

From the Scylla of Restriction to the Charybdis of License? Exploring the Scope of the ‘Special Purposes’ Freedom of Expression Shield in European Data Protection

David Erdos*

Abstract

European data protection sits in a relationship of profound tension with public freedom of expression. Although, Directive 95/46 include a special purposes provision for processing ‘carried out solely for journalistic purposes or the purposes of artistic or literary expression’, its limited scope fails to provide for a general reconciliation of values in this area. As vividly highlighted by the recent Google Spain decision, these problems were only partially resolved in the Satamedia judgment. Proposed amendments to require Member States to effect a reconciliation between data protection and freedom of expression itself run the theoretical risk of expanding the scope of this highly discretionary clause into one of universal application. However, as this would clearly conflict with the core harmonizing aim of reform, it would almost certainly be interpreted much more restrictively, thereby fuelling existing confusions. A two-pronged, layered approach may be preferable. Firstly, the special purposes provision would be expanded to clearly protect all activities orientated towards disclosing information, opinion or ideas for the benefit of the public collectively. Secondly, Member States would be obliged to effect a broader but more stringent reconciliation of data protection with the right to public freedom of expression under the law’s general derogation provisions.

Keywords: Blogging, Data Protection, Directive 95/46, Eniro, Freedom of Expression, *Fonecta*, Free Speech, *Google Spain*, *Hitta.se*, Internet, Journalism, *Kordowski*, *Lindqvist*, *Note2be.com*, Media, Privacy, Political Campaigning, *Quinton*, *Ramsbo*, *Satamedia*, Search Engines, *Spichmich.de*, Street Mapping, Web 2.0.

1. Introduction

European data protection law and freedom of public expression coexist in a state of serious tension. In recognition of this fact, the drafters of European Union Data Protection Directive 95/46 included a ‘special

* University Lecturer in Law and the Open Society and Fellow in Law, Trinity Hall, University of Cambridge. I would like to thank the Data Protection Authorities (DPAs) and the many individuals who have assisted the research presented here, as well both the British Academy and the Leverhulme Trust who provided much needed financial support for it. In particular, I record my appreciation to Ailbhe O’Loughin who provided valuable research assistance in relation to France, Ilona Pallasvuo who did the same in relation to Finland, Anu Talus who was very helpful in sourcing Finnish legal materials and Michèle Finck who provided invaluable general assistance as regards the administration of the DPA survey analysed here and Guy Edwards who helped in the preparation of some descriptive statistics related to this. All opinions expressed and any errors remain my own.

purposes' provision requiring that Member States provide a qualified shield for processing 'carried out solely for journalistic purposes or the purpose of artistic or literary expression'.¹ In 2008, the Court of Justice of the European Union (CJEU) held in *Satamedia* that, at least when the processing in question concerned the reuse of data in documents already placed in the public domain under national legislation, the phrase 'solely for journalistic purposes' covered all activities whose 'sole object is the disclosure to the public of information, opinions or ideas'.² A significant amount of commentary on this decision understood it to be mandating an extremely broad construction of this provision, with Oliver stating that the definition of journalism offered was 'tantamount to declaring that all expression must be classified as such'.³ In fact, both the CJEU's and other European courts' construction of the special purposes provision remained not only highly opaque but also much narrower than this commentary suggests. In sum, even after *Satamedia*, these actors have generally interpreted the scope of this provision to exclude the dissemination of information to essentially privatized individuals even if these are indefinite in number and also other forms of dissemination where a processing purpose other than journalism may also be considered present. The CJEU's own rejection of an expansive interpretation of *Satamedia* was highlighted recently in *Google Spain* which, *inter alia*, found that, whilst in some circumstances web publishers may be able to benefit from the special purposes provision, 'that does not appear to be so in the case of the processing carried out by the operator of a search engine'.⁴ As a result, the current formulation of the special purposes provision is too restrictive to provide a general reconciliation of values in this area.

Roughly at the same time as the *Google Spain* case was first lodged with the CJEU, the European Commission announced a proposal to further harmonize European data protection law by replacing the current Directive with a new Data Protection Regulation.⁵ Although the Commission's draft suggested making only limited changes to the wording of the special purposes provision, both the Council and the European Parliament have now proposed more radical amendments which would expand its scope to allow, and require, Member States to affect a general reconciliation between data protection and 'freedom of expression'. Given that the entirety of European data protection has from its inception been recognised to be in inherent tension with freedom of expression, this rephrasing would, in principle, transform the special purposes provision into a clause of general application. In sum, the scope of free speech under European data protection would, in theory

¹ Directive 95/46, art. 9.

² Case C-73/07, *Tietosuojavaltuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy*, EU:C:2008:727 at [62].

³ Oliver, 'The protection of privacy in the economic sphere before the European Court of Justice', 46 CML Rev. (2009), 1443-1483 at 1454.

⁴ Case C-131/12, *Google Spain, Google v Agencia Espanola de Proteccion de Datos, Mario Costeja Gonzalez*, EU:C:2014:317 at [85].

⁵ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data* (COM (2012) 11 final).

at least, shift from the Scylla of undue restriction to the Charybdis of license. However, since such a change would dramatically conflict with the proposed Regulation's core aim of further harmonising data protection law across the EU, it is almost certain to be interpreted much more restrictively and against its natural meaning. As a result, it would not resolve the serious confusion which exists in this area.

This article provides the first systematic analysis of the scope of both the present, and potential future, special purposes provision within European data protection law. Building on this, it also forwards an alternative conceptualisation for managing the growing tension between European data protection and public freedom of expression in the future. Following this introduction, sections two and three outline both the general contours of the current European data protection regime and the history and structure of its special purposes provision. Section four explores in detail the CJEU jurisprudence on the scope of the 'special purposes'. Section five broadens the discussion by elucidating interpretations adopted at national level by both courts and Data Protection Authorities (DPAs). Following on from this, section six outlines the recent proposals to reform European data protection, and especially the special purposes provision itself, through the replacement of current Directive with a new Data Protection Regulation. Section seven then analyses the situation as a whole and forwards an alternative conceptualisation for reconciling European data protection and the right to public freedom of expression. Finally, section eight provides some brief conclusions.

2. The Current European Data Protection Regime

Purpose and Scope

The EU Data Protection 95/46, which is designed to 'give substance to and amplify'⁶ the provisions of a Council of Europe Data Protection Convention finalised in 1981,⁷ has a breathtaking purpose and scope. Its purpose is to 'protect the fundamental rights and freedoms of natural persons, and in particular their right to privacy with respect to the processing of personal data', at the same time prohibiting the restriction of the free flow of such information within the European Economic Area (EEA) for reasons connected with such protection.⁸ Absent a specific exemption, its material scope encompasses the 'processing of personal data

⁶ Directive 95/46, Recital 11.

⁷ Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (1981) (ETS 108).

⁸ On its face, the Directive only refers to the European Union. However, under the Agreement on the European Economic Area (O. J. 1994 L 1/3), the Directive also extends to Iceland, Liechtenstein and Norway, three associated states which, together within the EU, make up the European Economic Area (EEA). The precise relationship between these non-EU EEA States and both interpretations of the Directive provided by the Court of Justice of the EU and related legal provisions such

wholly or partly by automatic means’ as well as in certain structured, manual filing systems.⁹ Each of the relevant terms is defined expansively. ‘Processing ... by automatic means’ covers ‘any operation’¹⁰ performed by digital means, including ‘placing information on an [unstructured] internet page’.¹¹ Meanwhile, ‘personal data’ refers to ‘any information relating to an identified or identifiable natural person’.¹² Thus, ‘data’ and ‘information’ are not only treated synonymously, but both are defined broadly, arguably even to encompass very so as to cover even innocuous public domain material, innocuous published information such as perhaps even as anodyne as the name of an author coupled with a book title.¹³ In 2008 the CJEU confirmed that public domain material was included within its scope stating that any other holding would ‘largely deprive the directive of its effect’.¹⁴ Legal liability rests, in all cases, on ‘data controllers’, defined as those entities ‘which alone or jointly with others determin[e] the purposes and means of the processing of personal data’.¹⁵ The broad scope and purpose of European data protection ensures that there is necessarily a strong interaction with public freedom of expression, which may be conceptualised broadly as the freedom to disclose to an indefinite number of people ‘information and ideas without interference by public authority and regardless of frontiers’ coupled with the right of these individuals to receive the same.¹⁶

Default standards

The breadth of Directive 95/46 combines with the demanding nature of many its default requirements, two of which are outlined here for illustrative purposes. First, turning to data subject notification, Article 10 states that when information is collected directly from the data subject, they must be provided with information regarding the identity of the data controller, the purpose or purposes for which their data will be processed, and any further information necessary to guarantee fair processing. It has been argued that even processing data as a result of

as the right to data protection in the EU Charter of Fundamental Rights remains a matter of great complexity, the consideration of which is beyond the scope of this article.

⁹ Directive 95/46, art. 3.1

¹⁰ Directive 95/46, art. 2 (b).

¹¹ Case C-101/01, *Criminal proceedings against Bodil Lindqvist*, EU:C:2003:596.

¹² Directive 95/46, art. 2 (a).

¹³ ‘Amendments Likely on Data Protection’, *Bookseller*, July 5, 1991, p. 8. Recent CJEU jurisprudence, however, casts considerable doubt on the continuing validity of the most expansive interpretations of these terms. See, in particular, Joint Cases C-141/12 and C-172/12 *YS v Minister voor Immigratie, Integratie en Asiel; Minister voor Immigratie, Integratie en Asiel*, EU:C:2014:2081.

¹⁴ Case C-73/07, *Satamedia* at [46]-[48]. This understanding was confirmed in Case C-131/12, *Google Spain* at [30].

¹⁵ Directive 95/46, art. 2(d).

¹⁶ European Convention on Human Rights 1950 art. 10; Charter of Fundamental Rights of the European Union (O. J. 2010 C 83 p. 389), art. 11.

observing people constitutes ‘direct’ collection.¹⁷ This would seem to even make taking a photo of a crowd incorporating identifiable individuals legally suspect. Article 11 includes similar provisions for the ‘indirect’ collection of information unless, subject to ‘appropriate’ safeguards, such provision is either ‘impossible’ or ‘would involve disproportionate effort’.

