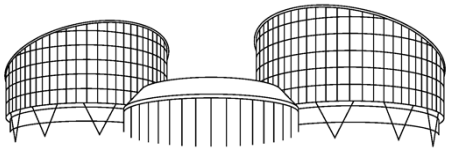

EUROPEAN COURT OF HUMAN RIGHTS
COUR EUROPÉENNE DES DROITS DE L'HOMME

GRAND CHAMBER

CASE OF HURBAIN v. BELGIUM

(Application no. 57292/16)

JUDGMENT

Art 10 • Freedom of expression • Newspaper publisher ordered to anonymise online archived version of lawful article published twenty years earlier, on grounds of "right to be forgotten" of driver who caused a fatal accident • Need to preserve integrity of press archives • Clarification of scope of "right to be forgotten online", a non-autonomous right linked to the right for respect for reputation • Establishment of criteria and rules for balancing the various rights at stake • Account taken by national courts of the nature and seriousness of the judicial facts reported on in the article, the lack of topical, historical and scientific interest and the fact that the person concerned was not well known • Continued online availability of article without restrictions apt to create "virtual criminal record" in view of the rehabilitation of the person concerned and the considerable time elapsing since publication of the original article • Anonymisation did not impose excessive and impracticable burden on publisher, while constituting the most effective means of protecting the privacy of the person concerned • Balancing of competing interests by the domestic courts in accordance with the Convention requirements • Interference proportionate and limited to what was strictly necessary

STRASBOURG

4 July 2023

This judgment is final but it may be subject to editorial revision.

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In the case of Hurbain v. Belgium,

The European Court of Human Rights, sitting as a Grand Chamber composed of:

Marko Bošnjak, *President*,
Pere Pastor Vilanova,
Arnfinn Bårdsen,
Faris Vehabović,
Egidijus Kūris,
Iulia Antoanella Motoc,
Yonko Grozev,
Carlo Ranzoni,
Alena Poláčková,
Tim Eicke,
Jovan Ilievski,
Jolien Schukking,
Péter Paczolay,
Gilberto Felici,
Lorraine Schembri Orland,
Ana Maria Guerra Martins,
Frédéric Krenc*, judges*,

and Johan Callewaert, *Deputy Grand Chamber Registrar,*

Having deliberated in private on 9 March and 23 November 2022 and on 10 May 2023,

Delivers the following judgment, which was adopted on the last-mentioned date:

INTRODUCTION

1. The present case concerns a civil judgment against the applicant, the publisher of the Belgian daily newspaper *Le Soir*, ordering him to anonymise, on grounds of the "right to be forgotten", the electronic online version of an article in the archives which mentioned the full name of G., the driver responsible for a fatal road-traffic accident in 1994. In his application the applicant relied on Article 10 of the Convention.

PROCEDURE

2. The case originated in an application (no. 57292/16) against the Kingdom of Belgium lodged with the Court under Article 34 of the Convention for the Protection of Human Rights and Fundamental Freedoms ("the Convention") by a Belgian national, Mr Patrick Hurbain ("the applicant"), on 26 September 2016.

3. The applicant was represented by Mr A. Berenboom and Ms S. Carneroli, lawyers practising in Brussels. The Belgian Government

("the Government") were represented by their Agent, Ms I. Niedlispacher, of the Federal Justice Department.

4. The application was allocated to the Third Section of the Court (Rule 52 § 1 of the Rules of Court). On 7 September 2018 the Government were given notice of the application. G. was given leave to intervene in the written procedure (Article 36 § 2 of the Convention and Rule 44 § 3).

5. On 22 June 2021 a Chamber of the Third Section, composed of Georgios A. Serghides, President, Paul Lemmens, Georges Ravarani, María Elósegui, Darian Pavli, Anja Seibert-Fohr, Peeter Roosma, judges, and Milan Blaško, Section Registrar, unanimously declared the application admissible and held, by six votes to one, that there had been no violation of Article 10 of the Convention. The dissenting opinion of Judge Pavli was annexed to the judgment.

6. On 16 September 2021 the applicant requested the referral of the case to the Grand Chamber in accordance with Article 43 of the Convention. On 11 October 2021 the panel of the Grand Chamber granted the request.

7. The composition of the Grand Chamber was determined in accordance with the provisions of Article 26 §§ 4 and 5 of the Convention and Rule 24.

8. The applicant and the Government each filed further written observations on the merits of the case (Rule 59 § 1).

9. The President of the Grand Chamber gave leave to sixteen organisations and entities, all represented by the organisation ARTICLE 19, to submit written comments (Article 36 § 2 of the Convention and Rule 44 § 3). G. was informed that the leave to intervene granted in the Chamber proceedings continued before the Grand Chamber. The third-party interveners submitted comments before the Grand Chamber.

10. A hearing took place in public in the Human Rights Building, Strasbourg, on 9 March 2022.

There appeared before the Court:

(a) for the Government

Ms I. NIEDLISPACHER, *Agent*,
Ms I. LECLERCQ, Co-Agent, *Adviser*;

(b) for the applicant

Mr A. BERENBOOM, Lawyer, *Counsel*,
Ms S. CARNEROLI, Lawyer, *Counsel*.

The Court heard addresses by Mr Berenboom and Ms Carneroli and by Ms Niedlispacher and Ms Leclercq, and their replies to judges' questions.

THE FACTS

11. The applicant was born in 1959 and lives in Genappe (Belgium).

I. THE BACKGROUND TO THE CASE

12. The applicant is the publisher of the daily newspaper *Le Soir*, one of Belgium's leading French-language newspapers.

13. In a 1994 print edition of the newspaper an article of around twenty lines in length, concerning a series of fatal road-traffic accidents occurring within a few days, reported on a car accident caused by G., who had been under the influence of alcohol at the time. The accident led to the death of two people and injured three others. The article mentioned G.'s full name. G. was a doctor at the relevant time and continues to exercise that profession. In 2000 he was convicted in connection with the incident and sentenced to a suspended term of two years' imprisonment. He served his sentence and was rehabilitated in 2006.

14. Since 13 June 2008 the newspaper's website has provided an electronic version of its archives dating back to 1989, including the above-mentioned article. When the archives were published online, and throughout the proceedings before the domestic courts, the articles were accessible free of charge on the website.

15. On 15 June, 7 July and 19 August 2010 G. wrote to the legal department of the public limited company S.A. Rossel et Compagnie, the owners of *Le Soir*, requesting that the article be removed from the newspaper's electronic archives or at least rendered anonymous. In support of his request G. referred to the fact that he was a doctor and that the article appeared on the list of search results when his name was typed into search engines including the newspaper's internal search engine and Google. He feared being dismissed on this account or losing patients, referring to "a professional death foretold".

16. On 16 June 2010 the legal department of S.A. Rossel et Compagnie refused to remove the article from the archives. On 29 December 2010 S.A. Rossel et Compagnie, in a registered letter, served notice on the managing director of Google Belgium to delist the article. Reminders were subsequently sent by registered post on 24 January and 23 February 2011. Before the domestic courts and the Court, the applicant stated that these steps had produced no response.

17. On 30 March 2012 G. brought the case before the Council for Journalistic Ethics (*Conseil de déontologie journalistique* – "the CDJ"), the self-regulatory body of the French and German-speaking media in Belgium. He pointed out that if a search was carried out at that time via the search engine of the website www.lesoir.be based on his first name and surname, the article of 10 November 1994 appeared in sixth place, that is, on the first page

of results; this was in fact the only article on the website lesoir.be which mentioned G. He added that when a Google search was performed based on his first name and surname, the first result on the list was the article on www.lesoir.be.

18. On 18 April 2012 the CDJ declared the request inadmissible on the grounds that the dispute did not concern a matter of journalistic ethics. It pointed to the solutions that had been adopted by Belgian news publishers with regard to electronic press archives, namely the right to rectification (in cases where the information was inaccurate) and the right of electronic communication (in cases where the information was incomplete).

II. THE DOMESTIC COURT PROCEEDINGS

19. In a summons served on 24 May 2012 G. instituted proceedings against the applicant in the Neufchâteau Court of First Instance, seeking to have the electronic archived version of the article in question anonymised on the basis of Article 1382 of the Civil Code. In the alternative, should the applicant actually provide irrefutable technical evidence of the impossibility of making the information anonymous, G. sought an order requiring him to add a "noindex" tag to the online version of the article to prevent it from appearing on the list of results when G.'s name was typed into the search engine of the newspaper's website. In G.'s view, even though he had addressed a reasonable and substantiated request to that effect to the applicant, the latter had kept the article online without anonymising it or adding a noindex tag, and had thus committed a fault and infringed G.'s "right to be forgotten".

20. In his written submissions the applicant objected to anonymisation and stated, among other things, that G. had argued in his statement of claim that the article was accessible to anyone who simply carried out an Internet search based on his first name and surname. In the applicant's view, this actually amounted to a criticism of the powerful nature of search engines. The applicant further stated that he had given notice to the administrator of the search engine Google to delist the article in question. As the search engine had refused to do so voluntarily, the applicant took the view that it was for the claimant to take proceedings against the search engine, since the latter was responsible for indexing the article. The applicant argued that this was the practice, for instance, in France, where the courts regularly ordered Google to delist content that infringed individuals' privacy. He added that Google's activities, unlike those of news publishers, were purely commercial, and Google could not rely on a right to information or a duty to preserve the archives or a duty to remember.

21. In a judgment of 25 January 2013 the Court of First Instance allowed most of G.'s claims. Noting that the applicant had not adduced any evidence of the impossibility of anonymising the article, the court ordered him to

replace G.'s first name and surname by the letter X in the digital version of the article featured on the newspaper's website and in any other database for which he was responsible. The applicant was ordered to pay one euro to G. in respect of non-pecuniary damage and to pay G.'s costs. The court rejected G.'s requests for an anonymised version of the judgment to be sent to the parties and to possible third parties and for the judgment to be declared immediately enforceable.

22. The applicant appealed.

23. In his written pleadings the applicant submitted, among other arguments, that the way in which the database of the newspaper *Le Soir* worked meant that it was not possible to amend archived articles and hence to replace G.'s name with the letter X. Furthermore, the noindex tags that might have prevented the article from being indexed by external search engines were technical tools that were liable to lead to problems on the website concerned and were provided by the operators of those search engines, which required users to open an account. He therefore opposed such a measure. Lastly, the applicant pointed out that the Court of Justice of the European Union ("the CJEU") had previously ruled that measures requiring electronic communications to be filtered or blocked had to have a domestic legal basis that was accessible, clear and foreseeable; in his view, no such basis had existed in the present case.

24. In his summarised observations to the Court of Appeal, G. requested that the first-instance judgment be upheld.

25. In a judgment of 25 September 2014 the Liège Court of Appeal upheld the first-instance judgment in its entirety. The Court of Appeal began by noting expressly that each of the parties had fundamental rights – the right to freedom of expression in the applicant's case and the right to respect for private and family life in G.'s case – which were guaranteed by national and international standards, but which were not absolute and were of equal ranking. It referred in its reasoning to Articles 8 and 10 of the Convention.

26. As to the criterion of lawfulness required in order to derogate from the principle of freedom of expression, the Court of Appeal noted that the "right to be forgotten" was considered by the domestic case-law and the legal literature to be an integral part of the right to respect for private life as enshrined in Article 8 of the Convention, Article 17 of the International Covenant on Civil and Political Rights and Article 22 of the Constitution. That was sufficient to satisfy the lawfulness test in order to derogate from the principle of freedom of expression. The Court of Appeal dismissed the applicant's argument that Article 1382 of the Civil Code did not provide a clear and foreseeable legal basis. The provision in question constituted the ordinary rules on liability and was applicable to news outlets, which could not be unaware that they might be held liable if the exercise of press freedom caused damage resulting from an infringement of the rights of others. As the Court of First Instance had observed, Articles 1382 et seq. of the Civil Code,

as interpreted by the Belgian legal literature and case-law, constituted legislation that was sufficiently accessible, clear, precise and foreseeable for the purposes of Article 10 § 2 of the Convention.

27. The Court of Appeal went on to dismiss the applicant's argument that G.'s action had been brought against him erroneously since it should have been directed against the search engine operators. The court found as follows:

> "The indexing of the impugned article by search engines is only possible because the article is present in the database of *Le Soir* in non-anonymised form and without any noindex tag. As observed above, [G.] is entitled to bring his action against the news publisher with a view to having the article concerning him anonymised, resulting in the removal of the results obtained following a search based on his first name and surname."

28. Regarding the "right to be forgotten", which, in the applicant's submission, was not applicable in the case at issue, the Court of Appeal stressed as follows:

> "Alongside the traditional aspect of the right to be forgotten linked to the fresh disclosure by the press of a person's previous convictions, there exists a second aspect linked to the erasure of the digital data, and in particular the data available on the Internet.
>
> The present dispute, which concerns the digitisation of journalistic archives, raises issues in relation to the latter aspect, namely the right to be forgotten online. That right concerns the possibility for an individual to request the erasure of data concerning him or her, and more specifically data posted online, after a given period. The aim, therefore, is no longer to prevent or punish the disclosure of past events, but to obtain the removal of information available on the Internet ...
>
> This right to be forgotten online was recognised very recently by the Court of Justice of the European Union (CJEU (Grand Chamber), 13 May 2014, Case C-131/12).
>
> In that judgment the CJEU held that the requirement regarding fresh disclosure of the information could be inferred from the effect of the search tool, which gave prominence to information that would not otherwise be visible online ...
>
> It is true that the CJEU judgment concerned a dispute between a Spanish citizen and the operator of a search engine (Google). Nevertheless, the principles established by that judgment can be transposed to the case at hand in so far as the publisher has also enabled the article in question to be given prominence via the search engine of the newspaper's website, which is accessible free of charge. The effect is also multiplied significantly by the development of the 'crawling' software used by Google-type search engines ...
>
> The right to be forgotten online, like the traditional right to be forgotten, is not unlimited and has to be tightly regulated in so far as it is liable to come into conflict with the freedom of expression of the press.
>
> The case-law, and in particular that of the Court of Justice of the European Union, has defined a number of criteria and conditions designed to guide the courts in assessing whether a proper balance had been struck between the fundamental rights enshrined, *inter alia*, in Articles 8 and 10 of the European Convention on Human Rights (see, in particular, [ECHR], 7 February 2012, *Von Hannover v. Germany*, and CJEU (GC), 13 May 2014, *Google v. Mario Costeja González*; see also Namur Court of First

Instance (Civil), 17 November 1997, JLMB [*Revue de jurisprudence de Liege, Mons et Bruxelles*], 1998, p. 781).

Thus, for recognition of a right to be forgotten, the facts must have been disclosed lawfully in the first place and must be of a judicial nature; there can be no contemporary interest in their disclosure; the facts cannot be of historical interest; a certain time must have elapsed between the two disclosures [or, more precisely, with regard to the online archived version of an article published at the time of the events, a certain time must have elapsed between the original dissemination of the article, irrespective of its format, and the request for anonymisation]; and the person concerned must not be a public figure, must have an interest in being reintegrated into society and must have discharged his or her debt."

29. In the Court of Appeal's view, its task was "to ascertain whether, in the instant case and in the light of these criteria, the restriction on press freedom stemming from [G.]'s request pursue[d] a legitimate aim and satisfie[d] the proportionality test, in conformity with Article 10 § 2 of the European Convention on Human Rights". In that connection the Court of Appeal found as follows:

"It is not disputed that the original publication of the article in question in the edition of the daily newspaper *Le Soir* of 10 November 1994 was lawful and that the facts reported on were of a judicial nature.

The fresh disclosure, within the meaning specified above, of the facts does not have any value in terms of newsworthiness.

[G.] does not hold any public office, and the mere fact that he is a doctor in no way justifies his continued identification in the online article some twenty years after the events. This is illegitimate and disproportionate, since it does not add anything to the value of the article and is liable to cause indefinite and serious harm to [G.]'s reputation by giving him a virtual criminal record, despite the fact that he has not only served his sentence after a final conviction for the offence but has also been rehabilitated.

Twenty years after the events, the identity of a person who is not a public figure does not add to the article's public interest, as the article merely makes a statistical contribution to a public debate on road safety.

Contrary to [the applicant]'s submissions, removing [G.]'s first name and surname does not render the information devoid of interest since it will have no impact on the actual substance of the information conveyed, which concerns a tragic road-traffic accident caused in particular by the harmful effects of alcohol.

[The applicant]'s arguments concerning the duty to remember and the need to preserve a full and faithful record in the archives are irrelevant. No request was made for the impugned article to be removed from the archives, but simply for the electronic version to be rendered anonymous; the paper archives remain intact and [the applicant] can still ensure the integrity of the original digital version.

The events reported on in the article are clearly not of historical significance, as the article relates to an unexceptional – albeit tragic – short news story which is not alleged, still less demonstrated, to have been a source of particular public concern.

Lastly, a significant length of time (sixteen years) elapsed between the initial publication of the article in *Le Soir* in November 1994 and the first formal request for anonymisation, made in a letter dated 15 June 2010; in all, some twenty years have now passed since the article was first published ...

As pointed out above, there is no public interest in learning the identity of the person responsible for a road-traffic accident that occurred almost twenty years ago.

It follows from all these considerations that:

- [G.] satisfies the criteria for claiming a right to be forgotten, and that keeping the article in question online without rendering it anonymous, many years after the events it reported on, is liable to cause him disproportionate harm when weighed against the benefits of strict observance of [the applicant]'s right to freedom of expression;

- the conditions of lawfulness, legitimacy and proportionality imposed by Article 10 § 2 of the European Convention on Human Rights in respect of any limitation of freedom of expression are satisfied in the present case."

30. The Court of Appeal went on to give the following reasons for its decision:

"[G.]'s request for anonymisation, made first in correspondence to *Le Soir* and subsequently in the context of the present proceedings, is apt to ensure a proper balance between the interests at stake.

That balance would not be achieved by the establishment of a right to digital rectification or communication as proposed by [the applicant], which in the present case would consist in allowing the respondent to publish a short text, containing a link to the original article, referring to the rehabilitation order. Such techniques are not appropriate in the context of an article reporting information that has become damaging owing to the passage of time. The techniques proposed by [the applicant] would allow the stigmatising effect of the serious offences committed by [G.], and of the sentence he has already served, to persist indefinitely and would render the rehabilitation order in his favour meaningless.

The most effective means of protecting [G.]'s privacy without interfering to a disproportionate extent with [the applicant]'s freedom of expression is to anonymise the article on the website of *Le Soir* by replacing [G.]'s first name and surname with the letter X ..."

31. The Court of Appeal found that by refusing to accede to the request to anonymise the article, the applicant had not acted in the way that any prudent and diligent publisher would act in the same circumstances. In the Court of Appeal's view, that refusal constituted a fault. The court further found as follows:

"[The applicant] is unfounded in his assertion that [G.] has failed to prove the damage caused to him by the continued online availability of the article in non-anonymised form. A simple search based on [G.]'s first name and surname in the search engine on *Le Soir*'s website or on Google immediately brings up the article; this is undoubtedly a source of harm to [G.], at least of a psychological nature. Such a situation makes knowledge of his previous conviction readily accessible to a wide audience which inevitably includes patients, colleagues and acquaintances, and is thus liable to stigmatise him, seriously damage his reputation and prevent him from reintegrating into society normally, despite the fact that many years have passed since he completed his sentence and was rehabilitated by the courts. ...

[The applicant] contends that the damage sustained by [G.] results solely from the offence committed in 1994 and from the indexing by Google of the articles from *Le Soir*. In his view, no causal link has been established between the fault he allegedly

committed and the damage for which compensation is sought. The court cannot accept this reasoning. There is of necessity a causal link between [the applicant's] wrongful decision to keep the article of 10 November 1994 online without anonymisation and the damage referred to above. Had that decision not been taken, search engines such as Google would not bring the existence of the impugned article to light and there would be no infringement of [G.]'s right to be forgotten and to the protection of his reputation."

32. The Court of Appeal added the following:

"... contrary to [the applicant]'s assertion, acceding to [G.]'s request does not confer on each and every individual a subjective right to rewrite history, nor does it make it possible to 'falsify history' or impose an 'excessive burden of responsibility' on [the applicant]. This court, like the lower court, is called upon to determine a specific dispute between two parties in the context of a one-off civil action for damages based on Article 1382 of the Civil Code, while seeking to ensure that a balance is struck between two competing fundamental rights claimed by the parties."

33. Regarding the applicant's argument that it was not possible to anonymise the article in the archives, the Liège Court of Appeal held as follows:

"[The applicant] argues that the way in which his newspaper's database works means that it is not possible to 'alter' archived articles ... In support of his claims, he submitted a report drawn up on 21 June 2013 by the newspaper's technical department ... The report in question, which was prepared *in tempore suspecto* by technicians who are in a relationship of dependency with [the applicant], does not provide any guarantees of impartiality and has no probative value. Such a report cannot in itself suffice as prima facie evidence of the alleged impossibility such as to justify recourse to an expert assessment. Moreover, the report does not state that it would actually be impossible to implement the measure requested (anonymisation of the article), but simply refers to the risks and costs. The only reference to impossibility concerns the 'physical impossibility of withdrawing the newspapers that have been sold, the collections that have been distributed, and the numerous copies of the content available in physical and digital format in the public domain' ..., something that has not been requested in the context of the present action. The technical argument advanced by [the applicant] to support his assertion that the action against him is unfounded is therefore dismissed."

34. Lastly, the Court of Appeal dismissed the cross-appeal lodged by G. in which he requested that an anonymised version of the judgment be sent to the parties and to possible third parties.

35. The applicant appealed on points of law. In one of his grounds of appeal he alleged a violation of Article 10 of the Convention. In particular, he argued that the "right to be forgotten" was not enshrined either in clear, precise and accessible domestic legislation or in a higher-ranking international rule, but was derived solely from the legal literature and case-law. He inferred from this that the Court of Appeal judgment had breached the requirement for the interference with the exercise of his right to freedom of expression to be lawful. The applicant further argued that the order for him to alter in the online archives the content of an article that had been published in the past and was available in the paper archives amounted to unjustified interference with his freedom of expression. In particular, he disputed the assertion that the fact of a publisher posting an article of this kind

online in a digital archive, in similar fashion to a library making an archived article available, constituted fresh disclosure for the purposes of the domestic courts' case-law.

