. She also subscribed to the applicant companies’ assertion that the ban constituted censorship of their ability to publish information in the public interest, comparing the practice to that of totalitarian states²¹⁷.

Finally, the dissenting opinion criticised the broad interpretation of the right to privacy as endorsed by the domestic authorities and the majority of the fourth chamber. In Tsotsoria’s view, the broad interpretation was based upon an “abstract and hypothetical need to protect privacy”²¹⁸. She substantiated this claim by specifying that there was never any “negative effect or harm (..) identified as having been inflicted upon any individual, nor had society been otherwise imperilled through the publication of these data”²¹⁹. A fictional, non-existing threat to privacy could never justify the restrictions on media freedom imposed upon the two companies²²⁰.

²¹³ Ibid., dissenting opinion, para. 5.

²¹⁴ Ibid.

²¹⁵ Ibid.

²¹⁶ 931/13, dissenting opinion, para. 6.

²¹⁷ Ibid., dissenting opinion, para. 7.

²¹⁸ Ibid., dissenting opinion, para. 8.

²¹⁹ Ibid.

²²⁰ Ibid.

A substantial part of the dissenting opinion is designated to the notion of journalism, and how the majority has interpreted and applied this concept in the applicable case. Tsotsoria reiterated the central elements of what constitutes journalism, namely collection of data, interpretation and storytelling²²¹. Tsotsoria feared the majority's ruling would lead to an interpretation of journalism which limits journalists ability to process personal data²²². She emphasized that the ruling could serve to establish a “quantitative framework” for determining limitations upon the press' ability to publish publicly available information. In essence, the ruling established a link between the notion of journalism, and limitations to freedom of expression, to the mere extent of information processed by journalist²²³.

Finally, Tsotsoria argued the Finnish government should not have been afforded the broad margin of appreciation it received. The ECtHR should rather have executed its supervisory function and concluded that the ban on the two companies, and thus their interference with their right to freedom of expression, had not been necessary in a democratic society pursuant to article 10²²⁴.

4 Balancing fundamental rights

4.1 Overview of this section

Section 4 will provide comments and analysis on the case of *Satamedia*. There are several topics that could be elaborated on regarding *Satamedia*, as well as the balancing of data privacy and freedom of expression. However, elaboration on the full extent of topics raised by *Satamedia* is too extensive for the scope of this thesis.

²²¹ Ibid., dissenting opinion, para. 9, with further references.

²²² Ibid., dissenting opinion, para. 9.

²²³ Ibid., dissenting opinion, para. 10.

²²⁴ 931/13, dissenting opinion, para. 12.

The following subsections will emphasize the following three aspects. Subsection 4.2 comments on the unique practice of a few Nordic countries of publicly disclosing tax information. Subsection 4.3 considers the alleged privacy interference by Satamedia. In the view of the author, the interference did not justify the restriction on freedom of expression. Instead of pursuing Satamedia for publishing the tax information, the Finnish legislator should instead have amended the undesired outcome from its law on public disclosure of tax information.

Finally, subsection 4.4 comments on the role attributed to the extent of information published by Satamedia. In alignment with the dissenting opinion, one may argue this reasoning could cause an unfortunate and potentially damaging impact upon press freedom and modern methods of conducting journalism.

4.2 Public disclosure of tax information

The practice of releasing tax information in the public domain is unique to a few Nordic countries, namely Finland, Sweden, Iceland and Norway²²⁵. Although the means of publishing and the extent of information available differs, there is widespread consensus that such information should reside in the public domain²²⁶.

In Sweden, the so-called Tax Calendars are available online for a surcharge of 254 SEK²²⁷. Each county in Sweden have their own Tax Calendar²²⁸. Norwegian tax lists are available online free of charge, but those seeking to consult it must log in with their national ID. Searches are restricted to 500 individuals each month, and the system keeps a log of every-

²²⁵ Conversable Economist.

²²⁶ The Guardian, November 2016.

²²⁷ WatchDog Watcher.