Secondly, as regards sensitive data, the regime goes much further, generally prohibiting private sector processing at least unless the data ‘are manifestly made public’ by the subject¹⁸ or their explicit consent is obtained.¹⁹ Sensitive data is defined broadly and categorically so as to encompass any information revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, trade-union membership, concerning health or sex life or relating to offences, criminal convictions or security measures.²⁰ On the basis that they reveal ‘racial or ethnic origin’, some court judgments have even held that colour photographs of identifiable individuals fall within this rubric.²¹

General exemptions and derogations

The Directive tempers the burdensome nature of its default requirements with a number of wide-ranging exemptions and derogations. To begin with, the first indent of Article 3.2 excludes processing in ‘the course of activity which falls outside the scope of Community law’, whilst the second similarly excludes processing ‘by a natural person in the course of a purely personal or household activity’. Additionally, Article 13 (1) (g) allows Member States to adopt legislative measures derogating from much of the default scheme if these are ‘necessary ... to safeguard ... the rights and freedoms of others’. Finally, via Articles 8.4 and 8.5, Member States may also derogate from the restrictions on private sector processing of sensitive data for reasons of ‘substantial public interest’ and subject to the provision of ‘suitable safeguards’ or, in the case of restrictions

¹⁷ Rosier and Vereecken, ‘Data Protection Aspects Within the Framework of Socio-Economic Research’ (2003), Institute for Employment Studies <<http://www.respectproject.org/data/415data.pdf>> (last visited 29 July 2014), p. 21. A recent judgment handed down by the ECJ appears to indicate that such an understanding is incorrect. See Case C-212/13 *František Ryneš v Úřad pro ochranu osobních údajů*, EU:C:2014:2428

¹⁸ The continuing tense of this phrase opens the way for individuals to later seek to withdraw such information from the public domain.

¹⁹ Directive 95/46, arts 8.1 and 8.3.

²⁰ *Ibid*, art. 8.

²¹ *Murray v Big Pictures* [2007] EWHC 1908 (Ch); [2007] EMLR 22 (overruled but not on this point); Hoge Raad [Netherlands Supreme Court], [23 March 2010] *LJN BK6331*.

applicable to data relating to offences, criminal convictions or security measures, subject to ‘suitable specific safeguards’.²² Under Article 8.6, the European Commission should be notified of any such derogation.

Notwithstanding their importance, however, neither of these classes of exemption or derogation can fully substitute for the special purposes provision which requires Member States to shield processing ‘carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression’.²³ Thus, in the *Lindqvist* case, the CJEU ruled that the first indent of Article 3(2) could not apply to the ‘fields of activity of individuals’²⁴ but only to those of ‘the State or State authorities’.²⁵ Turning to the second indent, the same case stated that this exemption only applies in relation to ‘activities which are carried out in the course of private or family life of individuals, which is clearly not the case with the processing of personal data consisting in publication on the internet so that those data are made accessible to an indefinite number of people.’²⁶ Obviously public communication intrinsically involves disclosure to an indefinite number. Meanwhile, the derogations provided for in Articles 13 (1) (g) and Articles 8.4-8.5 are not only drafted in discretionary as opposed to mandatory language but, in any case, only cover a limited range of the Directive’s provisions. In particular, no derogation may be made from the substantive requirement for a legitimating condition for processing,²⁷ the right to object to data processing,²⁸ the right to object to automated individual decision-making,²⁹ the duty to provide a notification of data processing,³⁰ and the data export regime.³¹ Additionally, no derogation made be made to remove the jurisdiction of the DPAs to supervise implementation of these requirements through considering complaints, investigating and intervening where necessary.³² Seemingly in an overbroad reliance on these provisions, in 2007 Sweden enacted a new law to exclude from all the substantive provisions of its *Personal Data Act* processing which ‘is not included in or intended to be included in a collection of personal data which has been structured in order to evidently facilitate search for or compilation of personal data’ and does not

²² Article 8.5 does, however, add that ‘a complete register of criminal convictions may be kept only under the control of official authority’.

²³ Directive 95/46, art. 9.

²⁴ Case C-101/01, *Lindqvist* at [43].

²⁵ *Ibid* at [43].

²⁶ *Ibid* at [47].

²⁷ Directive 95/46, art. 7.

²⁸ *Ibid*, art. 14.

²⁹ *Ibid*, art. 15.

³⁰ *Ibid*, arts 18, 19 and 21.

³¹ *Ibid*, arts 25 and 26. Nevertheless, it should be noted that under Art. 26 (1) (d), Member States are obliged to provide a derogation from the restriction on exporting personal data where this is necessary ‘on important public interest grounds’.

³² *Ibid*, art. 18.

violate the privacy of the data subject.³³ However, aside from this singular case, these general derogations have not to date been used by Member States to adopt wide-ranging legislative provisions protecting activities linked to public freedom of expression. In practice, therefore, it has been the specifically designed special purposes provision which has been utilised as the legislative mechanism for addressing the thorny issues which arise in this area. This article therefore turns to an elucidation of the history, general nature and in particular the scope of this important shield.

3 - The History and Current Structure of the Special Purposes Provision

The current special purposes provision which is found in Article 9 of Directive 95/46 has its origins in Article 19 of the first draft of the Directive which was released by the European Commission in 1990.³⁴ The original wording empowered, although did not require, Member States to grant derogations from all the provision of the Directive ‘in respect of the press and the audiovisual media ... in so far as they are necessary to reconcile the right to privacy with the rules governing freedom of information and of the press’.³⁵ This wording encountered criticism as a result of its merely permissive language, the institutionally confined nature of the group who could benefit from it and its alleged potential to provide exemptions for activities such as billing or customer profiling which, whilst carried out by the media, had no direct relationship with public freedom of expression. In response, the revised draft produced in 1992 rephrased the provision so as to state that ‘[w]ith a view to reconciling the right to privacy with the rules governing freedom of expression, Member States shall prescribe exemptions from this Directive in respect of the processing of personal data solely for journalistic purposes by the press, the audio-visual media and journalists’.³⁶ As a further aid to explication, the article was placed in a section for ‘special’ categories of processing and acquired the title: ‘Processing of Personal Data and Freedom of Expression’.³⁷ This revision, however, failed to satisfy all of the concerns and in October 1993 the

³³ Sweden, *Personal Data Act* 1998, s. 5(a) (as amended) (translated from Swedish). The extensive breath and deep depth of this provision is not compatible with the current wording of European data protection law. It is not tied to protection of any specific right or freedom and it shields processing from all the substantive data protection provisions and not just those set out in Article 13 (1) (g) and Articles 8.4 and 8.5 of the Directive. It is also relevant to note that this provision was not notified to the Commission as required by Article 8.6. See European Commission, ‘Notifications to the Commission by EU Member States in line with Article 8 (6) of Directive 95/46’ (2011) <http://amberhawk.typepad.com/files/commission_list_notifications_feb2011.pdf> (last visited 29 July 2014).

³⁴ European Commission, ‘Proposal for a Council Directive Concerning the Protection of Individuals in Relation to the Processing of Personal Data’ COM (90) 314 final (1990) O. J. C 277/49.

³⁵ *Ibid.*, Art. 19.

³⁶ European Commission, ‘Amended Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data’ COM (92) 422 final (1992) O. J. C 311/30.

³⁷ Linked to this, the accompanying explanatory memorandum stressed that the term ‘journalists’ was ‘intended to include photojournalists and writers such as biographers’. See European Commission, ‘Explanatory Memorandum: Amended

Belgium Presidency suggested adding to the clause the purpose of ‘creation artistique ou littéraire’ whilst also deleting any reference to specific classes of person who might engage in such activities. This was intended to ‘mieux préciser les limites des finalités des traitements relatifs à l’exercice de la liberté d’expression pour lesquels des dérogations sont nécessaires’.³⁸ Some seven delegations expressed reservations about this proposed change,³⁹ the principal concern being that the new wording might extend the its scope to the development of any product which could be protected via intellectual property.⁴⁰ Spain was particularly keen to emphasize that ‘databases could not be regarded as artistic creation’, a concern which was clearly related to the discussions on a Directive on the legal protection of databases which were underway at the same time.⁴¹ As a result, the wording was changed so as protect not ‘artistic or literary creation’⁴² but rather ‘artistic or literary expression’.⁴³ Spain and Italy, however, continued to petition for rejection of this expansion, a request which was assuaged by the Council agreeing to adopt a special Statement in the Minutes put forward by Italy, the final wording of which stated that the Council and the Commission noted that ‘copyright protection of artistic or literary works will not affect this Directive’ and that ‘literary and artistic expression is a form of expression, freedom of which is guaranteed by Article 10 of the European Convention on Human Rights’.⁴⁴ The final wording of Article 9 also emphasized its qualified nature. Derogations were to be provided ‘only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression’. Recital 37 further added that the derogations should be those ‘necessary for the purpose of balance between fundamental rights’.

Partly reflecting the rather opaque and ‘finely wrought’⁴⁵ balance between privacy and freedom of expression that Article 9 instantiated, it has been implemented very differently within EU Member States. Not only the depth but also the scope of the special purposes vary considerably. A considerable number of jurisdictions essentially repeat verbatim Article 9’s phraseology shielding all processing ‘solely for journalistic purposes or the purpose of artistic or literary expression’. A number of others, however, explicitly restrict derogations to the institutional media or journalistic purposes only, whilst laws in a few jurisdictions explicitly

Proposal for a Council Directive on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data’ COM (92) 422 final, p. 19.

³⁸ Council Document 7693/93 (7 October 1993) (no English version available).

³⁹ Council Document 7500/94 (9 June 1994) (noting reservations on this point by Germany, Spain, France, Greece, Italy, Portugal and to a certain extent Luxembourg).

⁴⁰ Spain, Agencia De Protection De Datos, *Memoria 1994*,

http://www.agpd.es/portaleswebAGPD/canaldocumentacion/memorias/common/MEMORIA_1994.pdf (last visited 2 July 2014), p. 59.

⁴¹ Council Document 7500/94 (9 June 1994) (noting reservations on this point by Germany, Spain, France, Greece, Italy, Portugal and to a certain extent Luxembourg). The discussion on databases eventually spawned Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (1996), O. J. L 27/03.

⁴² *Ibid.*

⁴³ Council Document 9951/94 (12 October 1994).

⁴⁴ Council Document 12148/94 (Annex) (16 December 1994) (Statement for the Minutes).

⁴⁵ Keller, *European and international media law: liberal democracy, trade and the new media* (OUP, 2011), p. 338.

seek to go beyond the wording in Article 9 by, for example, extending the derogation to the exercise of freedom of expression itself.⁴⁶ Whilst certainly interesting, it is not the purpose of this article to explore such national idiosyncrasies for their own sake. Rather, this article focuses on explicating the maximum scope of the special purposes provision as set out under current and potential future pan-European law. This question will first be approached by considering the relevant jurisprudence of the CJEU on this subject.