36. In a judgment of 29 April 2016 the Court of Cassation dismissed the appeal on points of law. It found that the applicant's argument that the Court of Appeal had derived the "right to be forgotten" online solely from the legal literature and case-law, to which it had attributed general regulatory scope, failed on factual grounds. The Court of Cassation held as follows:

> "... It follows [from] the reasoning [of the Court of Appeal judgment], firstly, that the judgment under challenge regards the right to be forgotten online as an 'intrinsic component of the right to respect for private life' (and indeed states so), and views such interference with the right to freedom of expression as may be justified in order to protect that right as being based not on the legal literature and case-law – which the judgment does not recognise as having general regulatory scope – but on Article 8 of the [Convention], Article 17 of the International Covenant on Civil and Political Rights and Article 22 of the Constitution; and, secondly, that it refers to the judgment of the Court of Justice of the European Union only to lend support to its view on the scope of that right to be forgotten."

37. The Court of Cassation further noted that the Court of Appeal had not based the "right to be forgotten online" on the European or domestic provisions concerning the protection of individuals with regard to the processing of personal data, namely EU Directive 95/46/EC (see paragraph 68 below) and the Belgian Act of 8 December 1992 (see paragraph 49 below).

38. The Court of Cassation also held as follows:

> "While Article 10 of the Convention for the Protection of Human Rights and Fundamental Freedoms and Article 19 of the International Covenant on Civil and Political Rights, which protect freedom of expression and, accordingly, press freedom, give the print media the right to place digital archives online and give members of the public the right to access those archives, these rights are not absolute and may in some circumstances, within the strict limits laid down by those treaty provisions, yield to other rights that are also worthy of respect.
>
> The right to respect for private life, which is guaranteed by Article 8 of the Convention for the Protection of Human Rights and Fundamental Freedoms, Article 17 of the International Covenant on Civil and Political Rights and Article 22 of the Constitution, and which – as acknowledged in this limb of the ground of appeal – encompasses the right to be forgotten, allowing an individual found guilty of an offence to object in some circumstances to his or her previous convictions being made public once more through fresh disclosure of the facts, may justify interference with the right to freedom of expression.
>
> The digital archiving of an old press article which, at the time it was printed, reported lawfully on past events that are now covered by the right to be forgotten, so construed, is not exempt from possible interference with the right to freedom of expression in order to protect the right to be forgotten.
>
> Such interference may consist in altering the archived text so as to prevent or make good a breach of the right to be forgotten.

After stating ... that the dispute concerned 'an ... aspect' of the right to be forgotten relating to 'the possibility for an individual to request the erasure of data concerning him or her, and more specifically data posted online, after a given period', '[t]he aim [being] no longer to prevent or punish the disclosure of past events, but to obtain the removal of information available on the Internet', the contested judgment found that, by placing the impugned article online, '[the appellant] enabled [that] article ... to be given prominence via the search engine of the newspaper's website, which [was] accessible free of charge. The effect [was] also multiplied significantly by the development of the "crawling" software used by Google-type search engines'.

Thus, the contested judgment ruled lawfully that the online archiving of the article in question amounted to a fresh disclosure of the respondent's previous conviction that was liable to infringe his right to be forgotten.

In adding, on the basis of factual remarks weighing the respondent's right to be forgotten against the appellant's right to create historically accurate archives and the public's right to consult them, that '[the respondent] satisfie[d] the criteria for claiming a right to be forgotten, and that keeping the article in question online without rendering it anonymous, many years after the events it reported on, [was] liable to cause him disproportionate harm when weighed against the benefits of strict observance of [the appellant]'s right to freedom of expression', and that 'the conditions of lawfulness, legitimacy and proportionality imposed by Article 10 § 2 of the Convention for the Protection of Human Rights and Fundamental Freedoms in respect of any limitation of freedom of expression [were] satisfied in the present case', the contested judgment provided legal justification for its ruling that the appellant, 'by refusing, in the specific context of the case and without reasonable cause, to accede to the request for the article to be anonymised', had committed a fault.

It therefore lawfully ordered him to 'replace the respondent's first name and surname with the letter X in the ... version of the article dated ... featured on the website www.lesoir.be and in any other database for which he [was] responsible' and to pay [the respondent] one euro in respect of non-pecuniary damage."

III. IMPLEMENTATION OF THE JUDGMENT OF 25 SEPTEMBER 2014

39. On 25 November 2014 G. brought proceedings against the applicant in the Liège Court of Appeal seeking an order for the applicant to pay a fine for failing to comply with the judgment of 25 September 2014, which had been served on the applicant on 7 November 2014. On 8 December 2014 the applicant informed the Court of Appeal that the version of the article in the online archives had been anonymised on 21 November 2014.

40. In a judgment of 19 March 2015 the Liège Court of Appeal dismissed the request for it to impose a fine, finding that this was not justified since the article had been anonymised in the meantime. However, the court noted, on the basis of the documents in the file, that the applicant "ha[d] demonstrated no readiness or resolve to implement the judgment". It therefore ordered him to pay the costs incurred by G. in seeking to obtain enforcement of the judgment.

41. Following the anonymisation of the article a note was inserted beneath the online version, under the heading "Full version", referring to the relevant judicial decision and to the possibility for anyone who so wished to consult

the article in its original form simply by sending an email request to that effect.

42. At the Grand Chamber hearing the applicant's representative stated that the newspaper had two sets of digital archives: one online archive which was accessible to the public, and another, known as the "master archive", which was not. He added that the references to G.'s first name and surname had been anonymised both on the website of *Le Soir* and in the newspaper's digital "master" archive which was not accessible to the public.

43. However, the Government and G., as a third-party intervener, pointed out in their respective observations before the Grand Chamber that the article in question could still be accessed in late 2021 in full, non-anonymised form, via the internal search engine of *Le Soir*. When G.'s name was typed into Google's search engine, however, the article no longer appeared in the list of results.

44. In January 2022, having been apprised of this situation, S.A. Rossel et Compagnie again anonymised the article. Accordingly, when G.'s name is entered into either Google's search engine or the internal search engine of *Le Soir*, no link to the article appears in the list of results.

45. Since January 2022 the archives of *Le Soir* have been available to subscribers only.

RELEVANT LEGAL FRAMEWORK AND PRACTICE

I. DOMESTIC LAW AND PRACTICE

A. The Constitution

46. The Belgian Constitution guarantees freedom to manifest one's opinions on all matters (Article 19) and freedom of the press (Article 25), as well as the right to respect for private and family life (Article 22).

B. The Civil Code

47. Under Article 1382 of the Civil Code, "any act committed by a person that causes damage to another shall render the person through whose fault the damage was caused liable to make reparation for it".

48. This provision may be used as the basis for civil actions for alleged abuse of press freedom (Cass., 4 December 1952, *Pas*. 1953, I, p. 215; see *De Haes and Gijsels v. Belgium*, 24 February 1997, § 26, *Reports of Judgments and Decisions* 1997-I).

C. The Act of 8 December 1992 on the protection of private life with regard to the processing of personal data

49. Under section 8(1) of the Act of 8 December 1992 on the protection of private life with regard to the processing of personal data ("the Protection of Private Life Act"), which was in force at the material time, the processing of personal data concerning cases coming before the ordinary and administrative courts, suspected offences, prosecutions or convictions in connection with offences, and administrative sanctions or preventive measures, was prohibited. Nevertheless, section 3(3)(a) of the Act provided that section 8 did not apply to the processing of personal data solely for journalistic purposes where it concerned data that had been manifestly made public by the data subject, or to data that were closely connected to the public profile of the data subject or the public nature of the events in which he or she had been involved.

50. Under section 14 of the same Act, the president of the Court of First Instance, as the judge responsible for hearing urgent applications, had jurisdiction to examine any request to rectify, remove or prohibit the use of any personal data that were inaccurate or, regard being had to the purpose of the processing, were incomplete or irrelevant; the recording, communication or retention of which was prohibited; the processing of which the data subject had objected to; or which had been retained beyond the authorised period.

51. The Act of 8 December 1992 was repealed by the Act of 30 July 2018 on the protection of individuals with regard to the processing of personal data. Section 24(2) exempts the processing of personal data carried out for journalistic purposes from the application of a number of Articles of Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 (see paragraph 69 below). Article 17 of the Regulation is not among the provisions concerned.

D. The Code of Criminal Procedure

52. Articles 621 to 634 of the Code of Criminal Procedure make provision for persons who have been convicted to apply for rehabilitation, subject to a number of conditions. Rehabilitation orders are made by the Court of Appeal.

53. The relevant part of Article 624 provides:

> "Rehabilitation shall be subject to a probationary period during which the applicant ... must ... have shown a willingness to reform and have displayed good conduct."

54. The relevant part of Article 634 provides:

> "Rehabilitation shall put an end, with future effect, to all the effects of the conviction for the person concerned, without prejudice to the rights acquired by third parties.
>
> In particular: ... it shall preclude reference to this decision ... in the judicial record..."

55. The legislation is aimed principally at the reintegration of convicted persons into society, and rehabilitation orders serve the interests of both the convicted person and society (Constitutional Court judgment no. 41/2012 of 8 March 2012). However, the rehabilitation of a convicted person does not mean that the facts established by the courts and forming the basis for the person's conviction are ignored as though they had never existed (Cass., 23 April 1997, *Pas*. 1997, I, no. 199).

E. The Judicial Code

56. The rule prohibiting the courts from ruling *ultra petita* is enshrined in Article 1138, point (2), of the Judicial Code and constitutes a special application of the disposition principle, one which, according to the Court of Cassation, follows from a general principle of law (Cass., 20 February 2002, R.G. P.01.1045.F; Cass., 26 June 2008, R.G. C.06.0405.N; Cass., 18 September 2014, R.G. C.12.0237.F).

57. Article 1138, point (2), of the Judicial Code reads as follows:

> "No application to reopen the proceedings shall be possible; instead, an appeal on points of law for breach of the law may be lodged against final decisions:
>
> ...
>
> (2) where a ruling has been given on matters that were not requested or an award made in excess of what was claimed;
>
> ..."

F. The domestic courts' case-law concerning the "right to be forgotten"

58. Prior to the events giving rise to the present case, the "right to be forgotten" had been recognised by the lower courts as an integral part of the right to respect for private life (see, for instance, Brussels Court of Appeal (urgent application), 21 December 1995, *JT* , 1996, p. 47; Brussels Court of First Instance, 30 June 1997, *JT*, 1997, p. 710; Namur Court of First Instance, 17 November 1997, *JT*, 1998, p. 187; Namur Court of First Instance, 27 September 1999, *Auteurs & Média*, 2000, p. 471; and Brussels Court of First Instance, 20 September 2001, *Auteurs & Média*, 2002, p. 77). This right was also recognised subsequently by the Court of Cassation (Cass., 29 April 2016, C.15.0052.F, in the applicant's case, and Cass., 8 November 2018, C.16.0457.F).

II. UNITED NATIONS INSTRUMENT

59. The Universal Declaration on Archives was initiated by the International Council on Archives (ICA) and was adopted by UNESCO in Paris on 10 November 2011. This non-binding declaration provides a

definition of archives that includes all recorded decisions, actions and official documents in all formats including paper, digital, and audiovisual. The aims it identifies include ensuring that archives are (i) managed and preserved in ways that ensure their authenticity, integrity and usability, and (ii) made accessible to everyone, while respecting the pertinent laws and the rights of individuals.

III. COUNCIL OF EUROPE INSTRUMENTS

A. Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data

60. The relevant passages of the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data of 28 January 1981 ("Convention 108") provide:

Article 1 – Object and purpose

"The purpose of this Convention is to secure in the territory of each Party for every individual, whatever his nationality or residence, respect for his rights and fundamental freedoms, and in particular his right to privacy, with regard to automatic processing of personal data relating to him ('data protection')."

Article 3 – Scope

"1. The Parties undertake to apply this Convention to automated personal data files and automatic processing of personal data in the public and private sectors.

..."

Article 5 – Quality of data

"Personal data undergoing automatic processing shall be:

(a) obtained and processed fairly and lawfully;

(b) stored for specified and legitimate purposes and not used in a way incompatible with those purposes;

(c) adequate, relevant and not excessive in relation to the purposes for which they are stored;

(d) accurate and, where necessary, kept up to date;

(e) preserved in a form which permits identification of the data subjects for no longer than is required for the purpose for which those data are stored."

Article 6 – Special categories of data

"Personal data revealing racial origin, political opinions or religious or other beliefs, as well as personal data concerning health or sexual life, may not be processed automatically unless domestic law provides appropriate safeguards. The same shall apply to personal data relating to criminal convictions."

Article 9 – Exceptions and restrictions

"...

2. Derogation from the provisions of Articles 5, 6 and 8 of this Convention shall be allowed when such derogation is provided for by the law of the Party and constitutes a necessary measure in a democratic society in the interests of:

...

(b) protecting the data subject or the rights and freedoms of others."

61. On 18 May 2018, at its 128th session held in Elsinore, the Committee of Ministers adopted an amending Protocol incorporating a modernised version of this convention ("Convention 108+"). The relevant provisions of this new version, which has not yet entered into force, read as follows:

Article 6 – Special categories of data

"1. The processing of:

...

- personal data relating to offences, criminal proceedings and convictions, and related security measures;

...

shall only be allowed where appropriate safeguards are enshrined in law, complementing those of this Convention.

2. Such safeguards shall guard against the risks that the processing of sensitive data may present for the interests, rights and fundamental freedoms of the data subject, notably a risk of discrimination."

Article 11 – Exceptions and restrictions

"1. No exception to the provisions set out in this Chapter shall be allowed except to the provisions of Article 5 paragraph 4, Article 7 paragraph 2, Article 8 paragraph 1 and Article 9, when such an exception is provided for by law, respects the essence of the fundamental rights and freedoms and constitutes a necessary and proportionate measure in a democratic society for:

...

b. the protection of the data subject or the rights and fundamental freedoms of others, notably freedom of expression."

62. The explanatory report to the amending Protocol to Convention 108 emphasises as follows in relation to Articles 6 and 11, cited above:

Article 6 – Special categories of data

"55. ... The requirement of appropriate safeguards, complementing the provisions of the Convention, does not exclude the possibility provided under Article 11 to allow exceptions and restrictions to the rights of data subjects granted under Article 9.

...

57. Specific types of data processing may entail a particular risk for data subjects independently of the context of the processing. ... Similar risks occur with the processing of data related to criminal offences (which includes suspected offences), criminal convictions (based on criminal law and in the framework of criminal proceedings) and related security measures (involving deprivation of liberty for instance) which require the provision of appropriate safeguards for the rights and freedoms of data subjects."

Article 11 – Exceptions and restrictions

"96. Littera b. concerns the rights and fundamental freedoms of private parties, such as those of the data subject himself or herself (for example when a data subject's vital interests are threatened because he or she is missing) or of third parties, such as freedom of expression, including freedom of journalistic, academic, artistic or literary expression, and the right to receive and impart information, confidentiality of correspondence and communications, or business or commercial secrecy and other legally protected secrets. This should apply in particular to processing of personal data in the audio-visual field and in news archives and press libraries. 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.

97. The second paragraph leaves open the possibility of restricting the provisions set out in Articles 8 and 9 with regard to certain data processing carried out for archiving purposes in the public interest, scientific or historical research purposes, or statistical purposes which pose no recognisable risk of infringement to the rights and fundamental freedoms of data subjects. For instance, this could be the case with the use of data for statistical work, in the public and private fields alike, in so far as this data is published in aggregate form and provided that appropriate data protection safeguards are in place (see paragraph 50)."

B. Recommendation No. R (2000) 13 of the Committee of Ministers

63. In Recommendation No. R (2000) 13 to member States on a European policy on access to archives, adopted on 13 July 2000 at the 717th meeting of the Ministers' Deputies, the Committee of Ministers considered that archives constituted an essential and irreplaceable element of culture, contributing to the survival of human memory. It noted the complexity of problems concerning access to archives at both national and international level due to the variety of constitutional and legal frameworks, the conflicting requirements of transparency and secrecy, the protection of privacy and access to historical information, all of which were perceived differently by public opinion in each country. The Committee of Ministers recommended that the governments of the member States take the necessary measures and steps to enact legislation on access to archives inspired by the principles outlined in the Appendix to the Recommendation, or to bring existing legislation into line with the same principles. The relevant passages of the Appendix to the Recommendation read as follows:

"**III. Arrangements for access to public archives**

5. Access to public archives is a right.

...

7. The legislation should provide for:

a. either the opening of public archives without particular restriction; or

b. a general closure period.

7.1. Exceptions to this general rule necessary in a democratic society can, if the case arises, be provided to ensure the protection of:

...

b. private individuals against the release of information concerning their private lives.

...

10. If the requested archive is not openly accessible for the reasons set out in article 7.1, special permission may be given for access to extracts or with partial blanking. The user shall be informed that only partial access has been granted.

...

IV. Access to private archives

12. Wherever possible, *mutatis mutandis*, attempts should be made to bring arrangements for access to private archives in line with those for public archives."

C. Recommendation Rec(2003)13 of the Committee of Ministers

64. Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information through the media in relation to criminal proceedings, adopted on 10 July 2003 at the 848th meeting of the Ministers' Deputies, stressed the importance of media reporting in informing the public on criminal proceedings, making the deterrent function of criminal law visible and ensuring public scrutiny of the functioning of the criminal justice system. The Committee of Ministers, while acknowledging the diversity of national legal systems concerning criminal procedure, recommended that the governments of member States take or reinforce, as applicable, all measures which they considered necessary with a view to the implementation of the principles set out in the Appendix to the Recommendation, the relevant passages of which read as follows:

"***Principles concerning the provision of information through the media in relation to criminal proceedings***

Principle 1 – Information of the public via the media

The public must be able to receive information about the activities of judicial authorities and police services through the media. Therefore, journalists must be able to freely report and comment on the functioning of the criminal justice system, subject only to the limitations provided for under the following principles.

...

Principle 8 – Protection of privacy in the context of on-going criminal proceedings

The provision of information about suspects, accused or convicted persons or other parties to criminal proceedings should respect their right to protection of privacy in accordance with Article 8 of the Convention. Particular protection should be given to parties who are minors or other vulnerable persons, as well as to victims, to witnesses and to the families of suspects, accused and convicted. In all cases, particular consideration should be given to the harmful effect which the disclosure of information enabling their identification may have on the persons referred to in this Principle."

D. Recommendation Rec(2012)3 of the Committee of Ministers

65. The Recommendation of the Committee of Ministers to member States on the protection of human rights with regard to search engines, adopted on 4 April 2012 at the 1139th meeting of the Ministers' Deputies, stressed the importance of search engines for rendering content on the Internet accessible and the World Wide Web useful for the public. It identified a number of measures to be taken by the member States, considering it essential that search engines be allowed to freely crawl and index the information openly available on the Web and intended for mass outreach. It noted, however, that the action of search engines could affect freedom of expression and the right to seek, receive and impart information. Similarly, their action had an impact on the right to private life and the protection of personal data, stemming from the pervasiveness of search engines or their ability to penetrate and index content which, although in the public space, was not intended for mass communication (or mass communication in aggregate), and from data processing generally and data retention periods.

66. The Recommendation further observed that, by combining different kinds of information on an individual, search engines created an image of a person that did not necessarily correspond to reality or to the image that a person would want to give of her or himself. The combination of search results created a much higher risk for that person than if all the data relating to him or her on the Internet remained separate. Even long-forgotten personal data could resurface as a result of the operation of search engines. As an element of media literacy, users should be informed about their right to remove incorrect or excessive personal data from original web pages, with due respect for the right to freedom of expression. Search engines should respond promptly to users' requests to delete their personal data from (extracts of) copies of web pages that search engine providers might still store (in their "cache" or as "snippets") after the original content had been deleted. The Recommendation added that it was vital to ensure compliance with applicable privacy and data protection principles, starting with Article 8 of the Convention and Article 9 of Convention 108, that provided for strict conditions to ensure that individuals were protected from unlawful interference in their private life and abusive processing of their personal data.

IV. EUROPEAN UNION LAW

A. Charter of Fundamental Rights of the European Union

67. Articles 7, 8 and 11 of the Charter provide:

Article 7 – Respect for private and family life

"Everyone has the right to respect for his or her private and family life, home and communications."

Article 8 – Protection of personal data

"1. Everyone has the right to the protection of personal data concerning him or her.

2. Such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

3. Compliance with these rules shall be subject to control by an independent authority."

Article 11 – Freedom of expression and information

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers.

2. The freedom and pluralism of the media shall be respected."

B. Relevant European Union standards concerning the protection and processing of personal data

68. Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 ("Directive 95/46/EC") on the protection of individuals with regard to the processing of personal data and on the free movement of such data was aimed at protecting the fundamental rights and freedoms of individuals, and in particular the right to privacy, with regard to the processing of personal data, while removing obstacles to the free movement of such data. The relevant provisions read as follows:

Article 8
The processing of special categories of data

"...

5. Processing of data relating to offences, criminal convictions or security measures may be carried out only under the control of official authority, or if suitable specific safeguards are provided under national law, subject to derogations which may be granted by the Member State under national provisions providing suitable specific safeguards. However, a complete register of criminal convictions may be kept only under the control of official authority.

Member States may provide that data relating to administrative sanctions or judgements in civil cases shall also be processed under the control of official authority.

..."

Article 9
Processing of personal data and freedom of expression

"Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data 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."

Article 12
Right of access

"Member States shall guarantee every data subject the right to obtain from the controller:

...

(b) as appropriate the rectification, erasure or blocking of data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data;

..."

Article 14
The data subject's right to object

"Member States shall grant the data subject the right:

(a) at least in the cases referred to in Article 7 (e) and (f), to object at any time on compelling legitimate grounds relating to his particular situation to the processing of data relating to him, save where otherwise provided by national legislation. Where there is a justified objection, the processing instigated by the controller may no longer involve those data;

..."

69. Regulation 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data ("the GDPR") repealed Directive 95/46/EC of 24 October 1995. It entered into force on 25 May 2018. Recital 153 and the relevant parts of Articles 4, 10, 17, 22 and 85 of the Regulation provide as follows:

Recital 153

"Member States law should reconcile the rules governing freedom of expression and information, including journalistic, academic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation. The processing of personal data solely for journalistic purposes, or for the purposes of academic, artistic or literary expression should be subject to derogations or exemptions from certain provisions of this Regulation if necessary to reconcile the right to the protection of

personal data with the right to freedom of expression and information, as enshrined in Article 11 of the Charter. This should apply in particular to the processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures which lay down the exemptions and derogations necessary for the purpose of balancing those fundamental rights. Member States should adopt such exemptions and derogations on general principles, the rights of the data subject, the controller and the processor, the transfer of personal data to third countries or international organisations, the independent supervisory authorities, cooperation and consistency, and specific data-processing situations. Where such exemptions or derogations differ from one Member State to another, the law of the Member State to which the controller is subject should apply. 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."

Article 4
Definitions

"For the purposes of this Regulation:

...

(4) 'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements;

..."