²²⁸ Ibid.

one who has viewed certain information²²⁹. Therefore, each person whose information has been viewed will know who has taken a look. Norwegian media outlets receive digital copies of the entire list, but are subjected to a contractual clause limiting their ability to publish the full extent of information in a searchable database²³⁰.

There are several legitimate reasons for publicly disclosing tax information, and for keeping the information private. Those advocating public disclosure argue it facilitates transparency on the national governments' largest source of revenue, allowing journalists and other "watch dogs" to scrutinize individuals' contribution to their community²³¹. Public disclosure has also been proven to contribute to more truthful reporting²³².

Advocates against public disclosure cite privacy concerns as their main argument. In their view, an individuals' income and wealth are private matters. Public disclosure of tax information facilitates meddling by friends, neighbours and co-workers. Further, the highest earners are often profiled in the media, regardless of whether they inhabit a public position or actively seek attention²³³. While there is a legitimate public interest in tax information, its disclosure does arguably contribute to the tabloid media's gossip columns²³⁴. As such, it resembles the increasingly intrusive practices by the media which Warren and Brandeis sought legal protection against.

However, the Nordic countries who pursue public disclosure of tax information do so to combat arbitrariness in their tax systems²³⁵. Although these countries have strict tax laws,

²²⁹ Lovvedtak 68 (2010-2011).

²³⁰ Wessel-Aas, Jon, 2012

²³¹ Wessel-Aas, Jon, 2012

²³² Bø, Slemrod and Thoresen. The research showed that public disclosure of tax information increased reported income by 3 %, cf. p. 3.

²³³ Tax Justice Network.

²³⁴ Ibid.

²³⁵ Ibid.

methods of tax planning, meaning methods of utilizing legal loopholes to minimize taxes, are still applied. A transparent tax system contributes to public debate on these issues.

4.3 Can publishing information in the public domain violate privacy?

The ruling in *Satamedia* is the result of a balancing of two competing interests. The role of the ECtHR was to consider how the Finnish Supreme Administrative Court had conducted this balancing assessment, and determine whether the balancing complied with the ECHR and the case law of the ECtHR²³⁶. The ECtHR sought to identify whether the restrictions imposed upon the right to freedom of expression had been “established convincingly by the Supreme Administrative Court”²³⁷. In those circumstances, the ECtHR needed “strong reasons to substitute its own view for that of the domestic courts”²³⁸. This is an expression of the margin of appreciation afforded to the national states.

Conversely, if the ECtHR found the restriction on freedom of expression to not be convincingly established, it could have executed its supervisory function and overruled the Finnish Supreme Administrative Court²³⁹.

Upon conducting their assessment, the ECtHR observed that the Finnish Supreme Administrative Court had “attached importance” to the two companies’ right to freedom of expression, and the right to data privacy for those who had their tax information published²⁴⁰. In the view of the ECtHR, the Finnish Supreme Administrative Court had sufficiently es-

²³⁶ 931/13, para. 70-71.

²³⁷ Ibid., para. 72.

²³⁸ Ibid.

²³⁹ Ibid., dissenting opinion para. 12.

²⁴⁰ Ibid., para. 71.

tablished that the interference of data privacy in this instance justified a restriction of the two companies' right to freedom of expression²⁴¹.

However, it is not obvious how the publication of tax information constituted a violation of data privacy to such an extent that it justified the restriction. The ECtHR did not elaborate on how the right to data privacy was affected. According to the dissenting opinion by Judge Tsatsoria, there was never any need for measures protecting data privacy²⁴². In her view, the imposed ban was based on an "abstract and hypothetical need to protect privacy"²⁴³.

Prior to the publishing by Satamedia, the Finnish legislator had determined that tax information should be in the public domain. The practice of the Finnish governments' public disclosure of tax information, and whether such disclosure violated data privacy, was not an issue for the Finnish Supreme Administrative Court nor the ECtHR. The violation of data privacy which justified the interference with freedom of expression occurred when Satamedia printed the entire lists and made them available through an on-demand text messaging service.

Critics of the ruling struggle to fathom how dissemination of public information already made available by the tax authorities could be subjected to restrictions²⁴⁴. In essence, the case of *Satamedia* seems to deal with a national government imposing restrictions on dissemination of information it itself determined should be available to the public. According to Tsatsoria, established case law of the ECtHR does usually not side with the national governments in such instances²⁴⁵.