4. Court of Justice of the European Union (CJEU) Jurisprudence

3.1 – *The Holding in Satamedia*

The leading CJEU case on the interpretation of Article 9 is *Satamedia*.⁴⁷ This Grand Chamber preliminary reference case concerned whether the activities of Satakunnan Markkinapörssi Oy and Satamedia Oy making public domain tax income data on 1.2 million Finnish residents available via a hard-copy catalogue and a pay-per-view Special Messaging Service (SMS) could be deemed to be ‘solely for journalistic purposes’ and, therefore, within the scope of the Article 9 shield. Satakunnan Markkinapörssi Oy, Satamedia Oy and Finland argued that this phrase covered ‘the entire protected area of freedom of expression’.⁴⁸ Somewhat along the same lines, Sweden referred to the unilateral statement it made on Article 9 at the time of Directive’s adoption. According to the Advocate-General, this held that ‘journalistic purposes depend, not on the information imparted, that is to say, the subject-matter, but on the nature of the communication’.⁴⁹ In fact, however, the Statement itself referred only to ‘artistic and literary expression’, stating that in Sweden’s opinion this referred ‘to the means of expression rather than the contents of the communication or its quality’.⁵⁰ In contrast, the European Commission, Estonia and Portugal disputed the applicability of Article 9, with the Commission in particular arguing that, owing to its far-reaching potential depth, its scope should be ‘interpreted restrictively’.⁵¹

⁴⁶ See Korff, *Data Protection Laws in the EU: The Difficulties in Meeting the Challenges posed by Global Social and Technical Developments* (2010), pp. 13-21
<http://ec.europa.eu/justice/policies/privacy/docs/studies/new_privacy_challenges/final_report_working_paper_2_en.pdf>
(last visited 4 July 2014).

⁴⁷ Case C-73/08.

⁴⁸ Opinion in Case C-73/07, *Satakunnan Markkinapörssi Oy and Satamedia Oy*, EU:C:2008:266 at [56].

⁴⁹ *Ibid* at [70].

⁵⁰ Council Document 4127/95 (Annex 1) (12 January 1995).

⁵¹ Opinion in Case C-73/07 *Satamedia* at [60].

The Advocate-General Opinion stated that ‘the Article 9 exception can apply only to processing operations which serve journalistic purposes alone’⁵² and that processing would only serve such purposes ‘when it aims to communicate information and ideas on matters of public interest’.⁵³ It did, however, acknowledge that examination of subject matter ‘is a sensitive issue’⁵⁴ and that, in principle, the fact that the activities in question were not undertaken by the traditional media, were undertaken for profit and were carried out via SMS did not in and of itself preclude the applicability of Article 9.⁵⁵ The question of public interest would need to be ‘determined by the national court in light of all available objective information’.⁵⁶

Unlike the Opinion, the Grand Chamber judgment expressed itself much more tersely. In contrast to the European Commission, the Court argued that ‘[i]n order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary ... to interpret notions relating to that freedom, such as journalism, broadly’.⁵⁷ As a result, it held that, at least when ‘relating to data from documents which are in the public domain under national legislation’, processing of personal data must be considered to be “solely for journalistic purposes” ... if the sole object of those activities is the disclosure to the public of information, opinions or ideas. Whether that is the case is a matter for the national court to determine’.⁵⁸ The Court also explicitly agreed with the Advocate General that it did not matter if such activities were not undertaken by the traditional media, were undertaken for profit and involved the new use of new electronic mediums of communication such as the internet.⁵⁹ Finally, the judgment emphasised that the shield provided by Article 9 even for processing within its scope was far from absolute; to the contrary, the Court stated that ‘the protection of the fundamental rights to privacy requires that the derogations and limitations in relation to the protection of data ... must apply only so far as is strictly necessary’.⁶⁰

3.2 – Analysis of the *Satamedia* holding within a broader CJEU context

⁵² Ibid at [80].

⁵³ Ibid at [128].

⁵⁴ Ibid at [70].

⁵⁵ Ibid in particular at [82] and [94].

⁵⁶ Ibid at [128].

⁵⁷ Case C-73/07, *Satamedia* at [56].

⁵⁸ Ibid at [66].

⁵⁹ Ibid at [58]-[60].

⁶⁰ Ibid at [56]. In clear tension with this understanding, Finnish data protection law entirely exempts this type of processing from compliance with substantive data protection responsibilities. See Finland, *Personal Data Act* s. 2(5) (523/1999).

The Court's central phrase - 'sole object ... the disclosure to the public of information, opinion or ideas' - has rightly been described as 'enigmatic'.⁶¹ If interpreted expansively and acontextually, it could be held to protect any dissemination to an indefinite number of people, even if this is for an essentially privatised purpose. On the other hand, if the term 'the public' is understood to be referring to the body politic (or a section thereof) collectively, then only dissemination oriented to contributing to a collective, public debate would be protected. Moreover, given the reference to 'sole object', Article 9 could even be deemed inapplicable if another purpose cognisable by European data protection was also present. Choosing between broader and narrower constructions is far from merely theoretical; to the contrary, as will be seen below, narrower constructions are likely to render the special purposes provision inapplicable to a wide range of both new and traditional communicative activities.

As noted above, a number of legal commentators have interpreted the meaning of this phrase very expansively. For example, Vousden argued that *Satamedia* 'favours the delivery of information in the public domain through the chaos of the market',⁶² whilst Lynskey stated that 'it will allow national courts to exempt virtually any form of expression involving personal data processing from the scope of the Directive'.⁶³ However, especially when examined with the context of the wider CJEU jurisprudence of *Lindqvist* and *Google Spain*, it is clear that the Court actually intended this phrase to be understood much more narrowly where, in particular, 'the public' referred to a collective as opposed to essentially privatised grouping. As will be seen in the following section, this was also the approach taken to the phrase when the *Satamedia* case itself returned to the Finnish courts.

Lindqvist was the first CJEU case in which the potential applicability of the special purposes provision was raised. It concerned the relationship between European data protection and the posting by a Swedish lady on her personal website of certain (generally rather innocuous) personal data about others working with her on a voluntary basis in a parish in the Swedish Protestant Church.⁶⁴ Seemingly forgetting that the wording had deliberately been narrowed so as to refer not to creation but rather expression, the European Commission argued

⁶¹ Oliver, 'The protection of privacy in the economic sphere before the European Court of Justice', p. 1454.

⁶² Vousden, 'Satamedia and the Single European Audiovisual Area', 31 *European Intellectual Property Review* (2009), 527-533 at 533.

⁶³ Lynskey, 'From Market-Making Tool to Fundamental Right: The Role of the Court of Justice in Data Protection's Identity Crisis' in Gutwirth, Leenes, de Hert and Pouillet (eds), *European Data Protection: Coming of Age* (Springer, 2013), pp. 59-84 at p. 71. Given that the Court was at pains to emphasise that even if processing was characterised as being solely for journalistic purposes, such activity remained within the scope of the Directive and could be the subject only of derogations which were strictly necessary to protect the fundamental rights in play, Lynskey's remarks are particularly difficult to square with the judgment.

⁶⁴ Case C-101/01 *Lindqvist* at [2].

that the website should be considered ‘an artistic and literary creation within the meaning of Article 9.’⁶⁵ However, despite both this explicit (albeit somewhat inaccurate) reference to the potentially broad concept of artistic and literary expression rather than simply journalistic purposes and that the fact that the website was clearly disseminating information to an indefinite number, the Court refused to endorse such an interpretation. Instead, it confined itself to holding that national authorities and courts responsible for applying national legislation implementing the Directive must ‘ensure a fair balance between the rights and interests in question, including the fundamental rights protected by the Community legal order’.⁶⁶

In the recent Grand Chamber case of *Google Spain* which concerned the data protection obligations of Google search engine when indexing and making available public domain search results, the Court stated that whilst:

[T]he processing by the publisher of a web page consisting of information relating to an individual may, in some circumstances, be carried out “solely for journalistic purposes” and thus benefit, by virtue of Article 9 of Directive 95/46, from derogations from the requirements laid down by the directive ... that does not appear to be so in the case of the processing carried out by the operator of a search engine.⁶⁷

It is notable that, similarly to *Lindqvist* and indeed *Satamedia*,⁶⁸ the Court tended to conflate analysis of ‘journalistic purposes’ and that the ‘purpose of literary and artistic expression’. Notwithstanding suggestions to the contrary,⁶⁹ it is clear this later phrase will shield a far narrower range of activity than the concept of artistic or literary creation within intellectual property law.⁷⁰ In any case, given that search engines such as Google clearly do disseminate on request information to an indefinite number of people (albeit on the basis of an individualised

⁶⁵ Ibid at [33].

⁶⁶ Ibid at [101].

⁶⁷ C-131/12 *Google Spain* at [85].

⁶⁸ It is true that in *Satamedia* not even the Satamedia company itself sought to argue that its processing had a literary or artistic expressive purpose. However, there was nothing to prevent the Court highlighting these aspects of the special purposes provision on its own account, as it did later in relation to ‘journalistic purposes’ in the *Google Spain* case.

⁶⁹ For example, discussing the UK implementation of Directive which admittedly refers not to ‘literary expression’ but rather to ‘literary purposes’ (United Kingdom, *Data Protection Act 1998*, s. 3), Jay appears to conflate this with literary work protection under intellectual property stating: ‘In relation to copyright protection under the *Copyright, Design and Patents Act 1988* a literary work is any original written material. There is no test of literary merit attached. It is suggested that this is also the correct approach to the concept of literary work in the context of the DPA’ (Jay, *Data Protection Law and Practice* (4th Edition) (Sweet & Maxwell, 2012), p. 566.

⁷⁰ In particular, especially given the common Statement of the Minutes on this adopted at time the Directive was finalized, the phrase ‘literary and artistic expression’ as opposed to ‘literary and artistic creation’ will not provide protection for what the European Court of Human Rights has defined as ‘commercial speech’, which has been defined as ‘primarily, speech that has the purpose of forwarding the commercial interests of an organization by promoting its products or services’. See Phillipson & Fenwick, *Media Freedom under the Human Rights Act* (OUP, 2006), p. 60.

request), the Court's explicit understanding of 'journalistic purposes' is clearly inconsistent with an expansive reading of the holding in *Satamedia*.

5. National Understandings of the Special Purposes

Although even before *Satamedia* national courts had held that the 'special purposes' provision was not confined to traditional institutional journalism, these actors have almost universally adopted a narrow construction of its holding, thereby deeming it inapplicable to activities as diverse as rating websites, street mapping services and socio-political campaigning. Meanwhile, DPAs have generally adopted an even more restrictive understanding of the special purposes shield, with many appearing to restrict its ambit to the professional media only.