Article 10
Processing of personal data relating to criminal convictions and offences

"Processing of personal data relating to criminal convictions and offences or related security measures based on Article 6(1) shall be carried out only under the control of official authority or when the processing is authorised by Union or Member State law providing for appropriate safeguards for the rights and freedoms of data subjects. Any comprehensive register of criminal convictions shall be kept only under the control of official authority."

Article 17
Right to erasure ("right to be forgotten")

"1. The data subject shall have the right to obtain from the controller the erasure of personal data concerning him or her without undue delay and the controller shall have the obligation to erase personal data without undue delay where one of the following grounds applies:

(a) the personal data are no longer necessary in relation to the purposes for which they were collected or otherwise processed;

(b) the data subject withdraws consent on which the processing is based according to point (a) of Article 6(1), or point (a) of Article 9(2), and where there is no other legal ground for the processing;

(c) the data subject objects to the processing pursuant to Article 21(1) and there are no overriding legitimate grounds for the processing, or the data subject objects to the processing pursuant to Article 21(2);

(d) the personal data have been unlawfully processed;

(e) the personal data have to be erased for compliance with a legal obligation in Union or Member State law to which the controller is subject;

(f) the personal data have been collected in relation to the offer of information society services referred to in Article 8(1).

2. Where the controller has made the personal data public and is obliged pursuant to paragraph 1 to erase the personal data, the controller, taking account of available technology and the cost of implementation, shall take reasonable steps, including technical measures, to inform controllers which are processing the personal data that the data subject has requested the erasure by such controllers of any links to, or copy or replication of, those personal data.

3. Paragraphs 1 and 2 shall not apply to the extent that processing is necessary:

(a) for exercising the right of freedom of expression and information;

...

(d) for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing;

..."

Article 22
Automated individual decision-making, including profiling

"1. The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her.

2. Paragraph 1 shall not apply if the decision:

(a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;

(b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or

(c) is based on the data subject's explicit consent.

..."

Article 85
Processing and freedom of expression and information

"1. Member States shall by law reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression and information, including processing for journalistic purposes and the purposes of academic, artistic or literary expression.

> 2. For processing carried out for journalistic purposes or the purpose of academic artistic or literary expression, Member States shall provide for exemptions or derogations ... if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information.
>
> ..."

70. On 7 July 2020 the European Data Protection Board adopted Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR. The Guidelines observe that the "right to be forgotten" was especially enacted under Article 17 GDPR to take into account the right to request delisting established in the CJEU's *Google Spain* judgment (C-131/12). The relevant parts dealing with the processing necessary for exercising the right to freedom of expression and information read, in particular, as follows:

> "50. The Court [of Justice of the European Union] also distinguished between the legitimacy that a web publisher can have to disseminate information against the legitimacy of the search engine provider. The Court recognised that the activity of a web publisher can be undertaken exclusively for the purposes of journalism, in which case the web publisher would benefit from the exemptions that Member States could establish in these cases on the basis of Article 9 of the Directive (currently, Article 85.2 GDPR). In this regard, in the judgment '*M.L. and W.W. vs Germany*' of June 28th, 2018, the ECHR indicates that the balancing of the interests at issue may lead to different results depending on the request at stake (distinguishing (i) a request for erasure brought against the original publisher whose activity is at the heart of what freedom of expression aims to protect from (ii) a request brought against the search engine whose first interest is not to publish the original information on the data subject but notably to enable identifying any available information on this person and thus establishing his or her profile).
>
> 51. Those considerations should be assessed in respect of Article 17 GDPR complaints as in those decisions, the rights of the data subjects that have requested the delisting must be weighed with the interests of Internet users to access the information."

C. Relevant case-law of the CJEU and related guidelines

1. Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González *(judgment of 13 May 2014, C-131/12, EU:C:2014:317)*

71. In the case of *Google Spain SL and Google Inc.* (hereafter "*Google Spain*"), the CJEU was called upon to define the extent of the rights and obligations arising out of Directive 95/46/EC with regard to Internet search engines. The case originated in a complaint lodged by a Spanish national with the Spanish Data Protection Agency against a Spanish daily newspaper and Google. The applicant had complained that when an Internet user entered his name in Google's search engine, the list of results displayed links to two pages of the newspaper mentioning his name in connection with an auction following attachment proceedings. He had requested the newspaper either to remove or alter those pages so that the personal data

relating to him no longer appeared, or to use certain tools made available by search engines in order to protect his data. He had also requested Google to remove or conceal the personal data relating to him so that they ceased to be included in the search results and in the links to the newspaper. While the Spanish agency had rejected the complaint against the newspaper – finding that the publication by the newspaper of the information in question was legally justified as it had taken place on the orders of a Ministry – it had upheld the complaint against Google, which brought an action before the Spanish courts. It was in the context of this judicial dispute that the case was referred to the CJEU for a preliminary ruling.

72. The CJEU held that the operations carried out by the operator of a search engine should be classified as "data processing", of which it was the "controller" (Article 2(b) and (d) of Directive 95/46/EC), regardless of the fact that the data in question had already been published on the Internet and had not been altered by the search engine. It stated that, in so far as the activity of a search engine could be distinguished from and was additional to that carried out by publishers of websites and also affected the fundamental rights of the data subject, the operator of the search engine had to ensure in particular that the guarantees laid down by the directive could have full effect. Moreover, given the ease with which information published on a website could be replicated on other sites, effective and complete protection of data users, and particularly of their right to privacy, could not be achieved if they had to obtain first or in parallel the erasure of the information relating to them from the publishers of websites. The CJEU concluded that the operator of a search engine was obliged to remove from the list of results displayed following a search made on the basis of a person's name links to web pages, published by third parties and containing information relating to that person, also in cases where the name or information had not been erased beforehand or simultaneously from those web pages and even, as the case might be, when its publication on those pages was in itself lawful.

73. The CJEU added that even initially lawful processing of accurate data could, in the course of time, become incompatible with the directive where those data were no longer necessary in the light of the purposes for which they had been collected or processed. That was so in particular where they appeared to be inadequate, irrelevant or no longer relevant, or excessive in relation to those purposes and in the light of the time that had elapsed. The CJEU concluded that if, under Articles 7 and 8 of the European Union's Charter of Fundamental Rights guaranteeing, respectively, the right to respect for private life and the right to the protection of personal data, the data subjects had a right to ensure that the information in question relating to them personally should no longer be linked to their name by a list of results – although this did not presuppose that the inclusion of the information in question caused prejudice to the data subject – and if they were thus entitled to request that the information in question no longer be made available to the

general public on account of its inclusion in such a list of results, those rights overrode, as a rule, not only the economic interest of the search engine operator but also the interest of the general public in having access to that information through a search relating to the data subject's name. However, according to the CJEU, the balance to be struck between the interests of the person making the request and the public's interest in having access to the information might depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which might vary, in particular, according to the role played by the data subject in public life.

74. Regarding the specific nature of the processing carried out by the operators of search engines, the CJEU found as follows:

> "37. Also, the organisation and aggregation of information published on the internet that are effected by search engines with the aim of facilitating their users' access to that information may, when users carry out their search on the basis of an individual's name, result in them obtaining through the list of results a structured overview of the information relating to that individual that can be found on the internet enabling them to establish a more or less detailed profile of the data subject.
>
> ...
>
> 80. It must be pointed out at the outset that, as has been found in paragraphs 36 to 38 of the present judgment, processing of personal data, such as that at issue in the main proceedings, carried out by the operator of a search engine is liable to affect significantly the fundamental rights to privacy and to the protection of personal data when the search by means of that engine is carried out on the basis of an individual's name, since that processing enables any internet user to obtain through the list of results a structured overview of the information relating to that individual that can be found on the internet – information which potentially concerns a vast number of aspects of his private life and which, without the search engine, could not have been interconnected or could have been only with great difficulty – and thereby to establish a more or less detailed profile of him. Furthermore, the effect of the interference with those rights of the data subject is heightened on account of the important role played by the internet and search engines in modern society, which render the information contained in such a list of results ubiquitous (see, to this effect, Joined Cases C-509/09 and C-161/10 *eDate Advertising and Others* EU:C:2011:685, paragraph 45)."

75. Regarding the difference between the processing carried out by the publisher of a web page and that carried out by the operator of a search engine, the CJEU found as follows:

> "85. Furthermore, the processing by the publisher of a web page consisting in the publication 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, whereas that does not appear to be so in the case of the processing carried out by the operator of a search engine. It cannot therefore be ruled out that in certain circumstances the data subject is capable of exercising the rights referred to in Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 against that operator but not against the publisher of the web page.

86. Finally, it must be stated that not only does the ground, under Article 7 of Directive 95/46, justifying the publication of a piece of personal data on a website not necessarily coincide with that which is applicable to the activity of search engines, but also, even where that is the case, the outcome of the weighing of the interests at issue to be carried out under Article 7(f) and subparagraph (a) of the first paragraph of Article 14 of the directive may differ according to whether the processing carried out by the operator of a search engine or that carried out by the publisher of the web page is at issue, given that, first, the legitimate interests justifying the processing may be different and, second, the consequences of the processing for the data subject, and in particular for his private life, are not necessarily the same.

87. Indeed, since the inclusion in the list of results, displayed following a search made on the basis of a person's name, of a web page and of the information contained on it relating to that person makes access to that information appreciably easier for any internet user making a search in respect of the person concerned and may play a decisive role in the dissemination of that information, it is liable to constitute a more significant interference with the data subject's fundamental right to privacy than the publication on the web page."

2. *Guidelines on the implementation of the Court of Justice of the European Union judgment in the case of* Google Spain SL and Google Inc. v. Agencia Española de Protección de Datos (AEPD) and Mario Costeja González *(C-131/12)*

76. In the Guidelines on the implementation of the CJEU's judgment in the case of *Google Spain* (C-131/12), adopted on 26 November 2014, the "Article 29" Data Protection Working Party stated as follows:

"11. Individuals are not obliged to contact the original site, either previously or simultaneously, in order to exercise their rights towards the search engines. There are two different processing operations, with differentiated legitimacy grounds and also with different impacts on the individual's rights and interests. The individual may consider that it is better, given the circumstances of the case, to first contact the original webmaster to request the deletion of information or the application of 'no index' protocols to it, but the judgment does not require this.

...

18. Search engines included in web pages do not produce the same effects as 'external' search engines. On the one hand, they only recover the information contained on specific web pages. On the other, and even if a user looks for the same person in a number of web pages, internal search engines will not establish a complete profile of the affected individual and the results will not have a serious impact on him, Therefore, as a rule the right to de-listing should not apply to search engines with a restricted field of action, particularly in the case of search tools of websites of newspapers.

...

21. From the material point of view, and as it's been already mentioned, the ruling expressly states that the right only affects the results obtained on searches made by the name of the individual and never suggests that the complete deletion of the page from the indexes of the search engine is needed. The page should still be accessible using any other terms of search. It is worth mentioning that the ruling uses the term 'name',

without further specification. It may be thus concluded that the right applies to possible different versions of the name, including also family names or different spellings."

77. As the right to delisting has to be reconciled with the public's right to have access to information and the freedom of expression of the publisher of the information, the second part of the Guidelines deals with common criteria to be used by the data protection authorities in handling complaints following refusal of delisting by search engines, in order to resolve the conflict of rights and interests. According to the Guidelines, in most cases more than one criterion will need to be taken into account in order to reach a decision, as no single criterion is in itself determinative. Each criterion is to be applied in the light of the principles established by the CJEU and, in particular, in the light of "the interest of the general public in having access to [the] information". The criteria, which are presented in the form of questions and answers, are as follows:

"1. Does the search result relate to a natural person – i.e. an individual? And does the search result come up against a search on the data subject's name?

2. Does the data subject play a role in public life? Is the data subject a public figure?

3. Is the data subject a minor?

4. Is the data accurate?

5. Is the data relevant and not excessive?

(a) Does the data relate to the working life of the data subject?

(b) Does the search result link to information which allegedly constitutes hate speech/slander/libel or similar offences in the area of expression against the complainant?

(c) Is it clear that the data reflect an individual's personal opinion or does it appear to be verified fact?

6. Is the information sensitive within the meaning of Article 8 of the Directive 95/46/EC?

7. Is the data up to date? Is the data being made available for longer than is necessary for the purpose of the processing?

8. Is the data processing causing prejudice to the data subject? Does the data have a disproportionately negative privacy impact on the data subject?

9. Does the search result link to information that puts the data subject at risk?

10. In what context was the information published?

(a) Was the content voluntarily made public by the data subject?

(b) Was the content intended to be made public? Could the data subject have reasonably known that the content would be made public?

11. Was the original content published in the context of journalistic purposes?

12. Does the publisher of the data have a legal power – or a legal obligation – to make the personal data publicly available?

13. Does the data relate to a criminal offence?"

78. The relevant parts of the answer to the second question/criterion read as follows:

> "The CJEU has made an exception for de-listing requests from data subjects that play a role in public life, where there is an interest of the public in having access to information about them. This criterion is broader than the 'public figures' criterion.
>
> What constitutes 'a role in public life'?
>
> It is not possible to establish with certainty the type of role in public life an individual must have to justify public access to information about them via a search result.
>
> However, by way of illustration, politicians, senior public officials, business-people and members of the (regulated) professions can usually be considered to fulfil a role in public life. There is an argument in favour of the public being able to search for information relevant to their public roles and activities."

79. The answer to the eighth question/criterion reads as follows:

> "There is no obligation for the data subject to demonstrate prejudice in order to request de-listing, in other words prejudice is not a condition for exercising the right recognised by the CJEU. However, where there is evidence that the availability of a search result is causing prejudice to the data subject, this would be a strong factor in favour of de-listing.
>
> ...
>
> The data might have a disproportionately negative impact on the data subject where a search result relates to a trivial or foolish misdemeanour which is no longer – or may never have been – the subject of public debate and where there is no wider public interest in the availability of the information."

80. The answer to the thirteenth question/criterion reads as follows:

> "EU Member States may have different approaches as to the public availability of information about offenders and their offences. Specific legal provisions may exist which have an impact on the availability of such information over time. [Data protection authorities] will handle such cases in accordance with the relevant national principles and approaches. As a rule, [data protection authorities] are more likely to consider the de-listing of search results relating to relatively minor offences that happened a long time ago, whilst being less likely to consider the de-listing of results relating to more serious ones that happened more recently. However, these issues call for careful consideration and will be handled on a case-by-case basis."

3. Two judgments delivered by the CJEU on 24 September 2019 in response to requests for a preliminary ruling concerning the obligation for operators of search engines to grant requests for delisting ("de-referencing").

81. In the first judgment (*GC and Others v. Commission nationale de l'informatique et des libertés (CNIL)*, C-136/17, EU:C:2019:773), the CJEU was called upon to rule as to whether the prohibition or restrictions relating to the processing of certain categories of sensitive personal data also applied to the operators of search engines. Ms G.C., Mr A.F., Mr B.H. and Mr E.D. had brought proceedings in the French *Conseil d'État* against the National

Commission on Data Processing and Civil Liberties (CNIL) concerning four decisions of the CNIL refusing to serve formal notice on Google Inc. to delist various links appearing in the lists of results displayed following searches based on their names. The links led to web pages published by third parties containing, among other things, a satirical photomontage placed online pseudonymously and depicting a female politician, as well as a number of articles referring respectively to the position held by one of the applicants as public relations officer of the Church of Scientology, the judicial investigation into a male politician and the conviction of one of the applicants for sexually assaulting children. The *Conseil d'État* put several questions to the CJEU concerning the interpretation of the rules under European Union (EU) law, seeking to establish in particular whether, regard being had to the specific responsibilities, powers and capabilities of the operators of search engines, the prohibition imposed on other controllers on processing certain special categories of data (relating, for instance, to political opinions, religious or philosophical beliefs, or sexual life) also applied to such operators.

82. After reiterating the findings made in its *Google Spain* judgment (see paragraphs 72-73 above), the CJEU emphasised that the GDPR, which had entered into force in the meantime, and in particular Article 17(3)(a) thereof, expressly required that a balance be struck between the fundamental rights to privacy and protection of personal data guaranteed by Articles 7 and 8 of the Charter on the one hand, and the fundamental right to freedom of information guaranteed by Article 11 of the Charter on the other.

83. The CJEU added that where the operator of a search engine received a request for delisting relating to a link to a web page on which sensitive data were published, the operator was required to ascertain, on the basis of all the relevant factors of the particular case and taking into account the seriousness of the interference with the data subject's fundamental rights to privacy and protection of personal data, whether the inclusion of that link in the list of results displayed following a search on the basis of the data subject's name was strictly necessary for protecting the freedom of information of Internet users potentially interested in accessing that web page by means of such a search.

84. Lastly, with regard to web pages containing data concerning criminal proceedings brought against a specific individual, the CJEU referred to this Court's judgment in *M.L. and W.W. v. Germany* (nos. 60798/10 and 65599/10, 28 June 2018), from which it inferred the following:

> "77. It is thus for the operator of a search engine to assess, in the context of a request for de-referencing relating to links to web pages on which information is published relating to criminal proceedings brought against the data subject, concerning an earlier stage of the proceedings and no longer corresponding to the current situation, whether, in the light of all the circumstances of the case, such as, in particular, the nature and seriousness of the offence in question, the progress and the outcome of the proceedings, the time elapsed, the part played by the data subject in public life and his past conduct,

> the public's interest at the time of the request, the content and form of the publication and the consequences of publication for the data subject, he or she has a right to the information in question no longer, in the present state of things, being linked with his or her name by a list of results displayed following a search carried out on the basis of that name.
>
> 78. It must, however, be added that, even if the operator of a search engine were to find that that is not the case because the inclusion of the link in question is strictly necessary for reconciling the data subject's rights to privacy and protection of personal data with the freedom of information of potentially interested internet users, the operator is in any event required, at the latest on the occasion of the request for de-referencing, to adjust the list of results in such a way that the overall picture it gives the internet user reflects the current legal position, which means in particular that links to web pages containing information on that point must appear in first place on the list."

85. In the second judgment of 24 September 2019 (*Google v Commission nationale de l'informatique et des libertés,* C-507/17, EU:C:2019:772), the CJEU specified that EU law did not require the operator of a search engine to carry out delisting ("de-referencing") on all versions of its search engine. Nevertheless, it was required to do so on the versions of the search engine corresponding to all the member States and to put in place measures to discourage Internet users conducting a search from one of the member States from gaining access to the links in question found on non-EU versions of the search engine. Furthermore, EU law did not prevent a supervisory or judicial authority of a member State from weighing up the fundamental rights at stake in the light of national standards of protection of fundamental rights and, after weighing those rights against each other, from ordering the operator of such a search engine, where appropriate, to carry out delisting in relation to all versions of the search engine.

4. TU and RE v Google LLC *(judgment of 8 December 2022, C-460/20, EU:C:2022:962)*

86. In this case, the German Federal Court of Justice requested the CJEU to interpret the GDPR, which governs, among other matters, the right to erasure ("right to be forgotten"), and Directive 95/46/EC, read in the light of the Charter of Fundamental Rights of the European Union. The case concerned a dispute in which Google, in 2015, had refused a request from two senior managers of a group of investment companies for the results of a search carried out on the basis of their names to be delisted ("de-referenced"). The search results contained links to a number of articles published in the same year containing allegedly inaccurate information. The individuals concerned had also requested Google to remove photographs representing them, displayed in the form of preview images ("thumbnails"), from the list of results of an image search based on their names, as the list showed only the thumbnails themselves and not the context in which the photographs had been published on the web page concerned.

87. In this judgment the CJEU held, in particular, that in the context of the weighing-up exercise to be undertaken between the interests and rights at stake, the right to freedom of expression and information could not be taken into account where, at the very least, a part – that was not of minor importance – of the information found in the referenced content proved to be inaccurate. The CJEU added, firstly, that it was for the person requesting delisting to establish the manifest inaccuracy of the information or of a part of the information that was not of minor significance. However, that person could not be required in principle to produce, as of the pre-litigation stage, a judicial decision given against the publisher of the website in question, even in the form of a decision given in interim proceedings. Secondly, the search engine operator could not be required to play an active role in trying to find facts that were not substantiated by the request for delisting, for the purposes of determining whether that request was well founded. Accordingly, where the request for delisting was substantiated by relevant and sufficient evidence establishing the manifest inaccuracy of the information found in the referenced content, the operator of the search engine was required to accede to that request. With regard to the photographs displayed in the form of thumbnails, the CJEU made clear that a separate weighing-up of the competing rights and interests was required. Account had to be taken of the informative value of the photographs regardless of the context of their publication on the web page from which they were taken, but taking into consideration any text element which accompanied directly the display of the photographs in the search results and which was capable of casting light on their informative value.

V. COMPARATIVE LAW AND PRACTICE

A. Contracting States

88. The data available to the Court, and in particular those emerging from a survey covering thirty-three Council of Europe member States[1], show that in twelve States the competent authorities or courts have dealt with requests, based on the "right to be forgotten", for the alteration (removal or anonymisation) of personal data accessible on the website of a news outlet.

[1] The following countries were included in the survey: Albania, Austria, Azerbaijan, Bosnia and Herzegovina, Croatia, the Czech Republic, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Latvia, Liechtenstein, Luxembourg, the Republic of Moldova, Montenegro, Norway, Poland, Romania, the Russian Federation (which, since the survey was carried out, has ceased to be a member of the Council of Europe (on 16 March 2022) and a High Contracting Party to the Convention (on 16 September 2022)), San Marino, Serbia, Slovakia, Slovenia, Spain, Switzerland, Ukraine and the United Kingdom. Regarding the United Kingdom, the survey covered two of its three jurisdictions, namely England and Wales and Scotland.

In four of these States a request of that kind for the removal or anonymisation of personal data had been granted in specific situations concerning information relating, in particular, to the health of the data subject. It seems that on the only two occasions when an order was made for data concerning an individual's prosecution or criminal conviction to be removed or rendered anonymous, the person concerned had been acquitted or the information had been false.

89. All of the member States surveyed that had received requests for anonymisation or removal of personal data contained in a press article reportedly examined the requests on a case-by-case basis depending on the specific circumstances and on the basis of a balancing exercise between the various interests at stake. A great variety of criteria were taken into account in that connection, coinciding to some extent with those established in the Court's case-law (*Axel Springer AG v. Germany* [GC], no. 39954/08, 7 February 2012, and *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, ECHR 2012).