²⁴¹ Ibid., para. 71-72.

²⁴² 931/13, dissenting opinion, para. 8.

²⁴³ Ibid.

²⁴⁴ Smith, Dominic and Batra, Rahul.

²⁴⁵ 931/13, dissenting opinion, para. 5.

How could the publishing by Satamedia constitute a violation of privacy, compared to the initial public disclosure by the Finnish tax authorities? One potential answer may be found in how Satamedia contributed to easier access to the tax information.

In accordance with the established case law of the ECtHR, a violation of data privacy may be determined on the notion of an individual's "legitimate expectation" of privacy²⁴⁶. This assessment is applied as an objective measurement determining the degree of data privacy an individual reasonably would expect in a specific situation. Therefore, it may be relevant to consider whether easier access to tax information surpassed Finnish citizens' "reasonable expectations" regarding public disclosure of their tax information.

The ECtHR did not consider this. In applying the fifth criterion from the Von Hannover ruling, which entailed a broader consideration of the consequences of the publication, the ECtHR restricted itself to mention that there were neither evidence nor allegations of any "misrepresentation or bad faith on the part of the applicant companies"²⁴⁷.

In fact, the ECtHR did not make any explicit assessment of the violation of data privacy. It simply mentioned that the Finnish Supreme Administrative Court had "attached importance" to this fundamental right²⁴⁸.

It is apparent the extensive dissemination the two companies facilitated made access to the tax information easier. This is essential for assessing whether Satamedia breached the citizens' legitimate expectation of privacy. The degree to which information is easy to access may determine its ability to violate data privacy, with the individuals' "reasonable expectation" of how the information were to be disseminated as the determining factor.

²⁴⁶ Case of Von Hannover v. Germany (2004), para. 51

²⁴⁷ 931/13, para. 67.

²⁴⁸ Ibid., para. 71.

In other words, the ECtHR could have argued that the augmented dissemination by *Satamedia* exceeded Finnish citizens' "reasonable expectations" of privacy. However, it is not apparent if this approach would justify the restriction of freedom of expression.

Both the Finnish tax authorities and the two companies provided on-demand access to the same tax information, and to the same amount of information. Whereas *Satamedia* published through print newspapers and their text messaging service, the Finnish tax authorities provided access through their web page²⁴⁹.

Even though individuals could access the information through the tax authorities, it is clear that distribution of a printed newspaper and by text messaging provided more options on how to receive tax information, thereby enhancing access to the information.

However, both services charged for inquiries of the database. Conversely, access through the tax authorities is significantly cheaper than the service offered by *Satamedia*. Therefore, the tax information is arguably more accessible through the Finnish tax authorities.

On these grounds, upon comparison with the disclosure practices of the Finnish tax authorities, it is hard to conclude the dissemination by *Satamedia* violated any reasonable expectations of privacy. Their dissemination of tax information appears to be more or less equal to the methods of the Finnish tax authorities.

Instead, the reason for the result of *Satamedia* seems to lie in how the Finnish national courts and the ECtHR apply its respective rules on data privacy. Upon balancing data privacy and freedom of expression, the ECtHR seeks to determine whether an interference of an individuals' data privacy justifies a restriction on the right to freedom of expression. This is the natural point of departure, and the reason for why it seems counterintuitive to

²⁴⁹ Dead For Tax Reasons.

uphold restrictions on freedom of expression when there does not seem to exist any violation of data privacy.

The ECtHR were tasked to determine whether the Finnish Supreme Administrative Court had conducted their assessment in accordance with the ECHR and the established case law of the ECtHR. However, the Finnish Supreme Administrative Court applied the national implementation of the DPD to reach its conclusion. Although national courts are obliged to adhere to the ECHR, they primarily interpret and apply national law.