5.1 – *Satamedia* and other Electronic Database Cases

The favouring by national courts of a fairly narrow construction of the *Satamedia* holding was immediately apparent once the preliminary reference returned to Finland for implementation. Here, the Finnish Supreme Administrative Court found that, despite the fact that data was clearly being disseminated to an indefinite number, these individuals were essentially acting as privatised actors rather than as part of a collective 'public'. The Article 9 shield was, therefore, inapplicable. In sum it stated

The text message service of Satamedia Oy is based on the fact that the company's service processes an individual person's tax data according to a request by another person. The question is not, as mentioned above, about expressing knowledge to a public, but about fulfilling a request made by an individual person about another person's personal data. The necessary, open and social interesting discussion or the control of society's exercise of power and the freedom of evaluation, all necessary in a democratic society, do not require an ability to treat individual personal data in the manner that is discussed here. Freedom of expression does not require an exemption to the protection of privacy in a situation of this kind.

The Court also found that the uneditorialized nature and scale of the data in question made even the processing of the full hard-copy catalogue non-journalistic stating that '[b]ecause the processing of registered data to this

extent can be compared with publishing of a so-called background register gathered by the whole company for editorial use, the question is not only about expressing information, opinion and ideas.⁷¹

The final determination in *Satamedia* chimes with detailed findings made by a number of Courts around Europe concerning the data protection responsibilities of new and often highly negative and intrusive evaluative databases which have proliferated online in recent years. These so-called ‘rating websites’ systematically collect and compile vast quantities of information relating to the business, employment or even intimate areas of individuals’ lives. Rating websites which have achieved particular prominence in Europe include those compiling information on school and university teachers⁷² and also doctors⁷³ although, as Solove notes, internet sites have also been set up to gather information on activity with a much stronger link to private life, including alleged impolite behaviour, bad driving and date cheating.⁷⁴ In 2008, the Paris Court of Appeal found that the teacher rating website *Note2be.com* was operating in violation of the requirements under French data protection law to obtain data fairly and to ensure their relevance and adequacy. The special purposes provision was not even raised as a possible defence to this and the site was ordered closed.⁷⁵ In 2009, the German Federal Court also handed down an opinion on a teacher rating website – *Spickmich.de*. In this case, the special purposes provision was considered but, similarly to the final Finnish judgment in the *Satamedia* case, the Court considered that the essentially privatised purpose of the site rendered it inapplicable. In sum it stated: ‘[T]he mere automatic listing of content does not yet constitute a journalistic and editorial design [*Gestaltung*]. Only when the opinion-forming effect on the community is dominant and not just a decorative accessory can such a design [*Gestaltung*] be spoken of’.⁷⁶ Unlike many rating websites, this forum did have a range of in-built limitations including that users could only leave marks, problematic content could be flagged, it was only open to subscribers (e.g. pupils, parents and teachers) and the content related to the teacher’s social as opposed to truly private life. Taking these protections into account and recognising that pupil’s freedom of expression should be considered a legitimate interest under general data protection law, the Court able to find the site in conformity general data protection law. This was not, however, the case as regards a lawyer rating website, *solicitorsfromhell.co.uk*, examined by the England and Wales High Court in *Law Society, Hine Solicitors &*

⁷¹ *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi Oy and Satamedia Oy* KHO 2009: 822009 (translated from Finnish). The court then found that these activities violated that Finnish Data Protection Act and referred the case back to the Finnish Data Protection Tribunal which ordered both Satakunnan Markkinapörssi and Satamedia to cease all data processing. See *Tietosuoja- ja valtuutettu v Satakunnan Markkinapörssi and Satamedia Oy (Data Protection Tribunal)* 2/933/2003.

⁷² Notably, <<http://www.ratemyteacher.co.uk>> (last visited 8 July 2014).

⁷³ Notably <<http://www.iwantgreatcare.com>> (last visited 8 July 2014).

⁷⁴ Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press, 2007), pp. 86-90.

⁷⁵ *Note2be.com Ltd., Mr SC v. La Federation Syndicale Unitaire and Others* 08/04727 (Paris Court of Appeal).

⁷⁶ *Spickmich.de* VI ZR 196/08 at [31] (translated from German).

Kevin McGrath v Rick Kordowski in 2010.⁷⁷ Founded in 2005, this website comprised of a “blacklist” of law firms and solicitors that should be avoided⁷⁸ collated from almost invariably anonymous postings made by disgruntled members of the public who were invited to “NAME and SHAME your OPPRESSOR”.⁷⁹ Justice Tugendhat found the site manifestly in violation of the data protection requirement to processing data fairly and lawfully and, therefore, granted a perpetual injunction ordering the removal of the website and prohibiting the publication by the Defendant of a similar website in the future.⁸⁰ Like *Spickmich.de*, the judgment did consider, albeit rather opaquely, whether special purposes protection for journalism could be claimed. Although acknowledging that ‘[t]oday anyone with access to the internet can engage in journalism at no cost’, Tugendhat J found that the ‘[j]ournalism that is protected by s. 32 [of the UK Data Protection Act] involves communication of information of ideas to the public at large in the public interest’.⁸¹ Since the communication lacked ‘the necessary public interest’,⁸² this derogation could not be invoked. Again, the reference to ‘public’ here clearly refers to a collective concept, as opposed to simply a characteristic shared by any indefinite number of individuals.

A survey administered to all EEA Data Protection Authorities (DPAs)⁸³ between March and July 2013 indicated that DPAs have adopted an equally restrictive approach to special purposes protection in this area. Thirty one responses were received to this survey including from twenty five national EEA DPAs (representing 81% of their total number).⁸⁴ One question concerned the relationship between data protection and a company which ‘establishes a website freely available on the Internet allowing individuals to “rate” and add comments about their teachers’. Of the thirty standardized⁸⁵ responses to this particular question, none considered the

⁷⁷ [2011] EWHC 3185 (QB).

⁷⁸ *Ibid* at [10].

⁷⁹ *Ibid* at [9]. It was also clear that, on occasion, the ability of the Defendant to delete material from the website had ‘been used as a tool to demand money from those it names’ (at [116]).

⁸⁰ *Ibid* at [184].

⁸¹ *Ibid* at [99].

⁸² *Ibid* at [99]. Since s. 32 of the UK *Data Protection Act* 1998 requires in all cases that the data controller have a reasonable belief that publication is in the public interest to benefit from substantive protection from data protection responsibilities (s. 32 (1)–(2)), it is tempting to interpret Tugendhat J’s analysis as being limited to consideration of the depth as opposed to scope of the ‘special purposes’ provision within UK law. This, however, cannot be the case since the procedural bar on injunctive relief, which is also set out in s. 32, only requires that the data controllers ‘claims, or it appears to the court, that any personal data to which the proceedings relate are being processing – (a) only for the special purposes, and (b) with a view to the publication by any person of any journalistic, literary or artistic material which, at the time twenty-four hours immediately before the relevant time, had not previously been published by the data controller’ (s. 32 (4)). Injunctive relief clearly was granted in this case. It, therefore, seems clear that Tugendhat J implied into very definition of journalistic purposes some, albeit very unclear, notion of public interest.

⁸³ These comprised 31 national DPAs, the Gibraltar DPA, Catalan DPA, Basque DPA and the 15 German Länder DPAs. As regards the Bavarian Länder, contact was made only with the body responsible for regulation of private sector processing (the Bayerisches Landesamt für Datenschutzaufsicht) and not the Bayerische Landesbeauftragte für den Datenschutz which is responsible for the regulation of certain public sector processing. This was reflective of the substantive interest of the survey.

⁸⁴ The other six responses were received from the Catalan DPA, the Gibraltar DPA and four German Länder DPAs.

⁸⁵ The other DPAs either were unable to reply to this specific question or provided an individualized free-text answer.

special purposes provision applicable, fifteen (50%) considered, following the logic of *Lindqvist*, that '[t]he general provisions of Data Protection law apply, but must be interpreted with regard for other fundamental rights including freedom of expression' and fourteen (47%) that '[t]he general provisions of Data Protection law apply in full'. A singular DPA (3%) argued that 'Data Protection does not apply' here.⁸⁶ Of the twenty eight DPAs which were able to provide relevant information as regards enforcement,⁸⁷ twelve (43%) indicated that at some point they had taken enforcement action against an internet rating website, although despite significant efforts to find details of these, evidence of such action found within public domain material was much sparser.⁸⁸

5.2 - Street Mapping Services with Street-Level Images

Following the launch of Google Street View in 2007 and its roll-out into Europe in 2008, EEA DPAs have adopted an even more rigorous approach to the data protection obligations of street mapping services. The same questionnaire mentioned above also probed DPAs' understanding of the relationship between data protection and a 'street mapping service' which 'produces maps with street-level photographic images including pictures of individuals, motor vehicles and homes'. Mirroring the above, of the twenty nine standardized responses to this question, none considered the special purposes provision applicable, 27 (93%) thought that '[t]he general provisions of Data Protection law apply in full' and only 2 (7%) that '[t]he general provisions of Data Protection law apply, but must be interpreted with regard for other fundamental rights including freedom of expression'.⁸⁹ A large number, fifteen (54% of the 28 relevant responses), indicated that they had taken enforcement action against a street mapping service and these claims were generally backed up by copious public domain material indicating the imposition of sometimes very onerous restrictions especially on Google

⁸⁶ As noted above, some of these DPAs need to interpret, albeit subject to the powerful principle of indirect effect, national laws with special purpose derogations that are divergent in scope from the maximum set out in Directive 95/46. However, even looking at the sixteen DPAs interpreting laws at least as expansive as that set out in Article 9 itself, a similar pattern emerges. Thus, 10 DPAs (63%) indicated that the 'general provisions of Data Protection apply in full', with the remainder indicating that such general provisions must be interpreted with regard for other fundamental rights.

⁸⁷ The federal German DPA indicated that, as it had no general jurisdiction over the private sector, it was unable to provide details of enforcement action. For similar reasons, the responses of the Spanish Catalan DPA were excluded from these results.

⁸⁸ It was possible to determine that the French Data Protection Authority had taken enforcement action not only in relation to Note2be.com (considered above) but also in relation to Palmares.com which offered users the possibility of rating lawyers, doctors, entrepreneurs and public personalities. See Commission Nationale de L'Informatique et des Libertés, *30th Activity Report 2009*, pp. 59-60 <http://www.cnil.fr/fileadmin/documents/en/CNIL-30e_rapport_2009-EN.pdf> (last visited 8 July 2014). In addition, the Netherlands DPA noted in its Annual Report that it investigated a teacher rating website in 2009 resulting its adaption and shielding from search engines. See Dutch DPA, *Summary of the Annual Report 2009*, p. 3 <http://www.dutchdpa.nl/downloads_jv/jv_2009_sv.pdf> (last visited 8 July 2014).