90. Seven of the twelve member States that had dealt with such requests stated expressly that a distinction had been made depending on the status of the defendant and in particular whether the request concerned a news outlet or a search engine. This seems to be due at least in part to the applicable EU law, according to which the right to erasure of data does not apply if processing of the data is necessary, among other purposes, for the exercise of the right of freedom of expression and information or for archiving purposes in the public interest. While in some instances (some of) the same criteria are deployed in examining a request for delisting concerning a search engine and a request for the alteration of content published by a news outlet, the relevance and weight attributed to those criteria appear to differ depending on the subject matter of the request and the status of the defendant.

91. Furthermore, in States that had dealt with requests for alteration of a press article published on the Internet, the competent courts and authorities did not take into account the fact that a print version of the same article remained intact. However, the Italian Court of Cassation had stressed the importance of taking steps to ensure that the print and digital versions of the same archived material remained identical.

92. Lastly, in at least five States the competent authorities or courts had explored the use of measures less restrictive of freedom of expression. In one further State it appears that the domestic courts are not empowered to examine the existence of less restrictive measures unless such measures have been requested by the claimant.

93. The practice of a number of the highest national courts in the member States surveyed regarding applications directed against search engine operators, media organisations or online information sites is set out in greater detail below.

B. Case-law of France's highest courts

1. *Judgment of 12 May 2016 of the Court of Cassation, First Civil Division*

94. The French Court of Cassation was called upon to rule on an action, brought in 2010 on the basis of section 38 of the Act of 6 January 1978 on data processing, files and civil liberties and on Article 1382 of the Civil Code, with a view to the removal of the applicants' personal data, which were subject to automatic processing on the website LesEchos.fr. The two applicants, traders who had been penalised in 2003 by the Financial Markets Board, sought the removal of their names from an article published in 2006 and subsequently made available free of charge in the archives of the newspaper *Les Echos*, after the *Conseil d'État* had altered the decision revoking their traders' licences and banning them from practising as traders, replacing it with a reprimand.

The Court of Cassation held as follows:

> "However, in finding – on grounds that have not been challenged – that the fact of requiring a news outlet either to remove from the website on which past articles are archived, which cannot be equated with publication of a database of judicial decisions, the information itself contained in one of those articles (in a situation where the removal of the full names of the persons concerned renders the article devoid of interest), or to restrict access to it by altering the usual listing, goes beyond the restrictions that may be imposed on freedom of the press, the Court of Appeal gave a proper legal basis for its decision, notwithstanding the subsidiary grounds challenged in the first limb."

2. *Judgment of 17 February 2021 of the Court of Cassation, First Civil Division*

95. This case concerned the legal representative of a company specialising in nutritional supplements who had been found guilty in a final judgment delivered in 2009 of illegally practising as a pharmacist, selling medicines without marketing authorisation and breaching the rules on advertising medicines and, in a 2011 judgment, of tax fraud and failure to keep proper accounts. The latter conviction was quashed by a 2019 ruling of the Criminal Convictions Review Court. In 2016 the applicant, who had discovered by chance that a page existed on a particular website reporting on his criminal convictions and containing a hyperlink to his father's death notice published on a separate site, and who alleged that the publication of that information breached his right to privacy, brought proceedings against the author of the web page in question under Article 9 of the Civil Code (right to respect for private life) seeking compensation for damage and the removal of the page. In the Court of Cassation proceedings the applicant complained that the Court of Appeal, in dismissing his action, had merely observed in the statement of facts that the website in question was purportedly aimed at discussing "irrational beliefs" and addressed topics such as conspiracy

theories, homeopathy, esoterism, spiritual healing and electromagnetism. In his view, the court had not identified any specific topic of public interest raised by the defendant in her remarks that would justify publishing information concerning his private life.

96. The Court of Cassation allowed the appeal and set aside the lower court's decision as lacking a legal basis. Referring to this Court's case-law (*Couderc and Hachette Filipacchi Associés v. France* [GC] (no. 40454/07, §§ 99, 100 and 102, ECHR 2015 (extracts)), and *Bédat v. Switzerland* [GC] (no. 56925/08, § 64, 29 March 2016)), the Court of Cassation took the view that the court hearing the case was required to weigh up the competing fundamental rights in the light of the interests at stake and to opt for the solution that best protected the more legitimate interest. The Court of Cassation held that when dealing with requests for the removal of information concerning judicial proceedings the courts should seek to ascertain whether the information that had been published formed part of a debate on a matter of general interest, justifying fresh disclosure of individuals' criminal convictions. The fact that the information was already in the public domain did not necessarily remove the protection of Article 8 of the Convention, as the interest in publishing the information had to be weighed against considerations relating to private life. These came into play in situations where information had been gathered about a specific individual, where personal data had been processed or used, or where the information in question had been made public in a way or to an extent that went beyond what the persons concerned could reasonably expect (*Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §§ 134-36, 27 June 2017).

3. *Thirteen judgments delivered by the French* Conseil d'État *on 6 December 2019*

97. In thirteen judgments dated 6 December 2019 the *Conseil d'État* defined the conditions governing respect for the right to delisting on the Internet as provided for by the GDPR, thus providing a guide on how to apply the "right to be forgotten". The judgments were adopted in the light of the judgment delivered by the CJEU on 24 September 2019 in response to a request from the *Conseil d'État* (see paragraphs 81 et seq. above).

98. According to the *Conseil d'État*, the main principles comprising the framework within which search engine operators were required to respect the right to delisting were as follows:

(i) the courts had to decide taking into account the circumstances and the law applicable on the date of their decision;

(ii) the delisting of search results that linked an individual's name to a web page containing personal data concerning him or her was a right;

(iii) the "right to be forgotten" was not absolute, and a balance had to be struck between the right to privacy of the person making the request and the public's right to receive information;

(iv) the respective weight accorded to these two fundamental freedoms would depend on the nature of the personal data.

99. These judgments dealt with three categories of personal data: (a) data deemed to be sensitive (those which represented the greatest intrusion into a person's life, concerning matters such as his or her health, sexual life, political opinions or religious beliefs); (b) data concerning criminal matters (judicial proceedings or a criminal conviction); and (c) data which concerned a person's private life but were not sensitive. The first two categories attracted the highest degree of protection: a request for the delisting of data which were sensitive or concerned criminal matters could only lawfully be refused if access to those data through a search based on the name of the person making the request was strictly necessary for the purpose of informing the public. In the case of the third category, the existence of an overriding public interest in having access to the information in question was sufficient.

100. The *Conseil d'État* held that the criteria to be taken into account in weighing up the rights at stake were: the characteristics of the personal data in question (nature, content, degree of objectivity, accuracy, source, the circumstances and timing of their publication online and the repercussions of the listing of the information for the person concerned); the role within society of the person making the request (whether he or she was well known and his or her role in public life and within society); and the circumstances in which the information had been made public (for instance, whether this was done by the person concerned of his or her own accord) and continued to be available.

C. Judgment of the High Court of England and Wales (QB) of 13 April 2018 in *NT1 and NT2 v. Google LLC [2018] EWHC 799*

101. The case concerned two businessmen who had submitted requests to Google for the delisting of several links to press articles concerning controversial property deals in connection with which they had been convicted. The first businessman (NT1) was convicted of criminal conspiracy in the late 1990s and sentenced to a prison term. He was released on licence, and was rehabilitated following a retrospective change to the law in 2014. The second businessman (NT2) was convicted of criminal conspiracy in the early 2000s and served six weeks in custody before being released on licence.

102. In examining the "right to be forgotten", the High Court referred to CJEU's *Google Spain* judgment (C-131/12) (see paragraphs 71 et seq. above) and to the Guidelines on the implementation of that judgment (see paragraph 76 above). The High Court performed a balancing exercise based on the principle of equal ranking between the rights to privacy and to the protection of personal data on the one hand and freedom of expression and information on the other. It found this principle to be consistent with the findings of the CJEU, which had not implied that in cases of this kind the public's interest in

having access to the information was inherently of lesser value than the individual's privacy rights. The High Court also found that Google could not claim an exemption for activities carried out for journalistic purposes.

103. In the light of the circumstances of the case, the High Court found that NT1 was a public figure with a limited role in public life. The information concerning his criminal conviction was not of a private nature since it did not relate to his personal life, but was of public interest in that it concerned a business crime for which he had been prosecuted and convicted. Although the information was sensitive, the harm allegedly suffered by NT1 was linked to his business and related to periods predating the time when he could complain of the processing of the information by Google. Furthermore, NT1 could not lay claim to any protection of his right to privacy since the information had been made public in the context of crime and court reporting in the media, which was a natural and foreseeable result of his own criminal behaviour.

104. The High Court also examined in detail the effect of rehabilitation in the context of claiming a "right to be forgotten". In its view, rehabilitation represented the point in time from which the convicted offender's privacy rights were engaged by any use or disclosure of information about the crime, conviction or sentence. The court further found that a person's rehabilitation carried some weight in the examination of a request for delisting, but still needed to be weighed against free speech and freedom of information considerations. In the case at hand the High Court took into consideration the exceptional circumstances in which NT1 had been rehabilitated following a recent change in the law, his misleading conduct after leaving prison, and the fact that he did not accept his guilt and had shown no remorse for his actions. Noting also that NT1 remained in business, the High Court found that the information concerning his past remained relevant to the assessment of his honesty by members of the public. It therefore dismissed his delisting claim.

105. Although it followed the same line of reasoning in relation to NT2, the High Court upheld the delisting claim in his case. It found, in particular, that the information in question had become out of date, irrelevant and of no sufficient legitimate interest to users of Google Search to justify its continued availability. Moreover, NT2 had been rehabilitated in accordance with the usual rules. Lastly, his current business activities were in a field quite different from that in which he had been operating at the time. His past offending was therefore of little if any relevance to persons with whom he might have business dealings.

D. Spanish Constitutional Court judgment of 4 June 2018 (no. 58/2018)

106. The judgment concerned a news report published in 1985 by the newspaper *El País*, and subsequently made available online in the

newspaper's digital archives, giving details of the detention of two individuals for drug trafficking. More than twenty years later, in 2009, after they had been released and rehabilitated, the individuals in question learnt that the article featured among the top results of a search based on their names carried out on the most commonly used search engines. In their statement of claim they sought (a) the removal or anonymisation of the information in the archives by *El País* and (b) the delisting, by the operators of search engines such as Google and by the newspaper itself, of the links to the article in question. Although the two lower Spanish courts upheld the applicants' claims, the Supreme Court allowed the appeal lodged by the newspaper and dismissed the part of the action concerning the alteration of the web page and its de-indexing on the newspaper's internal search engine.

107. The Constitutional Court was thus called upon to weigh up the various rights at stake, including the "right to be forgotten", which it defined as an aspect of the fundamental right to protection against the processing of personal data. Although that right also operated as a safeguard for the protection of individuals' privacy and their honour, to which it was closely linked, it was nevertheless an autonomous fundamental right. The court also took the view that the "right to be forgotten" was not absolute and that, as a general rule, freedom of information took precedence over the right to respect for private life and the right to informational self-determination, from which the "right to be forgotten" was derived.

108. The Constitutional Court stated that it would apply its settled case-law concerning the balancing of the right to respect for private life against freedom of information – an approach which was consistent with the Court's case-law. However, two decisive criteria were to be added to that balancing exercise, bearing in mind that the protection of personal data was involved: these were the passage of time and the publication of the information in question on the Internet. After observing that the information in question was truthful and was a matter of public interest since it related to a criminal case, the Constitutional Court deemed it essential to qualify its previous case-law in some respects. It found as follows:

> "As previously stated, the public relevance of the information is determined both by the subject matter and by the situation of the person to whom it refers. But the interest in the information may also be linked to its 'topicality', that is to say, to the degree to which it relates directly to the present time. The subject or object of a news report may be relevant in the abstract, but if it refers to an event which took place many years ago and which is unconnected to current events, it may have lost some of its public interest or information value and may or may not have acquired historical, statistical or scientific interest. Despite their indisputable significance, these types of interest are not directly linked to the formation of free, informed and pluralist public opinion; rather, they are linked to the overall development of culture which, of course, underlies the formation of opinions. In such cases, therefore, this may call into question the precedence given to the right to information [Article 20 § 1 (d) of the Constitution] over the right to privacy [Article 18 § 1 of the Constitution] of a person who, after a certain amount of time has passed, opts to request that those data and that information, which

> may have been of public relevance at the time, be forgotten. Of course, where the news report in question has been digitised and is stored in a media archive, the right to informational self-determination (Article 18 § 4 of the Constitution), as well as the right to privacy, is impaired."

109. Referring to the Court's case-law on the subject (*Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, ECHR 2009), the Constitutional Court found that the media fulfilled a dual function in making their databases available to the general public. The first function was as guarantor of the plurality of information which was a cornerstone of democratic societies, and the second was their role in maintaining archives containing news that had previously been reported, which were extremely useful for historical research. Although both these functions were important for the free formation of public opinion, they did not warrant equivalent protection in terms of protecting freedom of information, since one of them was of primary importance and the other was secondary. This had a direct impact on the balancing exercise between freedom of information on the one hand and the protection of honour, privacy and personal data on the other.

110. The Constitutional Court then referred to the CJEU's findings in *Google Spain* (C-131/12) (see paragraphs 71 et seq. above), according to which "that balance [between the fundamental rights at stake] may however depend, in specific cases, on the nature of the information in question and its sensitivity for the data subject's private life and on the interest of the public in having that information, an interest which may vary, in particular, according to the role played by the data subject in public life" (paragraph 81). In the case at hand the public relevance of the information, which was available in the digital press archives, was liable to be called into question by the passage of time. While it was true that the topic covered in the news report had been, and continued to be, of considerable public interest in relation to the issues of drug addiction and drug trafficking, the fact remained that the data subjects had not been in the public eye at the time of the events or at the time of the judgment.

111. The Constitutional Court noted that the information in question concerned past events which had no impact on the present, and that its dissemination at the present time contributed little to the public debate. Moreover, the offence concerned had not been especially serious and had not had a particular impact on society at the time it was committed. Consequently, the interest which the criminal proceedings may have generated initially had disappeared completely thirty years after the events. By contrast, the damage caused by the dissemination in the present day of the information – the interest of which was confined to its status as archived journalistic content – in terms of the honour and privacy of the persons concerned and the protection of their personal data was particularly serious, given the severe damage which the information (involvement in an offence and drug

dependency) had caused to their personal and professional reputation. The court therefore judged that damage to be disproportionate to the limited current interest in the news report. Accordingly, de-indexing the article in question on the newspaper's internal search engine so as to exclude it from a search using the names of the persons concerned had been an appropriate, necessary and proportionate measure.

112. The Constitutional Court added that, in any event, the information could be located by means of a thematic, time-based or geographical search or any other kind of search for journalistic purposes. Furthermore, following de-indexing the information continued to be available in print and in digital form, as the court-imposed restriction related solely to a specific means of accessing it. The proportionality of the measure was therefore ensured. In those circumstances, altering the content of the information by removing the names or rendering it anonymous, which would entail more serious interference with freedom of the press than simply limiting the dissemination of the information, was no longer necessary.

E. Case-law of the German Federal Constitutional Court (*Bundesverfassungsgericht*) and the Federal Court of Justice (*Bundesgerichtshof*)

1. Federal Constitutional Court judgment 1 BvR 16/13 of 6 November 2019 ("Right to be forgotten I")

113. In this first judgment, the Federal Constitutional Court examined the scope and content of the "right to be forgotten" in the context of a dispute between the complainant and a media outlet. The case originated in an action seeking to prohibit the defendant from mentioning the complainant's name in reports on the offence (murder) which the latter had committed and of which he had been convicted in 1982. The three articles dealing with the case, which were published in the print edition of the magazine *Der Spiegel* in 1982 and 1983 and which referred to the complainant by name, had been available in the defendant's online archives free of charge and without access restrictions since 1999. When the complainant's name was entered into one of the most commonly used Internet search engines, the articles in question were listed among the top search results. The complainant had first become aware of this in 2009, seven years after his release. The Federal Court of Justice had rejected the action, taking the view that the general public had a legitimate interest in obtaining information on significant events of contemporary history – such as the complainant's murder trial, which was inextricably linked to his name and person – by accessing the unaltered original news reports.

114. The Federal Constitutional Court held that the standard of review under constitutional law in respect of protection against possible breaches of fundamental rights stemming from the dissemination of articles and

information relating to a specific person derived from the general right of personality in its manifestation as a right limiting freedom of expression, rather than its manifestation as a right to informational self-determination. The latter right allowed individuals the possibility of influencing, in a differentiated way, the context and manner in which their personal data were accessible to and could be used by others. Thus, it guaranteed individuals a substantial say in deciding what information was attributed to their person. In the view of the Federal Constitutional Court, the right to informational self-determination was a separate manifestation of the general right of personality that had its own content distinguishing it from other manifestations of that right.

115. With regard to the general right of personality, the Federal Constitutional Court held that, given the realities of communication in the Internet era, the time factor was particularly important in assessing whether an individual had a claim to protection. The legal order had to protect individuals against the risk of being indefinitely confronted in public with their past opinions, statements or actions. Only when it was possible for matters to stay in the past could individuals be free to make a fresh start. The possibility for matters to be forgotten was part of the temporal dimension of individual freedom.

116. In the Federal Constitutional Court's view, it was not possible to derive from the general right of personality a right to request that all personal information disseminated through online communication processes be deleted from the Internet. In particular, individuals did not have a right to filter publicly accessible information according to their free discretion and personal views, allowing them to restrict such information to aspects that they themselves might regard as relevant and appropriate to their self-perceived image.

117. From the perspective of the news outlet, account had to be taken of freedom of expression and freedom of the press, which encompassed the fact of making archives available to the public online.

118. In the view of the Federal Constitutional Court, the scope of protection against the dissemination of press reports in a specific case was to be determined by weighing up the competing fundamental rights while taking full account of the particular circumstances of the case. In the case at hand, the proceedings concerned the question whether a news report that had been published lawfully in the first instance could be disseminated lawfully even many years later, after the circumstances had changed. In the balancing exercise, a number of procedural requirements applied (determining in which cases a change of circumstances had to be taken into account). There were also substantive criteria for assessing the significance of the passage of time between the initial publication of information and its further dissemination (such as the impact and subject matter of the report, the wider context of the events, including the conduct of the individual concerned, and the extent to

which the information was disseminated online). It was not possible, however, to take schematic rules on the use, publication and deletion of information from other contexts and apply these to determine whether the passage of time gave rise to a claim to protection.

119. Lastly, the Federal Constitutional Court held that striking a balance between the different fundamental rights at stake entailed taking into account the fact that there were various means of affording protection against the continued dissemination of old articles online. In deciding whether there was a right to protection against such dissemination, an intermediate solution between the two extremes of complete deletion of individualised information on the one hand and an unlimited requirement to tolerate the availability of such information on the other might first be sought on the basis of the interests of the opposing parties. More specifically, it was necessary to consider to what extent the operator of an online archive had the means of influencing access to and dissemination of the articles concerned on the Internet in order to protect the data subject. This applied particularly to search engines, which played a key role in the dissemination of information on the Internet. The court noted that the balancing exercise should seek to ensure that the measures taken were in fact sufficiently effective and were also reasonable for the media outlet operating the archive.

120. While, in the view of the Federal Constitutional Court, it was primarily incumbent upon the ordinary courts, which enjoyed wide discretion, to decide which detailed requirements operators of online archives must meet, the aim was to strike a balance that preserved unrestricted access to the original texts to the greatest extent possible, while also ensuring that where protection was merited in the individual case – especially in relation to name-based searches via search engines – sufficient limitations were put in place.

121. The Federal Constitutional Court concluded that the Federal Court of Justice had not conducted an adequate assessment of the harm caused to the complainant as a result of the further dissemination of the news reports under the changed circumstances resulting from the passage of time. It added that, given that the general availability of the articles had seriously impaired the complainant's rights, the decision of the Federal Court of Justice had failed to address nuanced possibilities for protection and thus a compromise that, as a less restrictive means, might be more reasonable for the defendant than removing the articles in question or altering them by electronically redacting the complainant's name.

2. Federal Constitutional Court judgment 1 BvR 276/17 of 6 November 2019 ("Right to be forgotten II")

122. In a second judgment the Federal Constitutional Court examined the scope and content of the "right to be forgotten" in the context of a dispute between the complainant and a search engine. The individual in question

complained of the fact that when her name was entered in a search engine, one of the results that was displayed contained a link to the transcript of a television broadcast which had been uploaded to the online archives in 2010. In that broadcast the complainant, who was mentioned by name, was accused of unfairly treating an employee who had been dismissed. As the dispute was governed by legislation that was fully harmonised under EU law, the Federal Constitutional Court applied the Charter of Fundamental Rights of the European Union.

123. The court held that where the persons concerned requested a search engine operator to refrain from referencing and displaying a link to certain content on the Internet, the balancing exercise to be performed in such cases had to take into account not only the personality rights of the individuals concerned (Articles 7 and 8 of the Charter) but also, in the context of search engine operators' freedom to conduct a business (Article 16 of the Charter), the fundamental rights of the content providers concerned as well as Internet users' interest in obtaining information.

124. In so far as a prohibition on the display of certain search results was ordered on the basis of an examination of the specific content of an online publication, and the content provider was thus deprived of an important platform for disseminating the content that would otherwise be available to it, this constituted a restriction of the content provider's freedom of expression (Article 11 of the Charter). However, the Federal Constitutional Court specified that the search engine operator could not invoke Article 11 of the Charter in relation to the search results displayed by its engine, as those search services were not aimed at disseminating specific opinions. Observing that the CJEU required the interest of the general public in access to information to be taken into account as a manifestation of the right to free information guaranteed by Article 11 of the Charter, the court added that the role of the press in a democratic society also had to be taken into consideration. However, at issue in this regard were not the individual users' rights, deriving from Article 11 of the Charter, to access information on the specific website in question, but rather freedom of information as a principle to be weighed in the balance when restricting the rights guaranteed by Article 16 of the Charter.

125. The Federal Constitutional Court also noted that the weight of the search engine operator's economic interests by itself was generally not sufficient, in the context of the balancing exercise, to justify restricting the data subjects' claim for protection. Greater weight was to be accorded to the interest of the public in obtaining information and, especially, to the fundamental rights of third parties. Accordingly, it could not be presumed in the case at hand – in contrast to certain cases determined by the CJEU, albeit in circumstances that differed from those in the present case – that the general right of personality should take precedence. On the contrary, the competing fundamental rights had to be balanced on an equal basis. Just as individuals

could not determine unilaterally *vis-à-vis* the media what information could be disseminated about them in the course of public communication processes, neither were they entitled to do so *vis-à-vis* search engine operators.

126. The Federal Constitutional Court held that the balancing exercise should not merely involve appraising the news report in its original context, but must also be informed by the easy access to and continuing availability of the information through the search engine. In particular, the significance of the time elapsing between initial publication and a search result obtained through a search engine had to be taken into account, as set out in current law under Article 17 GDPR in the sense of a "right to be forgotten".