Whereas the ECHR mainly protects the right to respect for private life in a broader sense, the DPD takes another, more narrow approach. It applies to the mere processing of personal data by a controller. Upon collecting tax information, Satamedia became processors of personal data, subjected to the restrictions and safeguards imposed by the DPD. The Finnish Supreme Administrative Court determined that Satamedia had right to conduct such processing. However, this is not synonymous with violating data privacy pursuant to the ECHR.

The ECtHR appears to simply have agreed with the Finnish Supreme Administrative Court on the existence of an interference to data privacy, without conducting an explicit assessment pursuant to ECHR article 8. The established public nature of the tax information, and therefore its detrimental ability to interfere with the data privacy of the Finnish citizens appears to not be sufficiently established.

Regardless of how the ECtHR reached its conclusion, it might be pertinent to consider the circumstances of the case in a broader perspective. Specifically, it seems relevant to assess why Satamedia should bear responsibility for the widespread dissemination of publicly available tax information.

Granted, they conducted processing of personal data on a massive scale, contributing to broad accessibility of tax information. However, they did so believing they were exempted

from the DPD, pursuant to its article 9. As emphasized in the dissenting opinion by Judge Tsotsoria, the majority “raised no questions as to [Satamedia’s] compliance with the standards of responsible journalism and their good faith has not been called into question”²⁵⁰.

Further, both the Finnish legislator and the ECtHR agreed the information in question was in the public interest. The ECtHR even stated “there were justified grounds for imparting such information to the public”²⁵¹.

In fact, the information was legally obtained directly from the Finnish tax authorities, in compliance with the Finnish act on disclosure of tax information²⁵². Therefore, it seems appropriate to consider if the Finnish government instead should be held as the liable party in this matter.

The Finnish legislator had determined tax information a matter of public record. As such, it had already considered the public interest in the information to outweigh any implications disclosure would have upon its citizens’ right to data privacy. For this reason it is hard to fathom the rationale for why the Finnish government went to such lengths to prohibit further dissemination of the tax information.

If the government determines information to be in the public domain, meaning it is accessible for anyone to consult, should it not also be the governments’ responsibility to implement safeguards restricting unwanted use of that information? It seems highly unlikely the Finnish legislator could not foresee publishing of the tax information in the manner Satamedia did.

²⁵⁰ 931/13, dissenting opinion para. 5.

²⁵¹ Ibid., para. 65.

²⁵² Ibid., para. 66.

Further, it also appears counterintuitive for the ECtHR to grant the Finnish Supreme Administrative Court a broad margin of appreciation without recognizing the role of the Finnish legislator in this matter²⁵³. It is peculiar that the conflicting practice between the Finnish legislator and the Finnish DPA's was not subjected to any scrutiny by the ECtHR.

A similar event occurred in Norway where information on taxable income and fortune, as well as the amount of taxes paid, is publicly disclosed by the Norwegian tax authorities. Norwegian newspapers receive digital versions of these files, in order to examine them for journalistic purposes. Until 2010, most newspapers also made the entire lists freely available in searchable databases online²⁵⁴.

This exceeded the degree of public dissemination intended by the Norwegian legislator. Therefore, an amendment to the law on public disclosure was enacted in 2010²⁵⁵. Instead of going after the newspapers for allegedly violating data privacy, the legislator amended the law to correct the undesired outcome it had caused.

In the opinion of the author, the ECtHR should have recognized the vital role free journalism plays in a democratic society. Instead of imposing restrictions on journalists' freedom of expression, the ECtHR should have paid attention to the public disclosure practices in Finland and the responsibility of the Finnish legislator.

Instead of pursuing Satamedia for its contribution to a debate in the public's interest, the Finnish government should have followed the Norwegian example of adjusting the law to amend its undesired outcome.

²⁵³ 931/13, para. 74.

²⁵⁴ Wessel-Aas, Jon, 2012.

²⁵⁵ Lovvedtak 68 (2010-2011).

4.4 Does the amount of collected data matter?

This final section elaborates on the role the mere amount of information published by Satamedia played in the ruling by the ECtHR. As explicitly recognized by the ECtHR, “the only problematic issue (..) was the extent of the published information”²⁵⁶.