⁸⁹ Again, if only the DPAs acting under a national law with a special purpose scope at least as expansive as that set out in Article 9 of Directive 95/46 are examined, a very similar pattern still emerges. Of the fifteen relevant responses, 13 DPAs (87%) indicated that the 'general provisions of Data Protection apply in full', with the remaining 2 DPAs finding that these general provisions applied but had to be interpreted with regard for other fundamental rights.

Street View itself.⁹⁰ European DPAs almost universally insisted on the automatic blurring of faces and vehicle registration numbers coupled with implementation of a right to object to inappropriate content post-publication. A number even argued that these services must provide route information in advance and also establish a mechanism for objecting to processing not just *ex post* but also *ex ante* publication.⁹¹ Finally, some DPAs even claimed that images of people’s homes also constituted protected personal data when processed in such a context.⁹² In Germany, this led to almost a quarter of a million individuals successfully demanding that such images be removed from the site.⁹³ In stark contrast, however, the Swedish DPA held that the protections of the data protection regime were entirely suspended as regards two street mapping services (Hitta.se and Eniro) since their activity was shielded under the *Swedish Fundamental Law on Freedom of Expression*.⁹⁴ Although clearly against the wording of the current Directive, the Swedish *Personal Data Act* draws on the provisions in this law to grant data controllers an absolute exemption not only in relation to journalism and literary and artistic expression but to the communication of “information on any subject whatsoever” including “through public playback of material from a database ... and other technical recordings”.⁹⁵ The implications of this divergence will be further analysed in section six below.

In general, there has been no attempt to challenge in the courts the basic assumption applied outside Sweden that, vis-à-vis street mapping services, data protection norms should apply without any explicit restriction. One exception, however, may be found in the 2010 challenge by Fonecta, a Finnish company providing a product similar to Google Street, to the Finnish Data Protection Ombudsman’s requirement that it obtain a permit for its data processing. This requirement rested *inter alia* on the assumption that the product was

⁹⁰ See for example Cyprus, Data Protection Authority, ‘ΕΡΩΤΗΜΑ: Γεωγραφικό σύστημα τρισδιάστατης απεικόνισης σε επίπεδο δρόμων με δυνατότητα περιήγησης [QUESTION: Three-dimensionable browsable geographic street-level imaging-system]’ <<http://www.dataprotection.gov.cy/dataprotection/dataprotection.nsf/All/1D8B566C8817321BC225791200299891?OpenDocument>> (last visited 27 July 2014) which not only stipulates these requirements but argues that they follow the ‘ι τις οδηγίες που [instructions]’ of the Article 29 Working Party of EU DPAs (cf. Directive 95/46, art. 29).

⁹¹ Luxembourg, Data Protection Authority, ‘La CNPD contrôle une voiture de “Google Street View”’ (2010) <<http://www.cnpd.public.lu/fr/actualites/national/2010/09/Google-cars-inspection/index.html>> (last visited 27 July 2014).

⁹² Ibid.

⁹³ Staff, ‘244,000 Germans log objections to Google Street View’ *Deccan Herald* (n. d) <<http://www.deccanherald.com/content/106394/244000-germans-log-objections-googles.html>> (last visited 27 July 2014).

⁹⁴ Gräslund, ‘Debatt viktig om grundläggande rättigheter [Debate on important fundamental rights]’ *Dialog* (June 2010) <<http://www.datainspektionen.se/Documents/magasindirekt/magasindirekt-10-01.pdf>> (last visited 05 May 2014).

⁹⁵ Sweden, *Data Protection Act* 1998, s. 7; Sweden, *Fundamental Law on Freedom of Expression*, art. 1. In most cases entities who wish to secure exemption in this way must register themselves with the Radio and TV Authority thereby securing a ‘no impediment to publication’ certificate (see Sweden, *The Fundamental Law on Freedom of Expression*, art. 11). As Gräslund notes above, both Hitta.se and Eniro had obtained such a certificate. This general requirement to register helps explain why these provisions were not explored in the *Ramsbo* case detailed below.

not solely ‘journalistic’.⁹⁶ Relying on an expansive understanding of the CJEU’s ratio in *Satamedia*, Fonecta sought to challenge this assumption. However, the Finnish Data Protection Board ruled that Fonecta’s processing was not in the relevant sense directed solely at the disclosure to the public of information, opinions and ideas but was rather aimed at improving its ‘services’. Particular emphasis was placed on the integration of the mapping service with ‘Yellow Pages’ directories that promoted various companies visible on the maps.⁹⁷ The Helsinki Administrative Court later affirmed this decision.⁹⁸ Overall, similarly to the rating website cases outlined above, it was found that the fact that these new products were designed to enable information to be used for the individual or corporate end users’ essentially discrete and privatized purposes, rendered the special purposes provision inapplicable.⁹⁹

5.3 – General Publication and the Sole Purposes Requirement

The current scope of the ‘special purposes’ provision has also been considered within the context of the seemingly more straightforward preparation, and then publication, of material in both online and offline format. *Ramsbo*, the first reported case to deal with this issue, occurred very soon after the coming into force of the Data Protection Directive and concerned the setting up by the defendant of a website spreading information about alleged malpractice in the Swedish banking system including negative comments about named individuals working at particular Swedish banks. Ramsbo sought to counter the argument that this activity involved a violation of the *Swedish Personal Data Act* by arguing that his activity was carried out solely for journalistic purposes. This argument was rejected right up to Court of Appeal level on the basis that the website was intended to spread derogatory information about named individuals and this was not a journalistic activity.¹⁰⁰ The Swedish Supreme Court disagreed holding that, since its purpose was to ‘inform, exercise criticism and

⁹⁶ Castrén and Snellman, ‘Street View Services Now Subject to Permit’ (11 February 2011) <<http://www.castren.fi/Page/c1ccbac8-1bad-436e-bb79-e1ffaa00df14.aspx?groupId=a0231459-d54f-4ff6-8057-034a2b359a33&announcementId=1a28522e-3a4a-4636-80f9-cdde2cea7b61>> (last visited 30 July 2014).

⁹⁷ *Tietosuojavaltutettu v Fonecta Oy* 1/993/2010 and 3/932/2010.

⁹⁸ *Tietosuoja-asiaa koskeva valitus v Fonecta Oy* 01026/11/1204. This decision particularly emphasised the fact that highly systematized and automatic processing in mapping services was considerably different to the editorial purposes of traditional media.

⁹⁹ This decision, in particular, underscores the fact that so-called ‘commercial speech’ will almost certainly not benefit from special purposes protection even on the basis of it being an instance of ‘literary and artistic expression’. See *supra* note 70.

¹⁰⁰ *Ramsbo v Public Prosecutor in Stockholm* (PUL-B 29-00) (B 3625-99) (21 December 1999) (Court of Appeal) <<http://www.bankrattsforeningen.org.se/SHdomslut.html>> (last visited 11 July 2014).

spark debate on societal issues of importance to the public', the website was journalistic.¹⁰¹ The Court did however further elucidate that whilst

[t]he website must be considered to have had a journalistic purpose this did not exclude that there could be a publication and processing of personal data which cannot be deemed to have been for a journalistic purpose. Publication of details of a purely private character, for example, are not normally considered to have journalistic purposes wholly independent of a publication placing this in an otherwise journalistic purposes context.¹⁰²

So long as the notion of 'societal issues of importance to the public' is not interpreted restrictively, the judgment can be taken as holding that publications aimed at disclosing information, opinion or ideas to individuals acting as members of the collective 'public' should be considered journalistic, but that unrestricted publication to individuals for essentially privatized purposes should not. Such a holding is entirely consonant with a proper construction of the *Satamedia* holding handed down by the CJEU some seven years subsequently.

The Swedish Supreme Court in the *Ramsbo* case mentioned above also gave some consideration to the meaning of the requirement found in the special purposes provision that protected processing be 'solely' for these purposes. This sole purposes requirement was an aspect of the law which was noted, but otherwise left unanalysed, by the CJEU in *Satamedia* itself. Whilst the Swedish Supreme Court did not attempt an exhaustive definition of this term, it did attempt to read it down stating that:

The restriction to 'solely' journalistic purposes is intended primarily to clarify that personal data used by the media and journalists other than for editorial purposes falls outside the exemption. For example, mass media's treatment of personal data for billing, or direct mail survey or reader profiles fall outside the exemption.¹⁰³

In general, however, a much stricter approach has been taken to this requirement, with the notion of 'solely' often being interpreted as akin to a requirement for exclusivity of purpose. Take, for example, the British case of *Quinton v Peirce*.¹⁰⁴ This case concerned alleged breaches of the fairness and accuracy provisions of the UK's *Data Protection Act* resulting from the publication by Robin Peirce, a candidate in a local council election,

¹⁰¹ *Ramsbo v Public Prosecutor in Stockholm* (PUL-B 293-00) (B 293-00) (June 12, 2001) at p. 10 (own translation from Swedish based on Google translate), available in Swedish at <<http://www.bankrattsforeningen.org.se/hddomslut.html>> (last visited 11 July 2014).

¹⁰² *Ibid* at p. 11 (own translation from Swedish based on Google translate).

¹⁰³ *Ibid* at p. 12 (own translation from Swedish based on Google translate).

¹⁰⁴ *Christopher John Quinton v Robin Heys Peirce and James David Cooper* [2009] EWHC 912 (QB).

of political material which mentioned Chris Quinton, the sitting counsellor. Justice Eady's judgment clearly stated that the Act's 'exemptions for journalism ... have no application to this election leaflet'.¹⁰⁵ This was despite that fact that the publication in question was clearly imparting a message, or in the phraseology of *Satamedia* 'information, opinions or ideas',¹⁰⁶ to the individuals in respect of the role as members of the collective 'public'. Indeed, as a result of its political subject matter, the leaflet fell within a type of collective disclosure which, on democratic grounds, has traditionally enjoyed the strongest protection within freedom of expression jurisprudence.¹⁰⁷ From a different and narrower perspective, however, the leaflet was aimed at promoting the candidacy of Robin Peirce for the local council. The purpose of canvassing political support is also a recognised one within UK and European data protection law.¹⁰⁸ Therefore, on a strict 'exclusivity' understanding of the sole purposes requirement, the leaflet did fail the relevant hurdles.