3. Judgment of the German Federal Court of Justice of 26 January 2021 (VI ZR 437/19)

127. This case concerned the lawfulness of the publication in March 2017 of two press articles relating to the applicant's activities within his parish and their retention in the online press archives. The applicant had requested their deletion.

128. In the view of the German Federal Court of Justice, in so far as the case did not concern the initial publication or republication of an article, but rather the retention of an article that was accessible to the public, in particular in the press archives, its lawfulness had to be assessed on the basis of a fresh balancing of the competing interests protected by the fundamental rights existing at the time of the relevant request for deletion. However, in that context the initial lawfulness of an article was a crucial factor justifying a high degree of legitimate interest on the part of the news outlets in continuing to make the article available to the public without having to review or alter it. In the case at hand the news outlet had complied with the relevant conditions at the time of initial publication and was therefore entitled in principle not to have to revisit the articles and their subject matter.

129. The interests of the data subject had to be weighed against the interests of the press and the public at large in the continued accessibility of an initially lawful article, in view of the changed circumstances. In that connection the courts had to take into consideration, in particular, the following factors: the seriousness of the breach of personality rights resulting from the continued availability of the information despite the passage of time; the length of time since the article had been archived; the conduct of the data subject in the meantime, including any updates; the actual continuing or diminishing impact of publication of the article on a large scale; the ranking of the information in the list of results following a name-based Internet search; the public interest in the continued availability of information whose initial publication had been lawful; and the interests of the content providers, based on fundamental rights, in having their content archived and made available in essentially unaltered form. Measures placing restrictions on the free availability in the online archives, in unaltered form, of initially lawful

press articles were reasonable only if the consequences for the data subject were particularly serious and the measures therefore did not fundamentally call into question the principle that such material should be made available other than in a few isolated cases.

130. In the case before it the German Federal Court of Justice found that there was nothing to indicate that the retention in the defendant's archives of the initially lawful press articles would have particularly serious consequences for the applicant.

F. Case-law of the Italian Court of Cassation

131. The Italian Court of Cassation tends to give a degree of priority to data protection that is in direct proportion to the time that has elapsed since the original publication of the information concerned.

132. The Court of Cassation has ordered the deletion of information only in cases where there was no public interest in retaining the information or where it had in fact been published in breach of the data subject's right to privacy (judgment no. 15160/2021). It has ruled that if there is a public interest in the accessibility of the information but the dissemination of the data subject's personal data is not essential (for instance, because the data subject is not a public figure), the only effective remedy is delisting. Deletion of the information should be a measure of last resort (judgment no. 13524/2021). The court has held that it is preferable to update the information or place it in context in the article concerned, which should reflect changes to information that was originally truthful and published lawfully but is no longer of topical relevance. Hence, in the view of the Court of Cassation, the intrinsically historical nature of any archive prohibits its "amputation" through the deletion of information. The fact that online archives are rapidly accessible merely justifies a special remedy for the data subject that does not affect the retention of the material as originally published. This also ensures that the print and digital versions of the archive remain identical (judgments nos. 5525/2012, 7559/2020 and 9147/2020).

THE LAW

ALLEGED VIOLATION OF ARTICLE 10 OF THE CONVENTION

133. The applicant alleged that the order for him to anonymise the archived version of the impugned article on the website of the newspaper *Le Soir* constituted a violation of freedom of expression, freedom of the press and freedom to impart information. He relied on Article 10 of the Convention, the relevant parts of which provide:

"1. Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...

2. The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are necessary in a democratic society, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, for the protection of health or morals, for the protection of the reputation or rights of others, for preventing the disclosure of information received in confidence, or for maintaining the authority and impartiality of the judiciary."

A. The Chamber judgment

134. The Chamber held, by six votes to one, that there had been no violation of Article 10 of the Convention. It found that the civil judgment against the applicant amounted to interference with his rights under Article 10. The interference in question had been prescribed by law and had pursued the legitimate aim of protecting the reputation or rights of others, in this case G.'s right to respect for his private life.

135. As to the necessity of the interference, the Chamber began by emphasising that the task of the national courts had been to balance, on the one hand, the freedom of expression of the applicant as a publisher, and in particular his right to impart information to the public, and, on the other hand, G.'s right to protection of his private life. While it reiterated the general principles with regard to the balancing of the rights at stake which it intended to apply in the present case (see *Axel Springer AG v. Germany* [GC], no. 39954/08, §§ 78-84, 7 February 2012), the Chamber nevertheless stressed the specific nature of the online publication of digital archives, inferring from this that the domestic courts had to be particularly vigilant whenever they granted a request for anonymisation or alteration of the electronic version of an archived article on the grounds of respect for private life. The Chamber further held that the criteria to be taken into account regarding the online publication or continued availability of archived material were, in principle, the same as those applied by the Court in the context of initial publication, although certain criteria might have more or less relevance in view of the particular circumstances of the case and the passage of time.

136. The Chamber concluded that the domestic courts had weighed up the rights at stake in accordance with the criteria established in the Court's case-law, attaching particular weight to the damage sustained by G. and to the fact that the anonymisation of the article on the website of *Le Soir* had left the archives themselves intact and had constituted the most effective measure amongst those that could have been taken in the present case, without interfering disproportionately with the applicant's freedom of expression. In the Chamber's view, the reasons given by the domestic courts had been relevant and sufficient, and it thus saw no strong reason to substitute its view

for that of the domestic courts and to disregard the outcome of the balancing exercise carried out by them.

B. The parties' submissions

1. The applicant

137. In his submissions to the Grand Chamber the applicant maintained that the order for him to anonymise the article in question amounted to interference that had not been necessary in a democratic society. He pointed out that the present case concerned digital press archives, the aim of which, in his submission, was to preserve all the information in an exhaustive manner for future generations. Accordingly, the passage of time could not be taken into consideration in determining whether or not there had been interference. Thus, in the applicant's view, the purpose of journalistic archiving was not limited in time.

138. The applicant submitted that six main characteristics distinguished the present case: (a) the lawful nature of the archived material, as its accuracy was not disputed; (b) the nature of the online document, which was an archived item rather than a current news report; (c) its consequences, as archives were intended to be kept over time, even if they had an impact on the right of the person concerned to protection of his or her reputation; (d) the fact that publishers were required to verify whether the accessibility of the archived material had a disproportionate impact on the claimant's right to privacy, not at the time when the information was disseminated but at the time of the request for anonymisation; (e) the status of the person concerned, in this case a private individual who was a member of a liberal profession (a doctor); and (f) the fact that the person concerned had not requested the search engines to delist the archived material. In the light of these characteristics, the threshold set by the criteria established in *Axel Springer AG* was so low that any individual mentioned in archived material could claim entitlement to have the material anonymised. In the applicant's submission, the criteria employed by the Court should take into account the specific features of the protection of digital archives.

139. The applicant argued that the integrity of the archives was an essential criterion in balancing the rights at stake and that the case went to the very essence of the media's mission. In his view, the role of archives was to ensure the continued availability of information that had been published lawfully at a certain point in time, and they must therefore remain authentic, reliable and complete. Since archiving was one of the functions of the press (a secondary one, but nevertheless of undoubted importance, as accepted by the Court), and was thus to be equated with the processing of data for journalistic purposes, the erasure of journalistic information faced a major obstacle: data that had originally been processed in the context of current events in a manner that was justified for journalistic purposes continued to be

appropriate, relevant and limited to what was necessary for those same purposes when they were archived. The applicant added that seeking to justify anonymisation by referring to the existence of a paper archive was outdated, inaccurate and inappropriate, given that the future of publishing depended on migration to digital technology and that paper archives would therefore cease to exist. Moreover, the Court itself had asserted the importance of digital archives (the applicant referred to *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, § 90, 28 June 2018).

140. In the applicant's submission, individuals should not be allowed to restrict the public's access to information concerning them and published by third parties, unless the information in question was private or defamatory in nature and its publication was not justified for other reasons. Since limitations on access to information which members of the public had the right to obtain, as a matter of public interest, had to be justified by particularly compelling reasons, any person wishing to restrict that access had to demonstrate the existence of significant harm, especially if the information was public in nature. Hence, in the applicant's submission, it was not enough for an individual to complain of the effects of a "virtual criminal record"; he or she had to demonstrate the actual damage suffered. In the present case G., who had alleged serious harm, had at no point demonstrated its existence before the domestic courts. Moreover, the Chamber had not ascertained whether G. had demonstrated the existence of such harm.

141. As to the criterion concerning a debate of public interest, the applicant argued that the obligation for him to assess, when a request for anonymisation was made, which information should be kept and which could be discarded was excessive and at the same time posed a threat to democracy, as the interest of archived material for the public did not necessarily diminish with the passage of time. On the contrary, journalists, researchers, historians, sociologists and members of the public had to be able to carry out research into past events, including short news stories, which constituted a genre in their own right as vital witnesses to their time, the state of society and changing civilisations. Thus, in the applicant's submission, the public-interest criterion was not a suitable means of determining whether or not there had been interference.

142. It was also necessary to consider the nature of the published information: in the balancing exercise between the rights at stake, the person seeking to protect his or her privacy had to demonstrate that the alleged infringement concerned archived information that was private (confidential and/or intimate) rather than public in nature. In the present case, the information in question had become public because G. had committed a serious offence. Although details of previous convictions constituted sensitive data, as indeed was made clear by Directive 95/46/EC (see paragraph 68 above) and by the Belgian Protection of Private Life Act (see paragraph 49 above), they could nevertheless be published for journalistic

purposes and subsequently archived for the same purposes (the applicant also cited, at European Union level, recital 153 and Articles 17 and 85 of the GDRP – see paragraph 69 above). The applicant stressed that, by contrast, the listing of content by search engines, which was primarily an economic activity, did not come within the scope of the exception "for journalistic purposes".

143. Referring to the Guidelines adopted by the "Article 29" Working Party in 2014 (see paragraphs 77 and 78 above) – which, in his view, could be applied to publishers also, albeit with a degree of flexibility – the applicant added that the status of the data subject had to be taken into account. In the present case, although G. was not a public figure, the fact that he was a doctor meant that he was a prominent individual who played a role in local public life. Accordingly, there were grounds for allowing the public to search for information concerning his role and activities in public life.

144. As to the severity of the measure in issue, the applicant argued that when the rights at stake were being weighed up the possible existence of measures less restrictive of freedom of expression was a major factor to be considered, while bearing in mind the aim pursued by the person claiming a "right to be forgotten". In the applicant's view, alongside the "right to be forgotten", there was a duty for search engines and news outlets to "organise memory", which entailed a sliding scale of measures to be implemented when dealing with requests to be forgotten concerning accurate journalistic content. On the lower end of the scale was delisting by search engines and de-indexing by publishers, while on the upper end was the outright removal of the content. In the applicant's submission, the approach to be taken in applying the "right to be forgotten" was the real issue raised by the present case.

145. In the present case, although G. had cited the resurfacing of the archived article on Google as the reason for his request for anonymisation, he had not at any stage submitted a delisting request to the search engines (the applicant also referred to *M.L. and W.W. v. Germany*, cited above, § 114). In the applicant's view, the domestic courts enjoyed some discretion in that regard and – subject to respect for the disposition principle which prohibited them from ruling *ultra petita* or *extra petita* – had to take into consideration the actual effectiveness of the available solutions and whether they could reasonably be imposed on the news outlet concerned. In the present case, in the applicant's submission, the Belgian courts had failed to comply with that obligation. In the instant case the subsidiarity principle should have entailed rendering the archived material inaccessible rather than immediately interfering with the integrity of its content; as a general rule, and as confirmed by the majority of European court rulings (the applicant referred to *M.L. and W.W. v. Germany*, cited above; the CJEU judgment in *Google Spain* (C-131/12) – see paragraphs 71 et seq. above; the CJEU judgment in *GC and Others* (C-136/17) – see paragraphs 81 et seq. above; and the European Data Protection Board Guidelines of 7 July 2020 – see paragraph

70 above), delisting entailed much less serious interference and was therefore preferable to alteration of the archived article, which amounted to censorship and the rewriting of history.

146. The applicant added that the proportionality assessment should also take account of what he regarded as the severe chilling effect of anonymisation of an archived newspaper article. Moreover, any obligation to review the lawfulness of an article at a later stage in response to a request from the data subject entailed a risk that the press would opt not to store information, articles, photographs or reports in the online archives or would omit individualised information likely to be the subject of such a request. The obligation to check the archives on an ongoing basis would also require investment in terms of time and personnel.

147. The applicant further submitted that G.'s rehabilitation did not confer on him a "right to be forgotten", as neither the relevant domestic provisions (see paragraph 55 above) nor the Court's case-law (he referred to *M.L. and W.W. v. Germany*, cited above, § 88) appeared to preclude reference to facts leading to a conviction in respect of which the person concerned had been rehabilitated.

148. Lastly, the applicant argued that the article in question had been published in accordance with the media's ethical and professional duties and responsibilities, which in his view allowed individualised information such as a person's full name to be included in a report, especially since the manner in which a subject was dealt with came within the scope of journalistic freedom. Furthermore, he had informed G. in good faith of the existence of measures that were less restrictive of freedom of expression, such as an electronic communication by the newspaper publisher or the delisting of the article by the search engine operators. Even in the case of an article that was defamatory the Court had not considered that it was the role of the judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of the article (the applicant referred to *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, § 65, 16 July 2013).

2. The Government

149. The Government did not dispute that the order for the applicant to anonymise the impugned article constituted interference with the exercise of his rights under Article 10 of the Convention. They submitted that the interference had pursued a legitimate aim within the meaning of Article 10 § 2, namely the protection of G.'s privacy. As to the lawfulness of the interference, the Government reiterated the submissions they had made in the Chamber proceedings, concluding that the order against the applicant had a basis that was sufficiently accessible, clear, precise and foreseeable.

150. With regard to the necessity of the interference, the Government argued that the present case concerned the balancing of the public's right to be informed about past events with the help of press archives against the

"right to be forgotten" of a person who was the subject of content published on the Internet; those rights were not absolute. The choice of measures to secure compliance with Article 8 – from which the "right to be forgotten" was derived – fell within the States' margin of appreciation, which enabled them to adapt to the circumstances of each case and to future technological developments. Referring to *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* (nos. 3002/03 and 23676/03, § 45, ECHR 2009), the Government added that the role of the press in keeping archives accessible to the public was secondary to its main role, and that the margin of appreciation afforded to States in striking a balance between the competing interests was likely to be greater where news archives of past events, rather than news reporting of current affairs, were concerned.

151. In the present case, the measure in issue had been taken on the basis of a fair balancing of those rights by the domestic courts, in the light of the criteria defined by the Court. In the Government's view, the Grand Chamber should reaffirm the line of case-law followed by the Chamber, according to which the criteria to be taken into account regarding the online publication or continued availability of archived material were in principle the same as those applied by the Court in the context of initial publication. The Government submitted, however, that some of these might be of greater or lesser relevance in view of the circumstances of the case (for instance, publication on the Internet rather than in print or the fact of asserting the "right to be forgotten" *vis-à-vis* a news publisher rather than a search engine operator) and of the passage of time. As time passed, individuals should have the opportunity to rebuild their lives without being confronted with their past mistakes by members of the public.

152. Nevertheless, other criteria might also be taken into consideration depending on the circumstances of the particular case. A first criterion was the integrity of the archives. However, this principle, underpinning all archiving activity, did not mean that the accessibility of archived material should be absolute, as made clear by the Universal Declaration on Archives (see paragraph 59 above) and by Article 17 GDPR (see paragraph 69 above). Furthermore, archived material, which could be stored in a wide variety of formats, did not have to be accessible to everyone on the Internet. In the Government's view, the anonymisation order made in the present case did not undermine the integrity of the archives but simply limited public access to an online article mentioning G.'s name. The paper archives would remain intact and interested persons such as researchers could still request access to the non-anonymised digital version of the article.

153. Another relevant criterion in the present case was the time that had elapsed since the initial publication of the article. This had a decisive influence on the weight to be attached to the other factors already taken into consideration in the balancing exercise carried out by the Court, namely the existence of a debate of public interest and whether or not the person in

question was well known. Other criteria also came into play: G.'s rehabilitation, the duties and responsibilities incumbent on the media in accordance with the law and the principles of responsible journalism, which differed from those relating to search engines, and the extent to which the information was disseminated. Those criteria had been deemed to be decisive by a number of the highest courts in Europe in determining disputes concerning the "right to be forgotten" (see "Comparative law and practice" above).

154. The Government added that the anonymisation order had been necessary in a democratic society in view of the circumstances of the present case, and in particular of the passage of time, which had rendered publication harmful. The domestic courts had indeed examined, as they were required to, whether other measures less restrictive of freedom of expression were possible, acting within their margin of appreciation and in accordance with the disposition principle and the requirement for trial to take place within a reasonable time. Thus, they had taken into account: (a) the main object of the statement of claim (anonymisation of the archived article rather than delisting); (b) the fact that placing the article in context by inserting additional text was not an appropriate measure; and (c) the position of the applicant, who had clearly rejected the suggestion of using noindex tags. While delisting was, as a general rule, the measure least restrictive of freedom of expression, in the instant case the measure ordered by the Belgian courts had been the most appropriate to the facts of the case, bearing in mind the range of measures proposed by the applicant. Moreover, de-indexing by *Le Soir* would amount to more serious interference with freedom of expression as the article would then no longer be indexed by external search engines and would thus be inaccessible, regardless of the search terms used, except through a search on the original website.

155. The Government argued that the present case was to be distinguished from previous cases examined by the Court concerning the "right to be forgotten". Firstly, in their view, it was to be distinguished from the case of *M.L. and W.W. v. Germany* (cited above), in view of the particular circumstances of the present case and especially the fact that G. was not well known, the fact that he had had no contact with the press, the fact that the events reported on in the impugned article were of less interest, and the fact that G. had been rehabilitated. Secondly, the facts were to be distinguished from those in *Węgrzynowski and Smolczewski* (cited above); in that case the applicant had sought the outright removal of the defamatory article, which had been published online at the same time as its publication in the newspaper's print edition. It was on the basis of this very specific set of factual and procedural circumstances that the Court had held that the removal of the article would amount to rewriting history. In the Government's view, it could in no sense be inferred from that judgment that any alteration, however slight, made to the online version of an article compared with the

original version should be equated with a rewriting of history contrary to freedom of expression and incompatible with archiving principles.

156. Lastly, the Government argued that the anonymisation of the online article was not apt to have a chilling effect on the behaviour of news outlets, which were required to take such measures only where a request to that effect was made by a data subject, in the light of the circumstances of each individual case and after balancing the rights at stake, with there being no absolute right to be forgotten. Moreover, purely economic considerations alone could not alter that balance.

157. In conclusion, the Government observed that the Belgian courts had determined a specific dispute between two parties in the context of a civil action for damages while seeking to ensure that a balance was struck between two competing fundamental rights claimed by the parties. They had taken their decisions after examining the criteria established by the Court and striking a reasonable balance between the interests at stake. In the Government's view, there were therefore no sufficiently strong reasons for the Court to substitute its own assessment for that of the domestic courts.

C. Submissions of the third-party interveners

1. The third-party intervener G.

158. The third-party intervener G. is the individual who requested anonymisation of the article mentioning his name that is in issue in the present case. He referred to the ordeal he had undergone in seeking to retain the benefit of being pardoned, having his offence forgotten and being rehabilitated by society. In the Grand Chamber proceedings he asserted in particular that the applicant had initially complied with the judicial decision ordering him to anonymise the article, before backtracking and publishing the non-anonymised version of the article online.

159. Regarding the necessity of the interference, the third-party intervener submitted that even if the Grand Chamber intended to employ the new criteria set out in the Court's judgment in *Biancardi v. Italy* (no. 77419/16, 25 November 2021) rather than those established in its settled case-law concerning the balancing of the right to respect for private life and freedom of expression, as developed in *Von Hannover* and *Axel Springer AG*, the conclusions of the Belgian courts should be upheld.

160. The intervener emphasised the following: the fact that the article belonged to the past, meaning that it attracted a lesser degree of protection; the considerable impact of fresh publication of the article on the Internet following the online publication of the archives; the absence of any public interest in being informed of his full name in the article (which, moreover, was sensitive information); the lack of severity of the measure imposed on the applicant; and the requirement for the media to conduct their activities in good faith. He added that the integrity of the archives could not be an absolute

value and that a very minor alteration to the electronic archives was acceptable if the paper archives remained intact.

161. With particular reference to the requirement to opt for measures less restrictive of freedom of expression, the third-party intervener stated that in the proceedings before the Court of First Instance he had actually proposed the use of a noindex tag as an alternative to anonymisation and that it was the applicant who had rejected that solution. By contrast, the only alternative proposed by the applicant had been the publication of a rectifying statement, which was not a valid solution in the present case. As to the possibility of requesting delisting, the intervener argued that his preference for anonymisation was justified by the fact that several search engines existed on the market and that the state of the technology at the time of his action suggested that separate noindex tags would be needed for each search engine, a situation which cast doubt on their effectiveness. Lastly, he submitted that a very minor alteration to online archived content should be viewed differently where, as in the present case, the matter concerned the online version of an article that had originally been published only in print form; in such cases, the article in the online archive was not aimed at informing the public but rather at generating traffic on the publisher's website and thus attracting advertising revenue.

2. Joint position of sixteen third-party interveners represented by the organisation ARTICLE 19

162. The following sixteen interveners, all represented by the organisation ARTICLE 19, submitted joint observations: ARTICLE 19, Global Campaign for Free Expression, the Centre for Democracy and Rule of Law, Prof. David Kaye, Digital Security Lab Ukraine, the Electronic Frontier Foundation, the European Centre for Press & Media Freedom, Guardian News Media Limited, the Helsinki Foundation for Human Rights, the Human Rights Centre of Ghent University, the Hungarian Civil Liberties Union, the International Press Institute, Times Newspapers Ltd, the Mass Media Defence Centre, Media Defence, Nyugat, and the Open Net Association.

163. The interveners took the view that while there was a balance to be struck between the rights at stake, the permanent removal of information from a digital media archive was not a proportionate restriction on freedom of expression and would have a deleterious impact on the integrity of that archive, which was an essential component of newsgathering and reporting. Interfering with the availability and the integrity of information online ran contrary to the values protected by Article 10 of the Convention, as it (a) prevented journalists and other actors performing the function of "public watchdogs" from knowing about information, thereby impeding them in investigating and uncovering information of public interest, and (b) created a risk of cancelling or altering historical memory and creating an inaccurate

and distorted account of the past, hindering decision-making and accountability.