Satamedia published tax information on 1.2 million Finnish citizens. This constituted the entire database of publicly available information, and exceeded the amount published by other Finnish news outlets²⁵⁷. In the view of the Finnish Supreme Administrative Court, the public interest in the tax information did not justify dissemination to such an extent. Therefore, the publishing by Satamedia amounted to processing of personal data rather than journalism²⁵⁸.

The ECtHR sided with the Finnish Supreme Administrative Court in this instance, explicitly acknowledging that the mere amount of information published constituted the sole reason for imposing restrictions upon the two companies’ right to freedom of expression pursuant to article 10 of the ECHR²⁵⁹.

This approach is controversial. Judge Tsotsoria emphasized in her dissenting opinion the risk of establishing a “quantitative framework” for determining what qualifies for journalism pursuant to article 10 of the ECHR²⁶⁰. In her view, linking journalism to the amount of information published entails a risk of “vague and disproportionate” interferences with freedom of expression²⁶¹.

²⁵⁶ 931/13, para. 68.

²⁵⁷ Ibid., para 106.

²⁵⁸ Ibid., para. 68.

²⁵⁹ Ibid., para. 70-72.

²⁶⁰ Ibid., dissenting opinion, para. 10.

²⁶¹ Ibid.

In the view of the author, there are two reasons why this approach is problematic. First, the notion of a quantitative threshold defining journalism appears to be completely unenforceable. Established case law of the ECtHR pursuant to article 10 relies on a qualitative assessment of whether the publication contributes to a debate of public interest, or whether it merely intends to satisfy the curiosity of the reader²⁶².

Introducing a quantitative criterion not only fails to reflect the qualitative nature of journalism, it falsely assumes a quantitative threshold is possible to determine. If a threshold cannot be determined, it cannot be enforced.

In fact, the unenforceable nature of a quantitative threshold is exemplified in the case of *Satamedia*. Satamedia was banned from publishing tax information to the extent they had in 2002²⁶³. Upon receiving the ban from the DPO, they requested guidance on how much information they would be allowed to publish. Seemingly unable to provide such guidance, the DPO merely responded that the two companies lacked legal basis to maintain and publish their entire database of tax information²⁶⁴. This response instigated the second round of appeals through the Finnish courts.

Secondly, introducing a quantitative criterion risks impeding journalists' ability to conduct their work. Satamedia were not only banned from publishing the information they had collected, they were forbidden to "collect, save or process" tax information to the extent they had in 2002. As mentioned above, no guidance was provided as to how much information would be deemed acceptable. This resulted in an undefined quantitative restriction being imposed on the mere collection of information.

²⁶² Von Hannover v. Germany, para. 60 and 65.

²⁶³ 931/13, para. 52 and 53.

²⁶⁴ Ibid., para. 20.

It is not hard to fathom the potential implications on journalism such a restriction might entail. In accordance with established case law by the ECtHR, gathering of information is an essential preparatory step in journalism and a protected part of press freedom²⁶⁵. As emphasized in the dissenting opinion by Tsotsoria, collection of data constitutes one of the “inalienable elements of journalism”²⁶⁶. Limiting the mere collection of information restricts the ability to conduct analysis. This obstructs journalists’ ability to contribute to a debate in the public interest.

There are several contemporary examples of journalism that exemplify the implications a quantitative restriction might entail. Leaks of enormous databases of information have contributed to some of the most important journalistic work conducted in the last years²⁶⁷. The Snowden files revealed extensive, world-wide mass surveillance²⁶⁸. The Panama Papers revealed how secretive offshore tax havens are being used by the world’s wealthiest, including several national leaders, to circumvent taxes²⁶⁹. The latter instance contained an unprecedented leak of 11.5 million files.²⁷⁰

If one considers the qualitative aspect of these publications, they certainly serve a highly legitimate contribution to a debate in the public’s interest. However, the publications also contain personal information which might deeply impact the reputation of those concerned. Journalists’ ability to determine which information should be published, and what should remain private relies on these qualitative assessments.

²⁶⁵ Magyar Helsinki Bizottság v. Hungary, para. 130.

²⁶⁶ 931/13, dissenting opinion para. 9. With further references.