Despite holding the special purposes provision inapplicable, no breach of the UK *Data Protection Act* was found in *Quinton v Peirce*.¹⁰⁹ Nevertheless, the equation of 'solely' with 'exclusivity' has exerted a broader chilling effect on public freedom of expression. For example, it has undergirded a widespread understanding that, since 'research' is regulated separately from the 'special purposes' in Directive 95/46,¹¹⁰ academic scholarship may only benefit from the narrow derogations available for the former activity and not the much more open and expansive 'special purposes' ones. For example, in 2003 the European Commission's RESPECT project drew up data protection guidelines for socio-economic researchers that only made reference to the former provisions.¹¹¹ This was despite the fact that, through the production of articles, books and other outputs, such scholarship is indubitably aimed at producing information, opinions and ideas for collective public benefit. This understanding has led to many academic institutions and research funders promulgating highly

¹⁰⁵ *Peirce* [2009] EWHC 912 at [4]. This point was apparently conceded even by the Pierce himself (also at [4]). Nevertheless, Pierce did seek to argue more generally that there was 'no room for data protection remedies in the context of an election campaign because of the need for uninhibited discussion before the electorate' (at [59]). Such a notion, however, was rejected by Eady J (at [59]).

¹⁰⁶ Case C-73/07, *Satamedia* at [66].

¹⁰⁷ Barendt, *Freedom of Speech*, 2nd ed. (OUP, 2005), p. 154

¹⁰⁸ See, for example, the entry under 'Reasons/purposes for processing information' in the UK Information Commissioner's Office model registration for 'Political Party' available at <http://ico.org.uk/for_organisations/data_protection/registration/~media/documents/library/Data_Protection/Forms/registration-nature-of-work-descriptions/political.ashx> (last visited 13 July 2014).

¹⁰⁹ In coming to this conclusion, Eady J clearly took into account the fact that he was 'by means no persuaded that it is necessary or proportionate to afford a set of parallel [data protection] remedies when damaging information has been published about someone, but which is neither defamatory nor malicious' (at [87]) and that he must avoid interpreting the statute 'in a way which results in absurdity' (at [93]). Given this, it may be taken that, albeit rather non-explicitly, Eady J did recognise the freedom of expression interest of Peirce in a similar way to the German Federal Court recognised the cognate freedom of expression interests of school pupils in the *Spickmich.de* case considered above.

¹¹⁰ The 'research' provisions, which are variously described as being available for 'scientific research', 'historical research', 'historical or scientific research' and 'historical, scientific or statistical purposes' are set out in Recital 34 and Arts. 11(2), 13(2) and 32(3) of the Directive 95/46. Research may also benefit from the derogations which Member States may optionally provide under Art. 13(1)(g) in the interests of the 'rights and freedoms of others'.

¹¹¹ Rosier and Vereecken, 'Data Protection Aspects' (2003) <<http://www.respectproject.org/data/415data.pdf>> (last visited 31 July 2014).

restrictive policies which, for example, prohibit researchers using covert methodologies even as regards data clearly of public interest and which could not be otherwise collected.¹¹² In addition, Scassa provides details of two adjudications made under the *Albertan Personal Information Protection Act*, a Canadian data protection statute which is modelled including as regards the definition of the ‘special purposes’¹¹³ on Directive 95/46, where a strict approach to sole processing requirement did lead to the finding of two concrete violations.¹¹⁴

Finally, it must be noted that a large number of EEA DPAs have continued to interpret the special purposes provision extremely restrictively, apparently restricting its use to the professional media only. Thus, the 2013 survey noted above also quizzed EEA DPAs on their understanding of the relationship between data protection and the activity of an individual who ‘[i]n his spare time ... publishes a blog’, ‘freely available on the Internet and visited by several hundred people a week’ which ‘discusses and disseminates gossip about various celebrities’. Whilst 7 DPAs (28% of the 25 standard responses to this question) did consider that special purposes provision would be applicable, 17 (60%) thought only that ‘[t]he general provisions of Data Protection law apply, but must be interpreted with regard for other fundamental rights including freedom of expression’. A further 3 DPAs (12%) variously indicated that, in their opinion, data protection either applied in full or did not apply at all.¹¹⁵

6. Reform Proposals

Following on from a 2010 commitment made to bring forward new legislation on this subject,¹¹⁶ on 25 January 2012 the European Commission proposed replacing Directive 95/46 with a new Data Protection Regulation.¹¹⁷ As the Commission Communication on this proposal stated, it was motivated by an understanding that the ‘existing rules provide neither the degree of harmonisation required, nor the necessary

¹¹² See Erdos, ‘Stuck in the Thicket? Social Research under the First Data Protection Principle’, 19 *International Journal of Law and Information Technology* (2011), 133-152.

¹¹³ Section 4 (3) (b) of this exempts processing personal data for literary and artistic purposes and no other purpose from all of the Act’s requirements. Meanwhile, s.4 (3) (c) provides a similar exemption for journalistic processing and no other purpose.

¹¹⁴ Scassa, ‘Journalistic Purposes and Private Sector Data Protection Legislation: Blogs, Tweets and Information Maps’ 35 *Queen’s Law Journal* (2010), 733-781, at 751-754.

¹¹⁵ Again, if only the responses from DPAs interpreting national legal provisions at least as expansive in scope as Article 9 of Directive 95/46 itself, a similar pattern emerges. Of the thirteen relevant responses, 7 DPAs (54%) held that the general provisions of Data Protection applied but must be interpreted with regard for other fundamental rights, 4 (31%) that the special purposes derogation was applicable and 2 (15%) that Data Protection law did not apply.

¹¹⁶ European Commission, *A Comprehensive Approach on Personal Data Protection in the European Union*, COM (2010) 609 final, p. 18.

¹¹⁷ European Commission, *Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of Such Data* (COM (2012) 11 final)).

efficiency to ensure the right to personal data protection'.¹¹⁸ In light of this, alongside proposing enacting a legal instrument that would by its nature be directly applicable in national law, the Commission's proposal contained many detailed provisions for enhancing the harmonization and effectiveness of the pan-European regime including placing a requirement to ensure data protection by design and by default,¹¹⁹ empowering all DPAs to issue fines for breaches of data protection law¹²⁰ and replacing the current Article 29 Working Party of EU DPAs with a European Data Protection Board charged with overseeing a 'consistency mechanism' aimed at securing coordinated interpretation and application of the law in relation to cross-border situations.¹²¹ In contrast, as regards its scope of application and much of its substance, the proposed Regulation was 'just an adjusted version (and in regard to many central provisions a copy) of Directive 95/46'.¹²² This largely imitative approach was particularly apparent in relation not only to the core material definitions but also the provisions on data subject notification and sensitive data, together with general exemptions and derogations, which were explored in section one above.¹²³

The Commission's draft Regulation similarly proposed only very limited changes as regards the scope of the special purposes provision. Thus, in this initial draft, Article 80, which is designed to be a direct replacement of Article 9 of Directive 95/46, similarly referred to processing 'carried out solely for journalistic purposes or the purpose of artistic or literary expression'. However, a new Recital did endorse the liberal interpretation of this phrase adopted by the CJEU in *Satamedia*, at the same time clarifying that this holding should not be restricted to the processing of 'data from documents which are in the public domain under national legislation'.¹²⁴ In sum, directly repeating elements of the judgment itself, this proposed Recital stated:

In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly. Therefore, Member States should classify as "journalistic" for the purpose of the exemptions and derogations to be laid down under this Regulation if the object of these activities is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them.

¹¹⁸ European Commission, *Safeguarding Privacy in a Connected World: A European Data Protection Framework for the 21st Century* (COM (2012) 9 final), p. 3.

¹¹⁹ Proposed General Data Protection Regulation, Art. 23.

¹²⁰ *Ibid*, Art. 79.

¹²¹ *Ibid*, Chapter VII (Co-operation and Consistency).

¹²² Blume and Svanberg, 'The Proposed Data Protection Regulation: The Illusion of Harmonisation, the Private/Public Divide and the Bureaucratic Apparatus', 15 *Cambridge Yearbook of European Legal Studies* (2013), pp. 27-46 at p. 36.

¹²³ See Proposed General Data Protection Regulation, Art. 2 (material scope including general exceptions), Art 4 (definition of *inter alia* 'personal data', 'processing' and 'controller'), Art. 9 (provisions on sensitive data), Art. 14 (provisions on data subject notification) and Article 21 (general derogations/restrictions).

¹²⁴ Case C-73/07, *Satamedia* at [62].

They should not be limited to media undertakings and may be undertaken for profit-making or for non-profitmaking purposes.¹²⁵

However, both the Council of the EU and the European Parliament have now proposed going considerably further than this liberalising gloss. On 31 May 2013, the Council suggested amending Article 80 to simply allow, and require, Member States to ‘reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression’ including, but not limited to, ‘processing of personal data for journalistic purposes and the purposes of artistic or literary expression’.¹²⁶ On 12 March 2014, the legislative resolution passed by the European Parliament proposed amending Article 80 to mandate and require Member States to provide a general reconciliation between the right to protection of personal data and ‘the rules governing freedom of expression in accordance with the Charter of Fundamental Rights of the European Union’.¹²⁷ At the same time, it was suggested that the relevant Recital be modified so as to state that:

[i]n order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom broadly to cover all activities which aim at the disclosure to the public of information, opinion or ideas, irrespective of the medium which is used to transmit them, also taking into account technological development. They should not be limited to media undertakings and may be undertaken for profit-making or non-profit making purposes.¹²⁸

7. General Analysis

The current scope of the special purposes provision within European data protection law is unacceptably confused and potentially far too narrow. To begin with, its reference only to ‘journalistic purposes or the purposes of artistic or literary expression’ suggests that it is limited to shielding three narrowly defined types of activity which are principally, even if not exclusively, carried out by professional journalists, artists and

¹²⁵ Recital 121, COM (2012) 11 final. This Recital also clarified that these derogations should apply to ‘news archives and press libraries’.

¹²⁶ Presidency to Council, *Addendum to Note on General Data Protection Regulation – Key Issues of Chapters I-IV, 10227/13*, <<https://www.huntonprivacyblog.com/wp-content/files/2013/06/st10227-ad01.en13.pdf>> (last visited 13 July 2014). At the same time, the pertinent part of Recital 121 was curtailed so as to only provide that ‘[i]n order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly.’

¹²⁷ Amendment 189, European Parliament, *Legislative Resolution of 12 March on the Proposal for a Regulation of the European Parliament and of the Council on the Protection of Individuals with regard to the Processing of Personal Data and on the Free Movement of such Data (General Data Protection Regulation)*, available at <<http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-//EP//TEXT+TA+P7-TA-2014-0212+0+DOC+XML+V0//EN>> (last visited 13 July 2014).