164. The third-party interveners stressed that the "right to be forgotten" was not an international legal standard. Initially, with the CJEU ruling in *Google Spain* (C-131/12), that right had been established in the context of personal data protection and its scope had been limited in a number of ways, applying only to search engines. While the "right to be forgotten" had subsequently been formalised in the GDPR, Article 17 of that Regulation nevertheless provided for an exception to the right to erasure in respect of data processed for journalistic purposes, an exception whose implementation varied in national legislation. Outside the European Union, the "right to be forgotten" was not expressly recognised in any international instruments or national constitutions. Moreover, at international level, numerous jurisdictions refused to recognise or apply a "right to be forgotten", while others applied the remedy of delisting against search engines but not against the publishers of news archives. Even in a European context, in the few cases in which the courts had applied the "right to be forgotten" in relation to news archives, they had not ordered the complete erasure of the information.

165. In the light of the Court's case-law, the third-party interveners submitted that restrictions on access to digital media archives, or their alteration, were rarely justified and required exceptional circumstances. In their view, there should be a presumption that the integrity of online media archives must be preserved and that any interference with that integrity should be subject to the strictest scrutiny. That scrutiny – which, in the interveners' view, presupposed balancing the rights at stake – entailed an assessment of whether the measure was the least restrictive way to achieve the aim pursued. Although delisting by search engines or de-indexing by the publisher of the content constituted in principle unjustified interference with media freedom, they were less restrictive of freedom of expression. When such measures were applied the information continued to be accessible and the integrity of the archives was not affected. Furthermore, they prevented the creation of a public profile of a particular individual. With anonymisation the information lost its relevance and could simply cease to exist. In the interveners' view, the potential effect on news outlets of ordering the alteration of content should not be overlooked, as they might overreact by deleting content in order to avoid legal proceedings or possible liability. Furthermore, such proceedings could lead to very high costs which could eventually force news outlets to close (the interveners cited the example of the newspaper in the recent case of *Biancardi* (cited above)).

166. Lastly, the third-party interveners submitted that the Court should consider three additional factors where the "right to be forgotten" was sought to be applied against the press. Firstly, the Court should consider whether the person claiming the "right to be forgotten" had suffered substantial harm going beyond mere embarrassment or discomfort. Where, in the context of

the "right to be forgotten", the matter concerned information that was true and of a public nature, only substantial harm could justify altering the archive. Secondly, the Court should bear in mind the very nature of archives, which were designed to preserve media reports, including personal data, despite the passage of time. Directly related to this was the significance of published information over time, as the individual in question could become a public figure or an article could acquire significance for academic, scientific or historical research. Furthermore, old news reports could provide meaningful comparison with recent events or acquire new meanings. Information about court proceedings should also remain available. Thirdly, according to the third-party interveners, the Court should consider the public's right to access information published by third parties, except when that information had an essentially private or defamatory character or when publication was not justified for other reasons.

D. The Court's assessment

1. Existence of an interference "prescribed by law" and pursuing a "legitimate aim"

167. The Court notes that it is not in dispute between the parties that the order for the applicant to anonymise the archived version of the impugned article on the website of the newspaper *Le Soir* amounted to interference with the exercise of his right to freedom of expression and freedom of the press, as protected by Article 10 of the Convention.

168. Furthermore, in the Grand Chamber proceedings the applicant did not reiterate the arguments submitted before the Chamber concerning the alleged lack of a foreseeable legal basis for the interference. Accordingly, the Grand Chamber sees no reason to depart from the Chamber's findings in this regard.

169. Likewise, the existence of a legitimate aim, namely the protection of the reputation or rights of others (in this instance G.'s right to respect for his private life), is not disputed by the parties. The Court agrees with this assessment.

170. Consequently, it remains for the Grand Chamber to examine whether the interference was "necessary in a democratic society".

2. Whether the interference was "necessary in a democratic society"

(a) Preliminary considerations regarding the scope of the case and the terminology used

(i) Scope of the case

171. It is important at the outset to highlight the distinguishing features of this case, which will have a decisive influence on the Court's assessment.

172. Firstly, the Court takes note of the assertion made by the applicant at the Grand Chamber hearing that, in addition to the print version, the impugned article was stored in two sets of digital archives: one, known as the "master" archive, which was not accessible to the public, and a second set of archives published online and accessible to the public. In examining the case it will take into account this particular context, that is to say, the existence of these three archived versions. The Court further observes in that regard that the Liège Court of Appeal ordered the applicant to anonymise the archived version of the impugned article on the website of the newspaper *Le Soir* and in any other database for which he was responsible (see paragraph 21 above). However, the Court notes that the reasoning of the Liège Court of Appeal's judgment referred only to the anonymisation of the article placed online on the website of *Le Soir* (see, in particular, paragraphs 29 and 30 above). What is more, the Court of Appeal also held that the anonymisation of the online archived version sufficed for it to conclude that its judgment of 25 September 2014 had been complied with (see paragraphs 39-40 above). In any event, as the arguments raised by the applicant in support of his complaint under Article 10 of the Convention, before both the domestic courts and this Court, relate solely to the anonymisation of the article placed online on the newspaper's website, the Court will focus its examination on this aspect of the case, notwithstanding the applicant's assertion at the hearing that the version stored in the master archive had also been anonymised (see paragraph 42 above).

173. Secondly, the Court observes that the great majority of cases it has examined hitherto concerning a conflict between the right to freedom of expression and the right to respect for private life related to the initial publication of reports about private aspects of the lives of individuals or their families (see, among many other authorities, *Hachette Filipacchi Associés (*ICI PARIS*) v. France*, no. 12268/03, 23 July 2009; *Axel Springer AG*, cited above; and *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, ECHR 2015 (extracts)). Unlike those cases, the present case concerns the online publication in 2008, and the continued availability, of the archived version of an article originally published in 1994 in the print edition of the newspaper *Le Soir*, which online version the applicant was ordered to anonymise by replacing G.'s full name with the letter X.

174. It follows that in this instance it is solely the continued availability of the information on the Internet, rather than its original publication *per se*, that is concerned. Furthermore, the original article was published in a lawful and non-defamatory manner. Lastly, it should be noted that this was a news report that was published and subsequently archived on the website of a news outlet for the purposes of journalism, a matter which goes to the heart of freedom of expression as protected by Article 10 of the Convention.

(ii) Terminology used

175. As regards terminology, the Court observes that a number of terms have been used to denote the variety of means deployed in order to give effect to the "right to be forgotten" to which the domestic courts referred (see also *Biancardi*, cited above, § 53). Generally speaking, the "right to be forgotten" may give rise in practice to various measures that can be taken by search engine operators or by news publishers. These relate either to the content of an archived article (for instance, the removal, alteration or anonymisation of the article) or to limitations on the accessibility of the information. In the latter case, limitations on access may be put in place by both search engines and news publishers. In the interests of clarity and consistency, in the present judgment the Court will use the term "delisting" to refer to measures taken by search engine operators, and the term "de-indexing" to denote measures put in place by the news publisher responsible for the website on which the article in question is archived (ibid., §§ 55-56).

(b) General principles

(i) Article 10 and the protection of digital press archives

176. The Court has consistently held that freedom of expression constitutes one of the essential foundations of a democratic society and one of the basic conditions for its progress and for each individual's self-fulfilment. Subject to Article 10 § 2, it applies not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock or disturb. Such are the demands of pluralism, tolerance and broadmindedness without which there is no "democratic society". As enshrined in Article 10, freedom of expression is subject to exceptions which must, however, be construed strictly, and the need for any restrictions must be established convincingly (see *Von Hannover v. Germany (no. 2)* [GC], nos. 40660/08 and 60641/08, § 101, ECHR 2012; *Couderc and Hachette Filipacchi Associés*, cited above, § 88; and *Bédat v. Switzerland* [GC], no. 56925/08, § 48, 29 March 2016).

177. As regards press freedom, although the press must not overstep certain bounds, particularly as regards the reputation and rights of others, its duty is nevertheless to impart – in a manner consistent with its obligations and responsibilities – information and ideas on all matters of public interest. Thus the task of imparting information necessarily includes "duties and responsibilities", as well as limits which the press must impose on itself spontaneously (see *Couderc and Hachette Filipacchi Associés*, cited above, § 89, and *Von Hannover (no. 2)*, cited above, § 102).

178. Not only does the press have the task of imparting such information and ideas; the public also has a right to receive them. Were it otherwise, the press would be unable to play its vital role of "public watchdog" (see Bladet Tromsø *and Stensaas v. Norway* [GC], no. 21980/93, §§ 59 and 62,

ECHR 1999-III; *Pedersen and Baadsgaard v. Denmark* [GC], no. 49017/99, § 71, ECHR 2004-XI; and *Von Hannover (no. 2)*, cited above, § 102). Moreover, particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive (see Timpul Info-Magazin *and Anghel v. Moldova*, no. 42864/05, § 31, 27 November 2007).

179. Furthermore, it is not for the Court, any more than it is for the national courts, to substitute its own views for those of the press as to what techniques of reporting should be adopted in a particular case (see *Couderc and Hachette Filipacchi Associés*, cited above, § 89) or how the profession should be exercised, including the means of transmission of opinions or information (see, *mutatis mutandis*, *Frăsilă and Ciocîrlan v. Romania*, no. 25329/03, § 63, 10 May 2012).

180. Nowadays, the content of freedom of the press must be assessed in the light of developments in information technology, as journalistic information no longer consists solely of news coverage in the printed press and broadcasting media. The Court has repeatedly held that, in addition to its primary function as a "public watchdog", the press has a secondary but nonetheless valuable role in maintaining archives containing news which has previously been reported and making them available to the public. In that connection the Court has held that Internet archives make a substantial contribution to preserving and making available news and information. Digital archives constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free (see *Times Newspapers Ltd*, cited above, §§ 27 and 45; *Węgrzynowski and Smolczewski*, cited above, § 59; and *M.L. and W.W. v. Germany*, cited above, § 90), although the Court observes that press archives tend increasingly to be behind a paywall. This function of the press, like the corresponding legitimate interest of the public in accessing the archives, is undoubtedly protected by Article 10 of the Convention (see *M.L. and W.W. v. Germany*, cited above, § 102).

181. The Court observes that in *Times Newspapers Ltd* (cited above, § 45), it found that "the margin of appreciation afforded to States in striking the balance between the competing rights is likely to be greater where news archives of past events, rather than news reporting of current affairs, are concerned. In particular, the duty of the press to act in accordance with the principles of responsible journalism by ensuring the accuracy of historical, rather than perishable, information published is likely to be more stringent in the absence of any urgency in publishing the material." However, the Court emphasises that these findings must be interpreted with due regard to the particular context of the case in question, which concerned the storage in a digital newspaper archive of articles that had been criticised as being defamatory and whose very accuracy had been called into question. Furthermore, it is of crucial importance that the Convention is interpreted and

applied in a manner which renders its rights practical and effective, not theoretical and illusory. A failure by the Court to maintain a dynamic and evolutive approach would risk rendering it a bar to reform or improvement (see, *mutatis mutandis*, *Christine Goodwin v. the United Kingdom* [GC], no. 28957/95, § 74, ECHR 2002-VI).

182. On the subject of digital press archives, the Court has previously stressed the importance of their role in enabling the public to learn about contemporary history and allowing the press, by the same means, to carry out its task of helping to shape democratic opinion (see *M.L. and W.W. v. Germany*, cited above, §§ 101-02). For its part, Recommendation No. R (2000) 13 of the Committee of Ministers to member States on a European policy on access to archives also notes that archives constitute an essential and irreplaceable element of culture, contributing to the survival of human memory (see paragraph 63 above). Even in the context of a defamatory publication the Court has held that "it is not the role of judicial authorities to engage in rewriting history by ordering the removal from the public domain of all traces of publications which have in the past been found, by final judicial decisions, to amount to unjustified attacks on individual reputations" (see *Węgrzynowski and Smolczewski*, cited above, § 65).

183. The Court also notes the emergence over the past decade of a consensus regarding the importance of press archives. Hence, in the specific context of the processing of personal data at European Union level, the GDPR makes express provision for an exception to the right to the erasure of personal data where the processing of the data is necessary for the exercise of the right of freedom of expression and information (Article 17(3)(a)). Like Directive 95/46/EC which preceded it, the GDPR requires EU member States to provide in their legislation for exemptions or derogations for processing carried out for journalistic purposes if they are necessary to reconcile the right to the protection of personal data with freedom of expression and information (Article 85(2)). According to recital 153 of the GDPR, particular attention is to be paid to the processing of personal data "in news archives and press libraries" (see paragraph 69 above). In the same vein, in the Council of Europe context, the explanatory report to Convention 108+ specifies that the exceptions and restrictions provided for in Article 11 of that Convention should apply "in particular to processing of personal data ... in news archives and press libraries" (see paragraph 62 above).

184. For the press to be able properly to perform its task of creating archives, it must be able to establish and maintain comprehensive records. The Court considers – like the applicant (see paragraph 139 above) – that, since the role of archives is to ensure the continued availability of information that was published lawfully at a certain point in time, they must, as a general rule, remain authentic, reliable and complete.

185. Accordingly, the integrity of digital press archives should be the guiding principle underlying the examination of any request for the removal

or alteration of all or part of an archived article which contributes to the preservation of memory, especially if, as in the present case, the lawfulness of the article has never been called into question.

186. Lastly, although the freedom of expression protected by Article 10 of the Convention is not absolute, including when it comes to media coverage of matters of public interest, and regard being had to all the foregoing considerations, the Court considers that the national authorities must nevertheless be particularly vigilant in examining requests, grounded on respect for private life, for removal or alteration of the electronic version of an archived article whose lawfulness was not called into question at the time of its initial publication. Such requests call for thorough examination.

(ii) Article 8 and protection of the "right to be forgotten"

187. The Court observes that the reasoning of the national courts in the present case focused on the "right to be forgotten" claimed by Doctor G. However, the concept of a "right to be forgotten" has been interpreted in a variety of ways. In this context the Court must clarify, from the standpoint of the Convention, the scope of the claims arising out of that "right" for the purposes of the present case.

188. The Court reiterates at the outset that the concept of "private life" is a broad term not susceptible to exhaustive definition (see *S. and Marper v. the United Kingdom* [GC], nos. 30562/04 and 30566/04, § 66, ECHR 2008). Besides finding in numerous cases that the right to private life under Article 8 covers the physical and psychological integrity of a person and can therefore embrace multiple aspects of a person's identity, such as gender identification and sexual orientation, name or elements relating to a person's right to his or her image (see *M.L. and W.W. v. Germany*, cited above, § 86), the Court has also made clear that private life extends to activities of a professional or business nature (see *Niemietz v. Germany*, 16 December 1992, § 29, Series A no. 251-B) and to the right to live privately, away from unwanted attention (see *Smirnova v. Russia*, nos. 46133/99 and 48183/99, § 95, ECHR 2003-IX (extracts)). Article 8 of the Convention also protects a right to personal development, and the right to establish and develop relationships with other human beings and the outside world (see *S. and Marper*, cited above, § 66). There is therefore a zone of interaction of a person with others, even in a public context, which may fall within the scope of "private life" (see *Couderc and Hachette Filipacchi Associés*, cited above, § 83; *P.G. and J.H. v. the United Kingdom*, no. 44787/98, § 56, ECHR 2001-IX; and *Sõro v. Estonia*, no. 22588/08, § 56, 3 September 2015).

189. With more particular reference to the right to respect for one's reputation, the Court has held that a person's reputation, even if that person is criticised in the context of a public debate, forms part of his or her personal identity and psychological integrity and therefore also falls within the scope

of his or her "private life" (see, as a recent authority, *Denisov v. Ukraine* [GC], no. 76639/11, § 97, 25 September 2018). However, as in other spheres protected by Article 8, in order for that provision to come into play an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life. This requirement pertains to both social and professional reputation. Likewise, Article 8 cannot be relied on in order to complain of a loss of reputation which is the foreseeable consequence of one's own actions, such as the commission of a criminal offence. This rule is not limited to reputational damage but has been expanded to a wider principle according to which any personal, social, psychological and economic suffering that could be foreseeable consequences of the commission of a criminal offence cannot be relied on in order to complain that a criminal conviction in itself amounts to an interference with the right to respect for "private life". This extended principle should cover not only criminal offences but also other misconduct entailing a measure of legal responsibility with foreseeable negative effects on "private life" (ibid., §§ 98 and 112).

190. The Court further reiterates that where there has been compilation of data on a particular individual, processing or use of personal data or publication of the material concerned in a manner or degree beyond that normally foreseeable, private-life considerations arise. The Court has acknowledged that the protection of personal data is of fundamental importance to a person's enjoyment of his or her right to respect for private and family life as guaranteed by Article 8 of the Convention (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, §§ 136-37, 27 June 2017). It has also held that Article 8 of the Convention provides for the right to a form of informational self-determination, allowing individuals to rely on their right to privacy as regards data which, albeit neutral, are collected, processed and disseminated collectively and in such a form or manner that their Article 8 rights may be engaged (ibid., § 137).

191. For a number of years now, with the development of technology and communication tools, a growing number of persons have sought to protect their interests under what is known as the "right to be forgotten". This is based on the individual's interest in obtaining the erasure or alteration of, or the limitation of access to, past information that affects the way in which he or she is currently perceived. By seeking to have that information disappear, the persons concerned wish to avoid being confronted indefinitely with their past actions or public statements, in a variety of contexts such as, for instance, job-seeking and business relations.

192. It is clear that personal information that is published and has been available on the Internet for some time may have a far-reaching negative impact on how the person concerned is perceived by public opinion. There is also a risk of other harmful effects: firstly, the aggregation of information, which may lead to the creation of a profile of the person concerned (in that

connection, see also Recommendation Rec(2012)3 of the Committee of Ministers to member States on the protection of human rights with regard to search engines – paragraph 66 above, and the CJEU judgment in *Google Spain* (C-131/12) – paragraph 74 above); and secondly, if the information is not placed in context, this may mean that an individual consulting an online article about another individual receives a fragmented and distorted picture of the reality. What is more, irrespective of the actual frequency of searches linked to a particular name, another possible consequence of the online publication of information concerning a person is the constant threat and the resulting fear for that person of being unexpectedly confronted with his or her past again at any time.

193. Against this background, the question to be addressed by the Court is whether Article 8 affords protection against these negative effects and, if so, to what extent.

194. In that regard it should be noted at the outset that the concept of a "right to be forgotten" has many facets, that it is still under construction and that its application in practice has already acquired a number of distinctive features. First of all, the "right to be forgotten", defined as an aspect of the right to respect for private life, first emerged in national judicial practice in the context of republication by the press of previously disclosed information of a judicial nature, with the person claiming a "right to be forgotten" effectively seeking to obtain a judgment against the person who republished the information. It appears that in the present case the Liège Court of Appeal applied the criteria previously established in the domestic case-law regarding this aspect of the "right to be forgotten" (see paragraph 28 above). For its part the Court, without making express reference to this concept of a "right", previously held that after a certain time had elapsed, and in particular when a convicted person was approaching the end of his or her sentence or, still more so, when he or she had been finally released, that person had an interest in no longer being confronted with his or her past acts, with a view to being reintegrated into society. The lapse of time between conviction, release and republication was a decisive factor in the Court's examination (see *Österreichischer Rundfunk v. Austria*, no. 35841/02, §§ 68-69, 7 December 2006, and, recently, *Mediengruppe Österreich GmbH v. Austria*, no. 37713/18, §§ 68-70, 26 April 2022).

195. Subsequently, a new aspect of this "right to be forgotten" emerged in national judicial practice in the context of the digitisation of news articles, resulting in their widespread dissemination on the websites of the newspapers concerned. The effect of this dissemination was simultaneously magnified by the listing of websites by search engines. In judicial practice this aspect, known as the "right to be forgotten online", has concerned requests for the removal or alteration of data available on the Internet or for limitations on access to those data, directed against news publishers or search engine operators. In such cases, the issue is not the resurfacing of the information but

rather its continued availability online. The contemporary debate on this aspect of the "right to be forgotten" was undoubtedly reinforced by the CJEU's *Google Spain* judgment (C-131/12) concerning a request for the operator of a search engine to remove links to the web pages of a Spanish daily newspaper from the list of results.

196. In this new context, in addition to the right to respect for private life, the national courts and authorities find support in the right to the protection of personal data, which in some legal systems has become a self-standing right (see the findings of the High Court of England and Wales and the Spanish Constitutional Court – paragraphs 102 and 107 respectively above). According to a different approach, in the specific case of requests for news publishers to alter press articles, the "right to be forgotten" can be based only on the protection of the right of personality, which is thus to be distinguished from the right to informational self-determination, the latter being linked to the protection of personal data (see the "Right to be forgotten I" judgment of the German Federal Constitutional Court – paragraph 114 above). The Belgian domestic courts examining the present case did not base the "right to be forgotten online" on the European or domestic provisions concerning the protection of personal data (see, in particular, paragraph 37 above).

197. For its part, the Court has examined only a handful of cases concerning requests for the removal or alteration of news articles stored in digital archives. In those cases, brought under Article 8 of the Convention, the Court defined the applicants' interests as pertaining to the protection of their reputation, with the concept of the "right to be forgotten" being mentioned only recently, in the last of the cases listed in this paragraph. On each occasion the Court considered that the national courts, in rejecting the applicants' requests, had struck a fair balance between freedom of expression and the public's right to have access to the information on the one hand, and the applicants' right to protection of their reputation on the other.

(a) In the case of *Węgrzynowski and Smolczewski* (cited above), two lawyers complained that a newspaper article that was damaging to their reputation continued to be accessible to the public on the newspaper's website. The lawyers requested the removal of the article, which alleged that they had made a fortune by assisting politicians in dubious business deals. The Polish courts, ruling on an earlier defamation action, had held that the article in question was based on insufficient information and was in breach of the rights of the persons concerned. In this judgment the Court held, in particular, that the Internet, which was an information and communication tool particularly distinct from the print media, serving billions of users worldwide, was not and potentially would never be subject to the same regulations and control. Therefore, the policies governing the reproduction of material from the print media and the Internet might differ. The rules concerning the latter undeniably had to be adjusted according to technology's

specific features in order to secure the protection and promotion of the rights and freedoms concerned.

(b) The case of *Fuchsmann v. Germany* (no. 71233/13, 19 October 2017) concerned the rejection by the German courts of an action brought in July 2002 by the applicant – an international businessman – seeking an injunction against certain statements that had been published about him in June 2001 in an article in the online edition of the *New York Times*, in which he had been accused of involvement in gold smuggling and embezzlement and of having links to Russian organised crime. The Court agreed with the German courts' findings, observing that the article in question had contributed to a debate of public interest; that there had been a certain interest in the article since the applicant was a German businessman internationally active in the media sector; that it had a sufficient factual basis; that the journalist had complied fully with his journalistic duties and responsibilities; that the article had been free from polemical statements and insinuations; that the information disseminated had mainly concerned the applicant's professional life; and that the consequences of the article in Germany had been limited.