²⁶⁷ The Guardian, April 2014.

²⁶⁸ The Guardian, November 2013.

²⁶⁹ The Guardian, April 2016.

²⁷⁰ Ibid.

Establishing quantitative restrictions on the collection and analysis of this data risks impeding journalists' ability to conduct their qualitative assessment, as the integrity and correctness of the information may become compromised. Being able to see the complete picture of requires the full extent of information available. Imposing an ex-ante restriction upon the collection of information from the Panama Papers database would have dramatically damaged journalists' ability to contribute to a debate in the public's interest.

5 Conclusion

In the case of *Satamedia*, the fourth section of the ECtHR sought to balance data privacy with freedom of expression. In doing so, they have left a trail of conflicts and unanswered questions behind.

The ECtHR upheld restrictions on freedom of expression based on a non-existing violation of data privacy. In doing so, they explicitly acknowledged the quantity of information collected by a journalistic entity might constitute the sole reason for imposing restrictions. As demonstrated above, establishing a quantitative criteria may have profound impact upon future notions of modern journalism.

Granted, the ECtHR probably did not intend to establish such a dramatic precedence in their ruling. However, the ambiguity they left behind has undoubtedly caused uncertainty and concern. Therefore, it is now up to the Grand Chamber of the ECtHR to provide clarity and foreseeability to the balancing of privacy and data protection.

Hopefully, they will clarify the role played by qualitative aspects in the applicable instance rather than relying on the mere quantity of information. Further, it would be beneficial if they closely considered the Finnish legislators' role in this matter, as well as the lacking interference with data privacy conducted by *Satamedia*.

6 Table of reference

List of judgements

ECtHR:

- Application no. 931/13, Case of Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland.
- Application no. 8978/80, Case of X and Y v. The Netherlands
- Application no. 7525/76, Case of Dudgeon v. The United Kingdom
- Application no. 38030/12, Case of Khan v. Germany
- Application no. 5029/71, Case of Klass and Others v. Germany
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- Applications nos. 30562/04 and 30566/04, Case of S and Marper v. The United Kingdom.
- Application no. 5856/72, Case of Tyrer v. The United Kingdom.
- Application no. 62617/00, Case of Copland v. The United Kingdom.
- Application no. 18535/91, Case of Kroon and Others v. The Netherlands.
- Application no. 59320/00, Case of Von Hannover v. Germany (2004).
- Application no. 6538/74, Case of Sunday Times v. The United Kingdom
- Application no. 18030/11, Case of Magyar Helsinki Bizottság v. Hungary

CJEU:

- C-528/14 Breyer
- C-73/07 Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy

Treaties/statutes

- ECHR - Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention on Human Rights”)

- DPD - Directive 95/46/EC of the European Parliament and of the Council of October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data, official journal L 281, 23/11/1995.
- Regulation 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
- Act 523/1999 Henkilötietolaki (Personal Data Act). Available at: <http://www.finlex.fi/en/laki/kaannokset/1999/19990523>.
- Act No. 1346/1999, "Act on the public disclosure and confidentiality of tax information". Available at: <http://www.finlex.fi/fi/laki/kaannokset/1999/en19991346.pdf>.
- LOV-2000-04-14-31, Lov om behandling av personopplysninger (The Norwegian Data Privacy Act).
- Lovvedtak 68 (2010-2011), vedtak til lov om endringer i lov 13. juni 1980 nr. 24 om ligningsforvaltning.

Secondary literature

- Akandji-Kombe, Jean-Francois, "Positive obligations under the European Convention on Human Rights - A guide to the implementation of the European Convention on Human Rights". Council of Europe human rights handbooks, no. 7.
- B.J. Koops, "The Trouble with European data protection law", International Data Privacy Law, Volume 4, Issue 4, November 2014. Available at: <https://ssrn.com/abstract=2505692>.
- Bygrave 2014: Bygrave, Lee A., "Data Privacy Law: An International Perspective". Oxford University Press, 2014.
- Bygrave 2014b: Bygrave, Lee A., "Data Privacy Law and the Internet: policy challenges" in Witzleb, Lindsay, Paterson and Rodrick (eds.), "Emerging Challenges in Privacy Law: Comparative Perspectives", Cambridge University Press, 2014.