¹²⁸ Amendment 83, *Ibid.*

writers. Secondly, its stipulation that processing be ‘solely’ for one or other of these purposes, can easily be read as requiring a strict exclusivity of purpose. Such a requirement would deny special purposes protection to activities such as scholarly publication and the production of political campaign literature which, although fully capable of being conceived as aspects of literary expression, may likewise be held to fall within other purposes cognisable by European data protection, namely, research and canvassing political support respectively. Both of these potential restrictions fail to do justice to wide range of free speech interests which deserve the strongest of protection, especially but far from only within the increasingly participative ‘Web 2.0’ context. In *Satamedia*, the CJEU did address some of these problems by holding that the reference to ‘journalistic purposes’ must cover all activities whose ‘sole object ... is the disclosure to the public of information, opinions or ideas’.¹²⁹ However, not only was the proper of construction of ‘sole’ left unaddressed, but the ruling was in principle confined the processing of ‘data from documents which are in the in the public domain under national legislation’.¹³⁰ In any case, the continued presence of different language on the face of the Directive itself has encouraged many EEA DPAs to continue to construe its scope much more narrowly. This was vividly illustrated by the rejection by a majority of EEA DPAs of the applicability of the special purposes provision to the activities of the amateur blogger detailed in responses to the 2013 survey noted above.

In light of this, it is tempting to support proposals made by both the Council of the EU and the European Parliament during negotiations on the proposed Data Protection Regulation to expand the scope of ‘special purposes’ provision to cover ‘freedom of expression’ itself. However, such a rewording would in principle run the risk of moving from the Scylla of undue restriction to the Charybdis of license. Both the European Convention on Human Rights and the EU Charter of Fundamental Rights recognise that freedom of expression encompasses rights ‘to receive and impart information and ideas without interference by public authority and regardless of frontiers’.¹³¹ Moreover, from its inception, the entirety of European data protection has been correctly understood to be in inherent tension with such these rights. The Explanatory Report to the Council of Europe’s Data Protection Convention, on which the EU’s data protection framework is based,¹³² clearly states that ‘[t]he convention’s point of departure is that certain rights of the individual may have to be protected vis-à-vis the free flow of information regardless of frontiers, the latter principle being enshrined in international and European instruments on human rights (see Article 10, European Human Rights Convention;

¹²⁹ Case C-73/07, *Satamedia* at [66].

¹³⁰ *Ibid* at [66].

¹³¹ European Convention on Human Rights, art. 10; EU Charter, art. 11.

¹³² See Directive 95/46, Recital 11.

Article 19, International Covenant on Civil and Political Rights).¹³³ Thus, as Fritz Hondius, then Deputy to the Director of Human Rights for the Council of Europe, found:

Data Protection is not so much a set of rules concerning privacy (Article 8 of the [European] Human Rights Convention) as a set of restrictions on the exercise of freedom of information (Article 10) which are permitted [but not required] under the second paragraph of Article 10 in the interest of the protection of other rights and freedoms (including the right to privacy).¹³⁴

Theoretically, therefore, such a change of wording should enable the erstwhile special purposes provision to be relied upon to justify any alteration of data protection's fundamental provisions, thereby translating this extremely discretionary special purposes clause into one of universal application. Moreover, even if the provision was somehow confined to circumstances where information was disseminated to an indefinite number of people, its impact would be extremely far-reaching. As detailed above, read within its proper contextual context, the *Satamedia* holding was confined to providing a special purpose shield to disclosure to individuals acting in their capacity not as essentially privatized persons but rather as members of a collective 'public'. In contrast, providing a special shield for all forms of dissemination to an indefinite number is much broader proposition. Such an approach does lie at the heart of the Swedish *Fundamental Law on Freedom of Expression* which, against the requirements of the current Directive, has incorrectly been given precedence over data protection in Sweden. As detailed above, this law has led to street mapping services established in Sweden being entirely exempted from default data protection requirements. It has also led to a wide range of other databases being similarly shielded including one (Lexbase) which allows, for a fee, anyone to search individual criminal convictions from the past five years by 'name, social security number or geographic location. A series of red dots appear on a map showing where ex-offenders live'.¹³⁵ Moreover, given that protected databases are simply defined as 'collection[s] of information stored for automatic data processing',¹³⁶ there would appear to be no impediment to a general search engine ensuring that its index was shielded from data protection in a like matter. However, European law is clear that street mapping services, general search engines and databases which are primarily designed to further essentially privatised purposes should not be shielded from default data

¹³³ Council of Europe, Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108) Explanatory Report (1981) <<http://conventions.coe.int/Treaty/EN/Reports/Html/108.htm>> (last visited 27 July 2014) at [19].

¹³⁴ Hondius, 'A Decade of International Data Protection', 30 *Netherlands International Law Review* (1983), 103-128 at 114.

¹³⁵ Radio Sweden, 'Demand for law change after Lexbase launch' <<http://sverigesradio.se/sida/artikel.aspx?programid=2054&artikel=5768451>> (last visited 05 May 2014).

¹³⁶ Sweden, *Fundamental Law on Freedom of Expression*, art. 1.

protection through the special purposes provision. The changes proposed by both the Council of the EU and the European Parliament would certainly place such a restriction in jeopardy.

Of course, it may be argued that European data protection desperately requires a fundamental shift of focus and balance which the Commission's draft Regulation generally and manifestly fails to achieve. In principle, this argument is clearly correct. The almost unfathomable scope, inflexible nature and sometimes unduly onerous default standards of both the current Directive and the proposed Regulation are ill-suited to current digital realities. Indeed, Blume and Svanberg have cogently argued that

[T]he current and proposed architecture creates an overly bureaucratic and legalistic regulatory environment which often appears illogical and disproportionately burdensome and prescriptive ... In essence, this regulatory approach is the equivalent of legislating to end violent stabbings by introducing detailed rules for every time that someone picks up a knife, even if just to peel an apple.¹³⁷

Indeed, no lesser figure than the former UK Information Commissioner Richard Thomas not only stated in 2008 that European data protection was 'no longer fit for purpose'¹³⁸ but further argued in February 2013 that the proposed Data Protection Regulation 'should be taken back to the drawing board'.¹³⁹ However, these albeit very serious defects would best be addressed directly and on a pan-European level rather than through the side wind process of apparently radically expanding the scope of a special provision, which is designed to grant wide-ranging discretion to individual Member States, and in ways which are not clearly articulated or even understood. In any case, since a radical expansion of national discretion would dramatically conflict with the core harmonizing purpose of the proposed Regulation, this wording would almost certainly be interpreted much more restrictively and against its logical meaning, thus perpetuating rather than resolving the confusion in this area. In this regard, it must be emphasised that the Commission has explicitly linked its reform initiative to the achievement of greater harmonization in a number of areas of activity directly analysed in this article. For example, in 2011 the then European Commissioner for Justice, Fundamental Rights and Citizenship Viviane Reding highlighted the emergence of 'online mapping services including pictures of streets and people's homes' stating that a 'more coordinated approach at EU level is needed to address such cases in a consistent and

¹³⁷ Blume and Svanberg, op. cit, *supra* note 122 at pp. 35-36.

¹³⁸ Timmins, 'Data protection laws "not fit for purpose"' (8 July 2008) <<http://www.ft.com/cms/s/0/afb07a5e-4c41-11dd-96bb-000077b07658.html#axzz38ljUaYIU>> (last visited 26 July 2014).

¹³⁹ Leach, 'Ex-ICO: Draft EU privacy rules will turn every citizen "into a liar"' (6 February 2013) <http://www.theregister.co.uk/2013/02/06/uk_ico_position_data_protection_directive/> (last visited 28 July 2014).

effective way'.¹⁴⁰ The Commission also intervened forcefully in *Google Spain* to support the proposition that search engines indexing public domain information should be regulated under European data protection law as data controllers outside the special purposes shield. The CJEU's judgement explicitly supporting this understanding was described by Reding as a 'clear victory for the protection of personal data of Europeans' demonstrating that 'data belongs to the individual not to the company'.¹⁴¹ A foretaste of the kind of illogical and restrictive interpretation which may be expected can already be seen both in political positions adopted by the Commission during the negotiation on the Regulation and in recent CJEU jurisprudence. On the political level, after the Council of the EU had proposed to expand the special purposes provision to enable a reconciliation with freedom of expression itself, it is notable that the Commission continued to insist that 'the indexation of personal data by search engines is a processing activity not protected by the freedom of expression'.¹⁴² Similarly, perhaps also aware of the potential future change of wording to the special purposes provision, in *Google Spain* the CJEU also studiously refused to acknowledge that regulation of the index of a search engine engaged freedom of expression, rather arguing only that this implicated 'the economic **interest** of the operator of the search engine' and 'the **interest** of the general public in finding that information'.¹⁴³ This is in stark contrast its earlier *Lindqvist* judgment of 2003 where, despite refusing to rule the special purposes provision applicable, the CJEU did acknowledge that 'Mrs Lindqvist's freedom of expression in her work preparing people for Communion and her freedom to carry out activities contributing to religious relief have to weighed against the protection of the private life of the individuals about whom Mrs Lindqvist has placed data on her internet site'.¹⁴⁴ However, given that a search engine is clearly involved in disseminating information which the internet user then receives, it remains an undoubted fact that its activities do fall squarely within freedom of expression's scope. Indeed, in current technological reality, general search engines are even used ubiquitously to receive information linked to political and other matters of clear social interest which freedom of expression jurisprudence has generally been particularly careful to safeguard.

On balance, expanding the special purposes provision to simply refer to freedom of expression itself could cause more problems than it resolves. Assuming this is the case, the special purposes provision must still be subject to amendment. Firstly, the confusing and potentially restrictive notion of 'journalistic purposes'

¹⁴⁰ Reding, 'Your data, your rights: Safeguarding your privacy in a connected world' (March 16, 2011), <http://europa.eu/rapid/press-release_SPEECH-11-183_en.htm?locale=en> (last visited 26 July 2014).

¹⁴¹ Reding, 'Today's Court Judgment' (13 May 2014), <<https://www.facebook.com/pages/Viviane-Reding/291423897690447>> (last visited 29 July 2014).

¹⁴² Council of the EU, Document 11013/13 (Annex) (21.06.13) <<http://www.statewatch.org/news/2013/jun/eu-council-dp-regulation-revised-11013-13.pdf>> (last visited 28 July 2013), p. 93.