(c) The case of *M.L. and W.W. v. Germany* (cited above) concerned the refusal of the Federal Court of Justice to order three different media organisations to anonymise press files concerning the applicants' conviction for the murder of a well-known actor, in which the applicants were referred to by their full names. In finding that there had been no violation of Article 8 of the Convention in respect of the applicants, the Court had regard to the following considerations: the fact that at the time the applicants' requests for anonymisation were lodged the impugned reports had continued to contribute to a debate of public interest; the fact that the applicants were not simply private individuals unknown to the public; the applicants' conduct with regard to the media, which they had approached after their conviction with a view to having the proceedings reopened; the fact that the reports had related the facts in an objective manner and without the intention to present the applicants in a disparaging way or to harm their reputation; and the limited accessibility of the information.

198. Only very recently did the Court examine a set of proceedings concerning the de-indexing of an article published by an online newspaper, in an application lodged under Article 10 of the Convention. In *Biancardi* (cited above), the applicant, the former editor-in-chief of an online newspaper, was held liable under civil law for having kept on his newspaper's website an article from 2008 reporting on a fight in a restaurant and giving details of the criminal proceedings opened in that connection. The Court found that not only Internet search engine providers but also the administrators of newspaper or journalistic archives accessible through the Internet, such as the applicant, could be required to de-index documents. The Court held that there had been interference with the applicant's right to impart information, guaranteed by the Convention, but that the interference had

pursued a legitimate aim, namely the protection of the restaurant owner's reputation, and had been necessary. In arriving at that conclusion it took into consideration the following criteria: the length of time for which the article was kept online, the sensitiveness of the data and the gravity of the sanction imposed. It therefore ruled that there had been no breach of the applicant's freedom of expression, especially since he had not actually been required to remove the article from the website.

199. Thus, from the standpoint of the Convention, the "right to be forgotten online" has been linked to Article 8, and more specifically to the right to respect for one's reputation, irrespective of what measures are sought for that purpose (the removal or alteration of a newspaper article in the online archives or the limitation of access to the article through de-indexing by a news outlet). In the Court's view, a claim of entitlement to be forgotten does not amount to a self-standing right protected by the Convention and, to the extent that it is covered by Article 8, can concern only certain situations and items of information. In any event, the Court has not hitherto upheld any measure removing or altering information published lawfully for journalistic purposes and archived on the website of a news outlet.

(iii) The criteria to be applied by the Court

200. The question which the Court must address in the present case is whether the decisions of the Belgian courts ordering the applicant to anonymise the electronic version of the impugned article on the website of the newspaper *Le Soir*, on grounds of the "right to be forgotten", amounted to a violation of freedom of expression under Article 10 of the Convention. In that connection it will have to determine whether the anonymisation order was based on relevant and sufficient reasons in the specific circumstances of the present case and, in particular, whether it was proportionate to the legitimate aim pursued.

201. Having dealt with numerous applications in which it was called upon to examine the fair balance to be struck between freedom of expression and various aspects of the right to respect for private life in cases concerning initial publication, the Court has developed an extensive body of case-law on the subject, establishing criteria relating to the balancing of these rights and the Contracting States' margin of appreciation in this context. In *Couderc and Hachette Filipacchi Associés* (cited above, §§ 90-93), under Article 10 of the Convention, the Court summarised the general principles in this regard as follows:

> "90. The choice of the means calculated to secure compliance with Article 8 of the Convention in the sphere of the relations of individuals between themselves is in principle a matter that falls within the Contracting States' margin of appreciation, whether the obligations on the State are positive or negative ... Likewise, under Article 10 of the Convention, the Contracting States have a certain margin of appreciation in assessing whether and to what extent an interference with the freedom

> of expression protected by this provision is necessary ... However, this margin goes hand in hand with European supervision, embracing both the legislation and the decisions applying it, even those delivered by an independent court. In exercising its supervisory function, the Court's task is not to take the place of the national courts, but rather to review, in the light of the case as a whole, whether the decisions they have taken pursuant to their power of appreciation are compatible with the provisions of the Convention relied on ...
>
> 91. In cases which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the news report, or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect ... Accordingly, the margin of appreciation should in theory be the same in both cases.
>
> 92. According to the Court's established case-law, the test of 'necessity in a democratic society' requires the Court to determine whether the interference complained of corresponded to a 'pressing social need', whether it was proportionate to the legitimate aim pursued and whether the reasons given by the national authorities to justify it are relevant and sufficient ... The margin of appreciation left to the national authorities in assessing whether such a 'need' exists and what measures should be adopted to deal with it is not, however, unlimited but goes hand in hand with European supervision by the Court, whose task it is to give a final ruling on whether a restriction is reconcilable with freedom of expression as protected by Article 10. Where the balancing exercise has been undertaken by the national authorities in conformity with the criteria laid down in the Court's case-law, the Court would require strong reasons to substitute its view for that of the domestic courts ..."

202. However, the question arises whether, in view of the specific nature of the present case, which lies in the fact that it concerns the electronic archived version of an article rather than the original version, the criteria hitherto employed by the Court in order to resolve a conflict between the respective rights under Articles 10 and 8 of the Convention need to be adjusted.

203. In this regard, in upholding the position adopted by the Belgian courts and finding that there had been no violation of the applicant's freedom of expression in the present case, the Chamber referred to the established criteria examined in cases relating to initial publication, as summarised in *Axel Springer AG* (cited above, §§ 89-95). These are: the contribution to a debate of public interest; whether the person concerned is well known; the subject of the news report; the prior conduct of the person concerned; the way in which the information was obtained and its veracity; the content, form and consequences of the publication; and the severity of the measure imposed on the applicant. The same criteria had been taken into account by the Court in previous cases concerning requests for the alteration of content stored in a digital press archive (see *Fuchsmann,* cited above, § 34, and *M.L. and W.W. v. Germany*, cited above, § 96).

204. By contrast, in the recent case of *Biancardi* (cited above, §§ 57-71), which concerned a request for the owner of an online newspaper to de-index

an article, the Court found that a new set of criteria needed to be taken into consideration in weighing up the rights at stake, namely the length of time for which the article was kept online, the sensitiveness of the data and the gravity of the sanction imposed.

205. For its part, the Grand Chamber considers that its assessment should take account of the different context of the present case compared with cases concerning initial publication. Regard being had to the general principles referred to above and in particular to the need to preserve the integrity of press archives, and also, to some extent, to the practice of the courts in the Council of Europe member States (see paragraphs 88-132 above), the Court considers that the balancing of these various rights of equal value to be carried out in the context of a request to alter journalistic content that is archived online should take into account the following criteria: (i) the nature of the archived information; (ii) the time that has elapsed since the events and since the initial and online publication; (iii) the contemporary interest of the information; (iv) whether the person claiming entitlement to be forgotten is well known and his or her conduct since the events; (v) the negative repercussions of the continued availability of the information online; (vi) the degree of accessibility of the information in the digital archives; and (vii) the impact of the measure on freedom of expression and more specifically on freedom of the press.

206. In most instances several criteria will need to be taken into account simultaneously in order to determine the protection to be afforded to private life when set against the other interests at stake and against the means employed to give effect to that protection in a particular case (as regards those means, see paragraph 241 below). Thus, the protection of private life in the context of an assertion of entitlement to be forgotten cannot be considered in isolation from the means by which it was implemented in practice. Seen from this perspective, it is a matter of carrying out a balancing exercise with a view to establishing whether or not, regard being had to the respective weight of the competing interests and the extent of the means employed in the specific case, the weight attributed either to the "right to be forgotten", through the right to respect for private life, or to freedom of expression was excessive.

207. In this context the Court observes that it previously found, in *M.L. and W.W. v. Germany* (cited above, § 97) – in line with the CJEU's *Google Spain* judgment (C-131/12; see paragraphs 71 et seq. above) and subsequent judgments concerning delisting by search engines – as follows:

> "... it is primarily because of search engines that the information on the applicants held by the media outlets concerned can easily be found by Internet users. Nevertheless, the initial interference with the applicants' enjoyment of their right to respect for their private life resulted from the decision of the media outlets to publish that information and, especially, to keep it available on their websites, even without the intention of attracting the public's attention; the existence of search engines merely amplified the scope of the interference. However, because of this amplifying effect on the dissemination of information and the nature of the activity underlying the publication

> of information on the person concerned, the obligations of search engines towards the individual who is the subject of the information may differ from those of the entity which originally published the information. Consequently, the balancing of the interests at stake may result in different outcomes depending on whether a request for deletion concerns the original publisher of the information, whose activity is generally at the heart of what freedom of expression is intended to protect, or a search engine whose main interest is not in publishing the initial information about the person concerned, but in particular in facilitating identification of any available information on that person and establishing a profile of him or her ..."

208. Furthermore, data subjects are not obliged to contact the original website, either beforehand or simultaneously, in order to exercise their rights *vis-à-vis* search engines, as these are two different forms of processing, each with its own grounds of legitimacy and with different impacts on the individual's rights and interests (see also, in this regard, the Guidelines on the implementation of the *Google Spain* judgment adopted on 26 November by the "Article 29" Working Party – paragraph 76 above). Likewise, the examination of an action against the publisher of a news website cannot be made contingent on a prior request for delisting. In the Court's view, this distinction between the activities of search engine operators and those of news publishers retains its significance when the Court is examining any interference with freedom of expression, including the public's right to receive information, based on a claim of entitlement to be forgotten.

209. Lastly, the Court considers that the chilling effect on freedom of the press stemming from the obligation for a publisher to anonymise an article that was initially published in a lawful manner cannot be ignored (see also the position of the third-party interveners – paragraph 165 *in fine* above). The obligation to review at a later stage the lawfulness of the continued online availability of an article following a request from a person claiming to be a victim of the situation – an obligation which implies weighing up all the interests at stake – entails a risk that the press may refrain in future from keeping reports in its online archives, or that it will omit individualised elements in articles that are likely to be the subject of such a request (see *M.L. and W.W. v. Germany*, cited above, § 104). Nevertheless, content providers are required to assess and weigh up the interests in terms of freedom of expression and respect for private life only where the person concerned makes an express request to that effect.

210. In that connection the Court reiterates that, in order for Article 8 of the Convention to come into play, an attack on a person's reputation must attain a certain level of seriousness (see paragraph 189 above). Accordingly, where the person concerned makes a request of this kind, he or she must duly substantiate the seriousness of the attack stemming from the continued online availability of the archived article (see, *mutatis mutandis*, the judgment of the Spanish Constitutional Court – paragraph 111 above; the "Right to be forgotten I" judgment of the German Federal Constitutional Court – paragraph 121 above; and the judgment of 26 June 2021 of the German

Federal Court of Justice – paragraph 129 above; see also, conversely, the CJEU's *Google Spain* judgment (C-131/12) – paragraph 73 above, and the Guidelines on its implementation – paragraphs 77 and 79 above).

211. Accordingly, although in the context of a balancing exercise between the right to freedom of expression and the right to respect for private life these two rights are to be regarded as being of equal value, it does not follow that the criteria to be applied in conducting that exercise all carry the same weight. In this context, in fact, the principle of preservation of the integrity of press archives must be upheld, which implies ensuring that the alteration and, *a fortiori*, the removal of archived content is limited to what is strictly necessary, so as to prevent any chilling effect such measures may have on the performance by the press of its task of imparting information and maintaining archives. Hence, in applying the above-mentioned criteria, particular attention should be paid to properly balancing, on the one hand, the interests of the individuals requesting the alteration or removal of an article concerning them in the press archives and, on the other hand, the impact of such requests on the news publishers concerned and also, as the case may be, on the functioning of the press as described above.

(c) Application to the present case

212. The Court notes at the outset that the Liège Court of Appeal based its decision on the following criteria in ordering the anonymisation of the article in the online archive: the facts had to have been disclosed lawfully in the first place and had to be of a judicial nature; there could be no contemporary interest in their disclosure; the facts could not be of historical interest; a certain time had to have elapsed between the two disclosures; and the person concerned could not be a public figure, had to have an interest in being reintegrated into society and had to have discharged his or her debt (see paragraph 28 above).

213. The Court must now examine, having regard to the margin of appreciation left to the national authorities in resolving a conflict between Article 8 and Article 10 of the Convention, whether the assessment carried out by the Liège Court of Appeal was consistent with that resulting from the criteria set out above (see paragraph 205), the application of which must also take into account the specific characteristics of cases concerning the alteration of lawful newspaper articles in the online archives on grounds of the "right to be forgotten". If that is the case, the Court would require strong reasons to substitute its own view for that of the Court of Appeal (see paragraph 201 above).

(i) The nature of the archived information

214. As regards the nature of the information in question, the Court considers that it should first be ascertained whether the information relates to

the private, professional or public life of the person concerned and whether it has a social impact, or whether, on the contrary, it falls within the intimate sphere of private life and is therefore particularly sensitive.

215. In that connection the Court observes that in the specific sphere of protection with regard to automated processing of personal data, the Council of Europe's Convention 108 on the subject (see paragraph 60 above) and the modernised version, Convention 108+ (see paragraph 61 above), and also Directive 95/46/EC (see paragraph 68 above), classify data concerning criminal matters as "special". By contrast, the Guidelines on the implementation of the CJEU's *Google Spain* judgment (C-131/12 – see paragraph 77 above), the CJEU judgment in *GC and Others* (C-136/17 – see paragraphs 83-84 above) and the ensuing judgments of the French *Conseil d'État* (see paragraph 99 above), make a distinction between "sensitive" data – those that represent greater intrusion into private life – and data concerning "criminal" matters, which attract a higher degree of protection compared with data that concern private life without being "sensitive". For its part the Court, in a recent ruling, characterised data relating to criminal proceedings as sensitive (see *Biancardi*, cited above, § 67).

216. The Court also reiterates that the approach to covering a given subject is a matter of journalistic freedom and that Article 10 of the Convention leaves it to journalists to decide what details ought to be published in order to ensure an article's credibility, provided that the choices which they make in that regard are based on their profession's ethical rules and codes of conduct (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 186, and *M.L. and W.W. v. Germany*, cited above, § 105; see also Recommendation Rec(2003)13 of the Committee of Ministers to member States on the provision of information through the media in relation to criminal proceedings – paragraph 64 above). In any event, in the case of press articles about criminal proceedings, the inclusion of individualised information such as the full name of the person concerned is an important aspect (see *Fuchsmann*, cited above, § 37) and in itself does not raise an issue under the Convention, even though a person's name falls within the personal sphere protected by Article 8 (see *S. and Marper*, cited above, § 66). This applies both at the time of initial publication and at the time of entry in the online archives.

217. In the present case the article in issue reported on a number of road-traffic accidents that had occurred in 1994 within the space of a few days, of which the accident caused by G. was one. The article mentioned G.'s full name and described the circumstances of the accident. The Court considers that, while the article did not concern an ongoing criminal investigation or a criminal conviction, it undoubtedly related to facts which subsequently gave rise to such a conviction. It therefore agrees with the finding of the Liège Court of Appeal, which noted that the facts reported on were of a judicial nature (see paragraph 29 above).

218. The Court considers that the judicial nature of the information in question raises the issue, among others, of the nature and seriousness of the offence that was the subject of the original article. This criterion has previously been used by the Court in its case-law, and by other courts in Europe in examining similar cases (see *M.L. and W.W. v. Germany*, cited above, § 111; the CJEU judgment in *GC and Others* (C-136/17) – paragraph 84 above; and judgment no. 58/2018 of the Spanish Constitutional Court – paragraph 111 above).

219. In the present case the Court observes that the article in question presented a series of short news stories reporting on proven events in a succinct and objective manner, and that G. did not allege at any stage during the domestic proceedings that the information in question needed to be updated or rectified. However, in the Court's view the facts reported on, although tragic, do not fall into the category of offences whose significance, owing to their seriousness, is unaltered by the passage of time. It should also be observed that the events giving rise to G.'s conviction were not the subject of any media coverage with the exception of the article in question, and that the case did not attract widespread publicity either at the time of the events reported on or when the archived version of the article was placed online (see, conversely, *M.L. and W.W. v. Germany*, cited above, § 105). This last factor was also taken into consideration by the Liège Court of Appeal in its assessment (see paragraph 29 above).

(ii) The time elapsing since the events and since initial and online publication

220. In the Court's view, the relevance of information is often closely linked to its topicality. Contrary to the applicant's assertions (see paragraph 137 above), it considers that the passage of a significant length of time has an impact on the question whether a person should have a "right to be forgotten". Like the Government, it notes that the passage of time since initial publication is one of the criteria highlighted by national courts in Europe in cases concerning the same issue (see paragraph 153 above; see also the judgment of the Spanish Constitutional Court – paragraph 108 above, and the judgment of the German Federal Constitutional Court – paragraph 115 above).

221. In the present case the article in issue, which was published in 1994, was placed online in the archives of the newspaper *Le Soir* in 2008. The passage of time was a relevant factor in the Liège Court of Appeal's assessment. That court noted that a significant length of time (sixteen years) had elapsed between the initial publication of the article and the first request for anonymisation; in all, some twenty years had passed by the time of delivery of its judgment (see paragraph 29 above). In these circumstances, the Court considers that G., who had been rehabilitated in 2006, had a legitimate interest, after all that time, in seeking to be allowed to reintegrate into society without being permanently reminded of his past.

(iii) The contemporary interest of the information

222. As a matter directly linked to the above considerations regarding the role of the press in creating and maintaining archives, the Court must next ascertain whether the article in question continues to contribute to a debate of public interest, whether it has acquired any historical, research-related or statistical interest (see *M.L. and W.W. v. Germany*, cited above, § 99, and the judgment of the Spanish Constitutional Court – paragraph 108 above) and whether it remains relevant for the purposes of placing recent events in context in order to understand them better. This assessment should be conducted from the perspective of the time when the person concerned submits his or her request concerning the "right to be forgotten".

223. In this context it should be pointed out that, on the subject of initial publication, the Court has consistently held that there is little scope under Article 10 § 2 of the Convention for restrictions on freedom of expression when a matter of public interest is at stake. The margin of appreciation of States is reduced where a debate on a matter of public interest is concerned (see *Editions Plon v. France*, no. 58148/00, § 44, ECHR 2004-IV, and *Couderc and Hachette Filipacchi Associés*, cited above, § 96). According to the Court's case-law, the public interest relates to matters which affect the public to such an extent that it may legitimately take an interest in them, which attract its attention or which concern it to a significant degree, especially in that they affect the well-being of citizens or the life of the community. This is also the case with regard to matters which are capable of giving rise to considerable controversy, which concern an important social issue, or which involve a problem that the public would have an interest in being informed about. Nevertheless, the public interest cannot be reduced to the public's thirst for information about the private life of others, or to the reader's wish for sensationalism or even voyeurism (see *Couderc and Hachette Filipacchi Associés*, cited above, §§ 101 and 103, and the references cited therein). From this perspective, an article's contribution to a debate of public interest may persist over time, either because of the information itself or because of new factors arising since publication, for instance subsequent developments in the original judicial proceedings.

224. However, owing to the specific nature of digital press archives, which concern information that is rarely of topical relevance, their current contribution to a debate of public interest is not decisive in most cases. In the absence of a contribution to such a debate, it must also be ascertained whether the archived information is of interest for any of the other purposes referred to above, for instance for historical or scientific purposes.

225. In the present case the Liège Court of Appeal held that, twenty years after the events, the identity of a person who was not a public figure did not add to the public interest of the article, which merely made a statistical contribution to a public debate on road safety. In the Court of Appeal's view, the events reported on in the article were clearly not of historical significance

either, as the article related to an unexceptional – albeit tragic – short news story which was not alleged, still less demonstrated, to have been a source of particular public concern (see paragraph 29 above). The Court sees no reason to question the duly reasoned assessment of the national court in this regard.

(iv) Whether the person claiming entitlement to be forgotten is well known, and his or her conduct since the events

226. As a general rule, the role or function of the person who is the subject of a report and/or photograph constitutes another important criterion to be taken into account in balancing the rights guaranteed by Articles 8 and 10 of the Convention (see *Von Hannover (no. 2)*, cited above, § 110, and *Axel Springer AG*, cited above, § 91). The extent to which an individual has a public profile or is well known influences the protection that may be afforded to his or her private life. Thus, the Court has accepted on numerous occasions that the public was entitled to be informed about certain aspects of the private life of public figures. This criterion, applicable in the case of newly published material, is also pertinent in the context of digital press archives (see *M.L. and W.W. v. Germany*, cited above, § 106).

227. The question whether the person concerned is well known should be examined in the light of the circumstances of the case and from the perspective of the time when the "right to be forgotten" request is made. The person's public profile may predate the facts reported on in the impugned article or be contemporaneous with them. Furthermore, while a person's public profile may diminish over time, he or she may also return to the limelight at a later stage for a variety of reasons.

228. The person's conduct since the events that were the subject of the original article may also justify refusing a "right to be forgotten" request in some situations (see *M.L. and W.W. v. Germany*, cited above, § 108). Conversely, the fact of staying out of the media spotlight may weigh in favour of protecting a person's reputation.

229. In the instant case the Liège Court of Appeal observed that G. did not hold any public office. In contrast to the argument advanced by the applicant before the Court (see paragraph 143 above), the Court of Appeal took the view that the mere fact that G. was a doctor in no sense justified his continued identification in the online article some twenty years after the events (see paragraph 29 above). For its part, the Court notes that G. was an individual unknown to the general public both at the time of the events and at the time of his request for anonymisation (see, conversely, *M.L. and W.W. v. Germany*, cited above, § 106). Furthermore, the case did not attract widespread publicity either at the time of the events reported on or when the archived version of the article was placed online.

230. The Court further notes that the domestic courts did not rule expressly on the issue of G.'s conduct after the events. There is also nothing to suggest that G. made contact with the media in order to publicise his

situation, either when the article first appeared in 1994 or when it was placed online in 2008 (see, conversely, *M.L. and W.W. v. Germany*, cited above, §§ 108-09). On the contrary, all the steps taken by him demonstrate a desire to stay out of the media spotlight (see paragraphs 15 and 21 *in fine* above).