- Bygrave, "Data Protection Pursuant to the Right to Privacy in Human Rights Treaties", International Journal of Law and Information Technology, 1998, Volume 6, p. 247-284. Available at: http://folk.uio.no/lee/oldpage/articles/Human_rights.pdf.
- Bygrave, Lee A., "Data Protection Law: Approaching Its Rationale, Logic and Limits". Kluwer Law International, 2002.
- Bø, Slemrod and Thoresen, "Taxes on the internet - Deterrence effects of public disclosure". Statistics Norway Research department, Discussion Papers no. 770, January 2014. Available at: https://www.ssb.no/en/forskning/discussion-papers/_attachment/161120?_ts=143e822ee80.
- Coe.int, European Court of Human Rights (ECtHR). Retrieved 30.11.2016. Available at: http://www.coe.int/t/democracy/migration/bodies/echr_en.asp.
- Conversable Economist, "Should individual Tax Returns Be Public Information". Published 30.03.2015. Retrieved 07.11.2016. Available at: <http://conversableeconomist.blogspot.no/2015/03/should-individual-tax-returns-be-public.html>.
- Council of Europe press release, "Grand Chamber hearing concerning use of taxation information". Published 14.09.2016. Retrieved 30.11.2016. Available at: <http://hudoc.echr.coe.int/app/conversion/pdf?library=ECHR&id=003-5484692-6886420&filename=Grand%20Chamber%20hearing%20Satakunnan%20Markkina porssi%20Oy%20and%20Satamedia%20Oy%20v.%20Finland.pdf>.
- Dead For Tax Reasons, "Finland - Tax Disclosure". Published March 2014. Retrieved 26.11.2016. Available at: <https://deadfortaxreasons.wordpress.com/tag/finland/>.
- Erdos, David, "From the Scylla of Restriction to the Charybdis of License? Exploring the Present and Future Scope of the "Special Purposes" Freedom of Expression Shield in European Data Protection". University of Cambridge Legal Studies Research Paper Series, paper no. 20/2015, April 2015. Available at: <https://ssrn.com/abstract=2477797>.

- Europa.eu, "Court of Justice of the European Union (CJEU)". Retrieved 29.11.2016. Available at: https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en.
- European Commission Press Release: "Joint Statement on the final adoption of the new EU rules for personal data protection". Published 14.04.2016. Retrieved 29.11.2016. Available at: http://europa.eu/rapid/press-release_STATEMENT-16-1403_en.htm.
- European Commission, "A Comprehensive Approach on Personal Data Protection in the European Union". Available at: http://ec.europa.eu/justice/news/consulting_public/0006/com_2010_609_en.pdf.
- European Court of Human Rights, "Factsheet on protection of reputation". Published October 2016. Retrieved 29.11.2016. Available at: http://www.echr.coe.int/Documents/FS_Reputation_ENG.pdf.
- Greer, Steven, "The margin of appreciation: Interpretation and discretion under the European Convention on Human Rights". Council of Europe publishing, Human rights files no. 17.
- Kilkelly, Ursula, "The right to respect for private and family life: A guide to the implementation of Article 8 of the European Convention on Human Rights", Council of Europe Human rights handbooks, no. 1, section 1.1. Available at: <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=090000168007ff47>.
- Lidsky, Lyrrisa: "European Court of Human Rights Favors Privacy over Right to Publish Truthful Information Obtained from Public Records". Retrieved 29.11.2016. Available at: <https://facultyblogs.law.ufl.edu/european-court-of-human-rights-favors-privacy-over-right-to-publish-truthful-information-obtained-from-public-records/>.
- Macovei, Monica, "Freedom of expression - A guide to the implementation of Article 10 of the European of Convention on Human Rights". Council of Europe Human rights handbooks, No. 2.