¹⁴³ Case C-131/12, *Google Spain* at [97] (emphasis added).

¹⁴⁴ Case C-101/01, *Lindqvist* at [86]-[87].

should be replaced with the broader concept of ‘all activities which aim at or instantiate disclosure to the public of information, opinions or ideas’. A Recital should also clarify that such disclosure is not limited to the professional media but rather is part of a fundamental right which may be enjoyed by all including academic scholars, sole individuals and campaign groups, and irrespective of whether the activity is undertaken for profit-making or non-profit making purposes. Secondly, the confusing express stipulation that processing must be ‘solely’ for such purposes should be removed, thereby underscoring that an activity which can be conceptualised entirely within these special purposes should not fall outside of this shield simply because it can also be thought of as actualising another purpose or purposes cognisable within European data protection law. However, even if the special purposes derogation is reformulated in these terms, it is clear that a number of activities linked to public freedom of expression broadly conceived will still find themselves outside its scope. This includes activity which plays a key role in either facilitating disclosure to the collective ‘public’, such as general search engines, and those which either facilitate or even instantiate individual self-expression, such as many rating websites. In light of the onerous nature of many of the default requirements in European data protection, these actors should also benefit from certain freedom of expression derogations. In practical terms, some of these activities have already secured the benefit of certain derogations, albeit of an unstructured, extra-statutory and therefore highly unstable form. For example, in the 2013 survey noted above, approximately half of the EEA DPAs explicitly acknowledged then when considering the obligations of a teacher rating website the general data protection provisions ‘must be interpreted with regard for other fundamental rights including freedom of expression’. Although more implicit and volatile, EEA DPAs understanding of the law vis-à-vis search engines discloses a similar approach. In its 2008 Opinion on search engines, the Article 29 Working Party of EU DPAs acknowledged that a ‘balance needs to be struck by Community data protection law and the laws of the various Member States between the protection of the right to privacy life and the protection of personal data on the one hand and the free flow of information and the fundamental right to freedom of expression on the other hand’.¹⁴⁵ However, when in the 2013 survey noted above EEA DPAs were explicitly asked to determine the relationship between data protection the ‘new form[] of online publication’ arising when ‘[a] company provides a service allowing people to search the information sources of the public Internet (including on identified individuals) through a web-based search engine’, 21 DPAs (81% of the standardized responses) indicated that ‘the general

¹⁴⁵ Article 29 Data Protection Working Party, *Opinion 1/2008 on Data Protection Issues related to Search Engines* <http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp148_en.pdf> (last visited 31 July 2014), p. 13.

provisions of Data Protection law apply in full'.¹⁴⁶ Nevertheless, following the handing down of *Google Spain* and implicitly returning to a focus on balance in 2014 the Working Party published guidelines which explicitly stated that “[t]he interest of the search engines in processing personal data is economic. But there is also an interest of internet users in receiving the information using search engines. In that sense, the fundamental right to freedom of expression ... has to be taken into consideration when assessing data subjects’ requests”.¹⁴⁷ Moreover, it is clear that this document does not none of the 26 questions posed by the Working Party to search engines in July 2014 suggested that they expected expect search engines these actors to adhere fully to the Directive’s various rules, in particular, as regards on private sector processing of sensitive classes of data, such as information on criminal convictions and political opinion, which as outlined above generally stipulate either that the explicit consent of the data subject has been obtained or that the data “are manifestly made public” by this same individual.¹⁴⁸ Such *ad hoc* approaches are clearly unacceptable from the point of view of legal certainty and consistency. Indeed, given that any restrictions on freedom of expression must be ‘prescribed by law’, they fail to meet the standard laid down by both the European Convention and the EU Charter.¹⁴⁹ At a minimum, the new law should explicitly require, as opposed to allow, Member States to lay down such derogations as are necessary to reconcile data protection with the right to public freedom of expression, broadly conceived, under that law’s general derogation provisions. These provisions are set out in Article 21 (vis-à-vis ordinary default data protection requirements) and Article 9 (2) (vis-à-vis the sensitive data rules) of the proposed Regulation, themselves largely the cognate of Article 13 and Articles 8.4 - 8.5 of the current Directive respectively. The wording of these provisions must be flexible enough to enable an appropriate balance between the rights and interests in play.¹⁵⁰ Nevertheless, the scope and depth of these provisions are rightly

¹⁴⁶ No DPAs though the special purposes provision was applicable, three DPAs (12%) indicated that ‘[t]he general provisions of Data Protection law apply, but must be interpreted with regard for other fundamental rights including freedom of expression’ and two (8%) that ‘Data Protection does not apply’. A similar pattern emerged if only DPAs acting under national laws with special purpose provisions at least as expansive as Article 9 of Directive 95/46 itself were examined. Here, 9 DPAs (69%) indicated that the general provisions of Data Protection apply in full, 2 (15%) that such provisions applied but had to be interpreted with regard for other fundamental rights and 2 (15%) that Data Protection law did not apply.

¹⁴⁷ Art. 29 Data Protection Working Party, *Guidelines on the Implementation of the Court of Justice of the European Union Judgment on “Google Spain and Inc v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González”* C-131/12, available at <http://ec.europa.eu/justice/data-protection/article-29/documentation/opinion-recommendation/files/2014/wp225_en.pdf> (last visited 2 December 2014).

¹⁴⁸ Directive 95/46, Art. 8(2).

¹⁴⁹ European Convention on Human Rights, Art. 10; European Union Charter of Fundamental Rights, Art. 11.

¹⁵⁰ In this regard, Amendment 116 to Article 21 proposed by the European Parliament in its Legislative Resolution of 12 March 2014 (*op cit*, supra 127) is particularly concerning. This would *inter alia* remove the possibility of any derogation from the data quality principles (set out in Art. 5 of the proposed Regulation and Art. 6 of the current Directive) and require ‘specific provisions’ including as to ‘the specific purposes and means of processing’. As demonstrated in the *Google Spain* case, even though generally drafted in a generally open-textured format, the data quality principles can constitute a very significant restriction on freedom of expression. Therefore, the need for certain targeted derogations cannot be excluded. Additionally, a number of the ‘specific provisions’ envisaged by the Amendment appear to mandate highly bureaucratic procedures in all circumstances. This would undermine the type of flexible balancing envisaged here.

more limited than that set out vis-à-vis the special purposes. As a result, requiring these clauses to be used to effect a reconciliation between data protection and more general aspects of public freedom of expression, will ensure that a variegated approach is taken to departures from the default data protection scheme in this broad area. Activities orientated towards disclosing information, opinion and ideas to individuals acting in their role as members of a collective ‘public’ will benefit from the deepest shield from data protection norms. At the same time, activities which merely facilitate such expression, or which either facilitate or instantiate essentially only individual self-expression, will also benefit from mandatory derogations, albeit of a more restricted nature.

8. Conclusions

European data protection sits in a relationship of profound, albeit until recently seriously under-acknowledged, tension with public freedom of expression. In light of this, the EU Data Protection Directive 95/46 includes a special purposes provision requiring that Member States set out a qualified shield for processing ‘carried out solely for journalistic purposes or the purpose of artistic or literary expression’.¹⁵¹ The scope of this provision, however, is both opaque and far too restrictive to provide a general reconciliation of values in this general area. Its wording suggests that it is only in relation to three types of activity, principally or perhaps exclusively carried out by professional journalists, artists and writers, that ‘[p]rocessing of personal data and freedom of expression’¹⁵² need to be considered in tandem. Moreover, its stipulation that processing be ‘solely’ for one or other of these purposes can easily be read to imply the need for a strict exclusivity of purpose, thereby removing from this shield activities such as scholarly research and socio-political campaigning where another purpose may also be considered present. In partial recognition of these limitations, the CJEU held in *Satamedia* that the reference to ‘journalistic purposes’ must include all activities whose ‘sole object ... is the disclosure to the public of information, opinions or ideas’.¹⁵³ However, as not only subsequent national decisions but also the CJEU’s own ruling in *Google Spain* has vividly illustrated, ‘the public’ here must be understood as referencing a collective grouping along the lines of the ‘body politic’ as opposed simply to an indefinite number of persons. The case also did not clarify the meaning of the reference to ‘solely’ within the special purposes. As a result, a wide range of activities related to public freedom of expression may continue to fall outside its scope including scholarly research, socio-political campaigning, rating websites, street mapping

¹⁵¹ Directive 95/46, Art. 9.

¹⁵² *ibid.*

¹⁵³ *Satamedia* at [66].

services and general search engines. Moreover, the continued presence of seemingly more restrictive language on the face of the Directive itself has encouraged many EEA DPAs to confine its scope primarily, or even exclusively, within the even narrower confines of the professional media.

As part of the proposed reform of European data protection, both the Council of the EU and the European Parliament have now proposed rewriting the special purposes provision to allow, and require, Member States to effect a reconciliation between data protection and freedom of expression itself. Given that European data protection has from its inception been recognised to be in inherent tension with freedom of expression, such a rephrasing would in principle translate the scope of this special and extremely discretionary clause into one of universal application. However, since this outcome would dramatically conflict with the core harmonizing aim of the proposed reform, it would almost certainly be interpreted much more narrowly and against its natural meaning. As a result, change of this sort would not only run the theoretical risk of moving from the Scylla of undue restriction to the Charybdis of license, but would be unlikely to resolve the fundamental confusion which exists in this area.

Given these problems, construction of an explicitly layered approach to these issues may offer a better way forward. Such a reform would be two-pronged. On the one hand, the special purposes provision would be expanded to explicitly refer to the concept of ‘all activities which aim at or instantiate disclosure to the public of information, opinions or ideas’, at the same time removing the confusing express stipulation that processing be ‘solely’ for the protected purposes. This would categorically ensure that all activity orientated towards a collective discourse would be covered including scholarship, socio-political campaigning and many types of blogging. At the same time, amendments should clearly oblige Member States to reconcile data protection with the right to public freedom of expression more broadly conceived under the law’s general derogation provisions. This requirement would enable activities, such as general search engines and certain rating websites, which facilitate disclosure of material to individuals acting as members of the collective ‘public’ or which either facilitate or instantiate individual self-expression, to also benefit from mandatory derogations, albeit of a more restricted nature. Such an approach cannot resolve the general and serious challenges confronting European data protection which are certainly deserving of urgent and sustained attention. Nevertheless, as regards the increasingly pressing tension between data protection and public freedom of expression, it would enhance coherence and certainty within the law, secure a greater degree of European harmonization in those areas where this is both more necessary and more appropriate and, finally, ensure a fairer balance between these two rights which are so often in critical conflict.