- Melville B. Nimmer, "The Right of Publicity", Law and Contemporary Problems 203-223 (Spring 1954). Available at:
<http://scholarship.law.duke.edu/lcp/vol19/iss2/6>.
- Mihail, Stephanie, "Does Privacy Overpower Journalistic Freedom?". European Data Protection Law Review, 2016 issue 1.
- Møse, Erik, "Menneskerettigheter", Cappelen Akademisk Forlag, 2002.
- NSA Files: Decoded - What the revelations mean for you. Published 01.11.2013. Retrieved 28.11.2016. Available at:
<https://www.theguardian.com/world/interactive/2013/nov/01/snowden-nsa-files-surveillance-revelations-decoded>.
- Sejersted, Fredrik; Arnesen, Finn; Rognstad, Ole-Andreas; Kolstad, Olav, "EØS-rett". 3rd edition. Universitetsforlaget, 2011.
- Smith, Dominic and Batra, Rahul, "Right to privacy vs freedom of expression". Published 06.08.2015. Retrieved 30.11.2016. Available at:
<http://www.lexology.com/library/detail.aspx?g=483211b7-6942-47e3-854d-ea35fdbdfff7>.
- Tax Justice Network, "Paying Taxes is Public in Finland". Posted 11.07.2009. Retrieved 11.11.2016. Available at: <https://taxjustice.blogspot.no/2009/07/paying-taxes-is-public-in-finland.html>.
- Tax Justice Network, "Paying Taxes is Public in Finland". Published 11.07.2009. Retrieved 07.11.2016. Available at: <https://taxjustice.blogspot.no/2009/07/paying-taxes-is-public-in-finland.html>.
- The Guardian, "Guardian and Washington Post win Pulitzer prize for NSA revelations". Published 14.04.2014. Retrieved 28.11.16. Available at:
<https://www.theguardian.com/media/2014/apr/14/guardian-washington-post-pulitzer-nsa-revelations>.
- The Guardian, "Norway, the country where you can see everyone's tax returns". Published 11.04.2016. Retrieved 08.11.2016. Available at:
<https://www.theguardian.com/money/blog/2016/apr/11/when-it-comes-to-tax-transparency-norway-leads-the-field>.

- The Guardian, "What are the Panama Papers? A guide to history's biggest data leak". Published 05.04.2016. Retrieved 28.11.2016. Available at: <https://www.theguardian.com/news/2016/apr/03/what-you-need-to-know-about-the-panama-papers>.
- The Guardian, "What is "safe harbour" and why did the EUCJ just declare it invalid?". Published 6.10.2015. Retrieved 11.11.2016. Available at: <https://www.theguardian.com/technology/2015/oct/06/safe-harbour-european-court-declare-invalid-data-protection>.
- The New York Times, "Alan F. Westin, Who Transformed Privacy Debate Before the Web Era, Dies at 83". Published February 22, 2013. Retrieved 05.11.2016. Available at: <http://nyti.ms/1E0xlA1>.
- Van Der Haak, Bregtje; Parks, Michael; Castells, Manuel, "The Future of Journalism: Networked Journalism". International Journal of Communication, no. 6, 2012. Available at: <http://ijoc.org/index.php/ijoc/article/view/1750/832>.
- Warren and Brandeis, "The Right to Privacy". Harvard Law Review, vol. 4, no. 5. Available at: http://groups.csail.mit.edu/mac/classes/6.805/articles/privacy/Privacy_brand_warr2.html.
- WatchDog Watcher, "Disclosing tax data". Published 06.01.2013. Retrieved 07.11.2016. Available at: <https://watchdog-watcher.com/2013/01/06/disclosing-tax-data/>.
- Wessel-Aas, Jon, "Skattelister, offentlighet og personvern - noen juridiske refleksjoner". Lov&Data nr. 110, June 2012, LOD-2012-110-08.
- Wessel-Aas, Jon: "Pressefrihetens kår i 2014: Ett skritt frem og to tilbake?". Available through: <http://www.uhuru.biz/?p=1531>.
- www.veroporssi.com. Retrieved 21.01.2016. http://translate.google.com/translate?prev=hp&hl=fi&js=y&u=http%3A%2F%2Fwww.veroporssi.com%2F&sl=fi&tl=en&history_state0=.