(v) The negative repercussions of the continued availability of the information online

231. As observed above, in cases concerning the protection of a person's social or professional reputation under Article 8 of the Convention, the Court has held that an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see paragraph 189 above). In that connection it notes the applicant's submission to the effect that limitations on access to information which members of the public have the right to obtain, as a matter of public interest, have to be justified by particularly compelling reasons, and his contention that any person wishing to restrict that access must demonstrate the actual existence of significant harm, especially if the information is public in nature (see paragraph 140 above and, to similar effect, the comments of the sixteen third-party interveners – paragraph 166 above).

232. In the Court's view, these considerations are relevant in the present case, which concerns the anonymisation of content stored in a digital press archive rather than a request for delisting addressed to a search engine. Accordingly, in order to justify the alteration of an article stored in a digital press archive, the person concerned must be able to make a duly substantiated claim of serious harm to his or her private life (see paragraph 210 above).

233. In this connection, with regard to judicial information, the Court considers it important in assessing the damage to the person concerned to take into account the consequences of the continued availability of the information for that person's reintegration into society (see paragraph 194 above, and *M.L. and W.W. v. Germany*, cited above, § 100; see also the judgment of the High Court of England and Wales cited at paragraph 104 above). Against this background, and in close conjunction with the length of time that has elapsed since the information was published, it should be ascertained whether the person's conviction has been removed from the criminal records and he or she has been rehabilitated, bearing in mind that what is at stake here is not just the interest of the convicted person but also that of society itself, and that individuals who have been convicted may legitimately aspire to being fully reintegrated into society once their sentence has been served (see, as regards the domestic law, paragraph 55 above). Nevertheless, in the Court's view, the fact that a person has been rehabilitated cannot by itself justify recognising a "right to be forgotten".

234. In the present case the Liège Court of Appeal held that the electronic archiving of an article concerning the commission of an offence should not

create a kind of "virtual criminal record" for G., who had served his sentence and been rehabilitated. The Court of Appeal observed that a simple search based on G.'s first name and surname in the search engine of the website of *Le Soir* or on Google immediately brought up the article. In the Court of Appeal's view, this was undoubtedly a source of harm to G., at least of a psychological nature. Such a situation made knowledge of his previous conviction readily accessible to a wide audience which – since G. was a doctor – inevitably included patients, colleagues and acquaintances, and was thus liable to stigmatise him, seriously damage his reputation and prevent him from reintegrating into society normally (see paragraphs 29 and 31 above).

235. In this regard the Court sees no strong reason to call into question the duly reasoned decision of the Liège Court of Appeal.

(vi) The degree of accessibility of the information in the digital archives

236. As regards the accessibility of published material, the Court would reiterate that Internet sites are an information and communication tool particularly distinct from the print media, especially as regards the capacity to store and transmit information, and that the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms, particularly the right to respect for private life, is certainly higher than that posed by printed publications (see *Delfi AS v. Estonia* [GC], no. 64569/09, § 133, ECHR 2015; *Editorial Board of* Pravoye Delo *and Shtekel v. Ukraine*, no. 33014/05, § 63, ECHR 2011 (extracts); and *Cicad v. Switzerland*, no. 17676/09, § 59, 7 June 2016), especially on account of the important role played by search engines.

237. However, it should be borne in mind that, generally speaking, consulting archives requires an active search which involves entering keywords on a dedicated web page containing the newspaper's archives. Thus, in the absence of such a search, an article contained in the digital archives is not, as such, likely to attract the attention of Internet users who are not looking for precise information concerning a particular person (see *M.L. and W.W. v. Germany*, cited above, § 113).

238. In weighing up the interests at stake, it is also important to ascertain the degree of accessibility of the archived article, that is, whether it is available without restrictions and free of charge or access is confined to subscribers or otherwise restricted.

239. In the present case the domestic courts observed that when they were placed online in 2008, the archives of the newspaper *Le Soir* had been available free of charge. Moreover, it is not in dispute that when G. made his request, and throughout the domestic proceedings, the archives continued to be accessible without restrictions and free of charge (compare *M.L. and W.W. v. Germany*, cited above, § 113, where access to certain articles was behind a paywall or was confined to subscribers). In view of this high degree of accessibility the Court considers, like the Liège Court of Appeal, that the

continued presence of the article in question in the archives undoubtedly caused harm to G.

(vii) The impact of the measure on freedom of expression and more specifically on freedom of the press

240. The Court must now examine the Liège Court of Appeal's assessment of the impact of the measure in question on freedom of expression and freedom of the press. To that end it must ascertain in particular whether the Court of Appeal, on the basis of a proper balancing between, on the one hand, G.'s interests and, on the other hand, those of the applicant relating to the performance of his task of imparting information and maintaining archives, limited the interference with the latter task to what was strictly necessary in order to protect the right to respect for private life asserted by G.

241. The Court notes that, in the light of technological developments in the digital sphere, European judicial practice has identified several types of measures aimed at protecting the reputation and rights of others in this context. The technical complexity of these measures and their impact on journalistic archives and/or access to information vary considerably. Thus, the following measures, among others, may be implemented by the operator of a search engine other than that of the content provider: (a) reorganisation of the search results so that the link to the website in question appears in a less prominent position in the list of results, or (b) complete or partial delisting (relating only to searches based on the name of the person concerned) through the removal of the link from the search engine's index. Meanwhile, the publisher of a website can, for instance: (a) remove all or part of a text stored in the digital archive; (b) anonymise the details of the person referred to in the text; (c) add a note to the text, that is, update the text by means of digital rectification (where the information was inaccurate) or via an electronic communication (where the information was incomplete); (d) remove the article from the index of the website's internal search engine; or (e) have the article de-indexed, either fully or partially (in relation only to searches based on the name of the person concerned), by external search engines, on the basis of access codes or directives issued to the search engine operators preventing their search programmes from crawling certain locations.

242. In view of the importance of the integrity of digital press archives (see paragraph 185 above), the Court considers that the national courts, in determining disputes of this kind and deciding which of the different measures sought by the person making the request to apply, must give preference to the measure that is both best suited to the aim pursued by that person – assuming that aim to be justified – and least restrictive of the press freedom which may be relied on by the publisher concerned. This assessment of the type of measure to be preferred may usefully be carried out in the light of the range of available measures listed in paragraph 241 above. Only

measures which meet this twofold objective can be ordered, even if this might involve dismissing the action of the person making the request.

243. For its part, in previous cases concerning the alteration of digital press archives, the Court assessed the nature of the measures taken at national level against the broader background of the various alternative measures available. Thus, it took into consideration the fact that the applicants had not taken any steps to compel the search engine operators to make the information concerning the applicants less easy to find (see *Fuchsmann*, cited above, § 53, and *M.L. and W.W. v. Germany*, cited above, § 114) or to request that the information about which they complained be rectified (see *Węgrzynowski and Smolczewski*, cited above, §§ 66-67). Furthermore, in the recent case of *Biancardi* (cited above, § 70), in finding that the de-indexing measure under consideration was proportionate from the standpoint of Article 10 of the Convention, the Court observed that there had been no question of requiring the newspaper to remove the impugned article from its digital archives.

244. In the present case, in his requests to the newspaper *Le Soir* and the Council for Journalistic Ethics, and subsequently before the courts, G. argued that if a search was carried out based on his first name and surname using the search engine of *Le Soir* or on Google, the article in question appeared among the first results, a situation which had an impact on his private and professional life. Although G.'s chief concern was the fact that the article was displayed following Internet searches based on his first name and surname carried out via search engines, he did not seek to defend his interests through an action against the operators of those search engines, but instead brought an action against the applicant. He sought primarily the anonymisation of the article and, in the alternative, the de-indexing of the article in the newspaper's internal search engine. As a third-party intervener in the present case before the Court, G. explained his choice by the fact that there were several search engines on the market and that the state of the technology at the time of his action suggested that separate noindex tags would be needed for each search engine, a situation which in his view left the effectiveness of that method open to doubt (see paragraph 161 above). It is against this specific background that the Court must examine whether – and, if so, to what extent – the national courts assessed the weight of the order to anonymise the article in question.

245. Firstly, they examined the applicant's argument that a balance could be achieved between the rights at stake by recognising a right to rectification or communication, that is, by the addition of further information to the article in question. The Court of Appeal considered that technique inappropriate in the present case as it would allow the stigmatising effect of the serious offences committed by G., and of the sentence he had already served, to persist indefinitely and would render the rehabilitation order in his favour meaningless (see paragraph 30 above).

246. Secondly, with regard to delisting by search engines, it is apparent from the documents in the file that the applicant argued before the Court of Appeal that the search engines alone were competent to deal with G.'s request and that the latter had erroneously directed his action against the applicant. The applicant added that the legal department of *Le Soir* had in fact contacted Google with a view to delisting but had received no reply. However, that argument was dismissed by the Court of Appeal, which observed that the indexing of the article by the search engines was only possible because the article was present in the newspaper's database in non-anonymised form and without any noindex tag. In the Court of Appeal's view, G. was therefore entitled to bring his action against the news publisher alone with a view to having the article concerning him anonymised so that it no longer appeared in the list of results obtained following a search based on his first name and surname (see paragraph 27 above).

247. Thirdly, the alternative referred to by G. in the proceedings before the Court of First Instance, consisting of the de-indexing of the article in the internal search engine by the newspaper's publisher, was not examined by that court, in view of the fact that the latter had already allowed the main request for anonymisation of the article. Likewise, it was not examined by the Liège Court of Appeal, since the applicant had not submitted any request to that effect and since G., in his summarised observations, had requested that the first-instance judgment be upheld (see paragraph 24 above). However, it is worth noting that in the court proceedings the applicant opposed de-indexing by external search engines, arguing that noindex tags were technical tools that were liable to lead to problems on the website concerned and that the search engine operators made the use of such tags subject to the opening of a user account (see paragraph 23 above).

248. Regard being had to the procedural framework of the dispute and in particular to the restrictions imposed by the disposition principle in civil matters under Belgian law (see paragraphs 56-57 above), the Court considers at the outset that the courts cannot be criticised for confining their examination to the admissibility and merits of G.'s main claim – for anonymisation of the article – which they ultimately allowed.

249. Thus, the Liège Court of Appeal found that the most effective means of protecting G.'s privacy without interfering to a disproportionate extent with the applicant's freedom of expression was to anonymise the article on the website of *Le Soir* by replacing G.'s first name and surname with the letter X. In that connection, the Court has previously held that anonymisation is less detrimental to freedom of expression than the removal of an entire article (see *M.L. and W.W. v. Germany*, cited above, § 105). It notes that anonymisation constitutes a particular means of altering archived material in that it concerns only the first name and surname of the person concerned and does not otherwise affect the content of the information conveyed.

250. The Court further notes that in examining whether that measure was proportionate, the Liège Court of Appeal took care to assess the implications of the measure for G., for the public who were entitled to have access to the information, and for the applicant. It concluded that the fact of acceding to G.'s request did not confer on each and every individual a subjective right to rewrite history, nor did it make it possible to "falsify history" or impose an "excessive burden of responsibility" on the applicant.

251. As regards the importance to be attached to the integrity of the archives (see paragraph 185 above), the Court notes that the Liège Court of Appeal took this factor into consideration in its reasoning. In reply to the applicant's arguments concerning the duty to remember and the need to preserve a full and faithful record in the archives, the Court of Appeal made clear, indeed, that no request had been made for the article to be removed from the archives, but simply for the electronic version to be rendered anonymous. It also stressed that the paper archives remained intact and that the applicant could still ensure the integrity of the original digital version (see paragraph 29 above). As the Court has already noted (see paragraph 172 above), that reasoning may appear to be in contradiction with the operative provisions of the Court of Appeal's judgment, which upheld the judgment of the Neufchâteau Court of First Instance whose anonymisation order extended to any database for which the applicant was responsible. Furthermore, the applicant's representative stated at the Grand Chamber hearing that the material had been anonymised both in the online archive and in the "master" archive that was not accessible to the public. However, the fact remains that the Liège Court of Appeal considered that the anonymisation of the online archived version alone sufficed for it to conclude that its judgment of 25 September 2014 had been properly complied with. In any event, it is not the Court's task to rule on this issue, since the applicant's complaint before it concerns only the anonymisation of the online version of the article on the website of *Le Soir* (see paragraph 172 above).

252. The Court would note that in the present case the original, non-anonymised, version of the article is still available in print form and can be consulted by any person who is interested, thus fulfilling its inherent role as an archive record.

253. As to the Court of Appeal's assessment of the technical feasibility for the applicant of anonymising the article on the website of *Le Soir*, the applicant – as the Chamber correctly observed – did not adduce any evidence capable of persuading the Court that this assessment was arbitrary or manifestly unreasonable. On the contrary, the article was anonymised shortly after the Liège Court of Appeal judgment had been served on the applicant (see paragraph 39 above), a fact that belies the applicant's assertion before the domestic courts that such a measure was not technically feasible.

254. Lastly, as regards the possible chilling effect on freedom of the press stemming from the obligation for a publisher to anonymise an article that was

published initially in a lawful manner, the Court considers that such an obligation may in principle fall within the "duties and responsibilities" of the press and the limits which may be imposed on it (see paragraph 177 above). Nevertheless, in the circumstances of the present case, it does not appear from the file that the anonymisation order had such a profound impact on the performance by the newspaper *Le Soir* of its journalistic tasks as to impair that performance in practice.

(d) Conclusion

255. In the light of the foregoing, the Court notes that the national courts took account in a coherent manner of the nature and seriousness of the judicial facts reported on in the article in question, the fact that the article had no topical, historical or scientific interest, and the fact that G. was not well known. In addition, they attached importance to the serious harm suffered by G. as a result of the continued online availability of the article with unrestricted access, which was apt to create a "virtual criminal record", especially in view of the length of time that had elapsed since the original publication of the article. Furthermore, after reviewing the measures that might be considered in order to balance the rights at stake – a review whose scope was consistent with the procedural standards applicable in Belgium – they held that the anonymisation of the article did not impose an excessive and impracticable burden on the applicant, while constituting the most effective means of protecting G.'s privacy.

256. In those circumstances, and regard being had to the States' margin of appreciation, the Court finds that the national courts carefully balanced the rights at stake in accordance with the requirements of the Convention, such that the interference with the right guaranteed by Article 10 of the Convention on account of the anonymisation of the electronic version of the article on the website of the newspaper *Le Soir* was limited to what was strictly necessary and can thus, in the circumstances of the case, be regarded as necessary in a democratic society and proportionate. It therefore sees no strong reasons to substitute its own view for that of the domestic courts and to disregard the outcome of the balancing exercise carried out by them.

257. Accordingly, there has been no violation of Article 10 of the Convention.

FOR THESE REASONS, THE COURT

1. *Holds*, by twelve votes to five, that there has been no violation of Article 10 of the Convention.

Done in English and in French, and delivered at a public hearing in the Human Rights Building, Strasbourg, on 4 July 2023, pursuant to Rule 77 §§ 2 and 3 of the Rules of Court.

Johan Callewaert	Marko Bošnjak
Deputy to the Registrar	President

In accordance with Article 45 § 2 of the Convention and Rule 74 § 2 of the Rules of Court, the following separate opinions are annexed to this judgment:

– concurring opinion of Judge Krenc;
– dissenting opinion of Judge Ranzoni, joined by Judges Kūris, Grozev, Eicke and Schembri Orland.

M.B.
J.C.

CONCURRING OPINION OF JUDGE KRENC

(Translation)

1. I voted in favour of finding no violation of Article 10 of the Convention. I would like to further explain some of the considerations on which I based my position in this factually, technically and legally complex case.

I. As regards the principles

A. The limited elasticity of the *Von Hannover* criteria

2. First of all, I agree with the present judgment in that it refrains from applying, as such, the criteria set out in *Von Hannover v. Germany (no. 2)* ([GC], nos. 40660/08 and 60641/08, §§ 108-13, ECHR 2012) and decides to establish new criteria that are better suited to the issue at stake (see paragraph 205 of the present judgment). The elasticity of the *Von Hannover* criteria, which were designed to resolve classic conflicts between Articles 8 and 10 of the Convention in media-related matters, is indeed not unlimited.

3. The specific characteristics of cases concerning the digitisation of press archives are at least twofold.

First of all, there is the specific nature of the medium. The Internet has made access to information instantaneous, ubiquitous and permanent. This requires us to rethink to some extent the balance between freedom of expression and the right to respect for private life (see, in particular, *Delfi AS v. Estonia* [GC], no. 64569/09, ECHR 2015).

Secondly, there is the passage of time, which contributes to lessening – or increasing[1] – the interest of the information and at the same time to reinforcing – or reducing – individuals' legitimate expectations with regard to their private lives. Thus, the passage of time can tip the balance significantly in favour of either side of the scales containing the right to privacy and freedom of expression, a balance that is not set in stone.

It also means that the online version of the article is no longer of interest in terms of its topicality, but rather as an archive. The task of maintaining archives thus supersedes the press's primary mission to impart information.

4. The adoption of a new set of criteria is therefore justified by the fact that the case at issue does not concern the lawfulness of the original publication of an article but its continued availability online (see, in particular, paragraph 174 of the present judgment).

[1] See *Éditions Plon v. France*, no. 58148/00, § 53: "… the more time that elapsed, the more the public interest in discussion of the history of President Mitterrand's two terms of office prevailed over the requirements of protecting the President's rights with regard to medical confidentiality."

5. In my humble opinion, the new criteria set out in the present judgment have the merit of providing, in line with the subsidiarity principle, a useful framework for the national courts called upon to determine disputes concerning online archives. That is, to my mind, one of the major contributions of this judgment.

B. The importance of preserving the integrity of digital press archives

6. I also agree with the emphasis placed in the present judgment on the importance of preserving the integrity of digital press archives, which the judgment describes as a "guiding principle" (see paragraph 185 of the judgment). I share that view.

7. However, as I see it, the integrity of the archives is inextricably linked to their accessibility. The two go hand in hand. Indeed, what is the point of ensuring the integrity of the archives if they are not accessible or are accessible only subject to strict conditions or at considerable cost? In that regard, I note in the present case that, while the version of the article in the digital archives was freely accessible during the domestic proceedings, its accessibility is now limited as it is available only to subscribers. Naturally, the funding of the press is essential in order for it to fulfil its role as a "watchdog" in a democratic society. However, where access is limited or is made difficult for historians, researchers or the public at large, the argument of the integrity of the archives loses much of its force.

II. As regards the present case

A. The configuration of the present case and the content of the Court's subsidiary review

(i) The configuration of the present case

8. A particular feature of the present case is that it concerns a conflict of rights: the right guaranteed by Article 10 of the Convention and asserted by the applicant before the Court, on the one hand, and the right protected by Article 8 and claimed by G. before the domestic courts, on the other.

9. In such a context the Court cannot consider the case solely from the perspective of the applicant's interests. It must examine the case in the round, in the light of the applicant's interests and those of G., as the domestic courts did. Moreover, it is well established that the outcome of an application should not vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person affected by the publication complained of, or under Article 10 by the author or publisher (see, among other authorities, *Couderc and Hachette Filipacchi Associés v. France* [GC], no. 40454/07, § 91, ECHR 2015 (extracts)).

10. This task is not always an easy one, because in the proceedings before the Court the case is presented through a single prism, namely that of the applicant whose claims have been dismissed by the domestic courts. The configuration of the case before the Court may give rise to difficulties in that regard, given that the winning party in the domestic proceedings is not automatically a party before the Court. The only possible means for that party to defend its interests before the Court is to make an application to intervene as a third party on the basis of Article 36 § 2 of the Convention, which G. did in the present case.

(ii) The Court's subsidiary review

11. It is now well established in the Court's case-law that where a conflict between Article 8 and Article 10 of the Convention has been resolved by the domestic authorities on the basis of the criteria set out by the Court, the latter would require "strong reasons" to substitute its own view for that of the authorities in question (see paragraph 201 of the present judgment). In this case, in my view, no such "strong reasons" exist.

12. If I were a domestic judge, would I have taken a different decision from that reached by the Belgian courts in the present case? Possibly. But that is not the issue. The Court is an international court, not a domestic one. Accordingly, it is not its task to state how it would have preferred the conflict between the competing rights to be resolved. It cannot lay claim to such a role. Its task is to determine whether the decision taken by the domestic courts is compatible with the criteria it has laid down under the Convention and falls within the margin of appreciation left to the national authorities in resolving disputes between individuals which involve competing rights. In other words, the Court is not called upon to carry out its own balancing exercise, but to review the exercise conducted by the domestic courts.

13. I found two factors to be particularly persuasive in the present case: the detailed examination of the case by the domestic courts (see paragraphs 14 et seq. below) and the concern to ensure the accessibility of the impugned article (see paragraphs 24 et seq. below).

B. The examination of the case by the domestic courts

14. A variety of measures may be considered in order to determine disputes arising from the digitisation of press archives (see paragraph 241 of the present judgment).

The most "drastic" measures consist in the outright removal of the archived material (an approach that was dismissed in the case of *Węgrzynowski and Smolczewski v. Poland*, no. 33846/07, 16 July 2013, under Article 8 of the Convention) or, at the opposite end of the scale, its retention

in full (deemed compatible with Article 8 in the case of *M.L. and W.W. v. Germany*, nos. 60798/10 and 65599/10, 28 June 2018).

The other options consist in the de-indexing of the article (found to be compatible with Article 10 of the Convention in *Biancardi v. Italy*, no. 77419/16, 25 November 2021), its alteration (an approach dismissed in *Fuchsmann v. Germany*, no. 71233/13, 19 October 2017, under Article 8) or the addition of a notice (deemed compatible with Article 10 in *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)*, nos. 3002/03 and 23676/03, ECHR 2009).

I note that in each of the cases cited above the Court endorsed the choice made by the national authorities, although the measures in question differed in each case.

15. The present case concerns a different measure on which the Court had not previously ruled, namely the anonymisation of digital archived content accessible to the public. As observed in the present judgment (see paragraph 249), the measure in question is specific and limited. It relates solely to the first name and surname of the person concerned and does not affect the remainder of the information conveyed. It concerns personal data which form part of the inner core of private life but which may, in some cases, be essential to the information conveyed.

16. Allow me to note in passing that our Court is no stranger to the practice of anonymisation. An applicant may in fact request and obtain anonymity, even after the decision or judgment has been delivered, where anonymisation is necessary in order to guarantee his or her safety or privacy[2]. Such cases of anonymisation are not uncommon in practice.

17. In the present case it should be noted that the Liège Court of Appeal gave lengthy reasons for its judgment in the light of the Convention. After identifying the conflicting rights it carried out a detailed balancing exercise, subject to review by the Court of Cassation, which in substance met the criteria defined by the Court in the present judgment.

18. In my view, a clear distinction needs to be made between the continued online availability of the article on the one hand and G.'s continued identification in that article on the other.

Was the article of 10 November 1994, entitled "*Série noire dans le Tournaisis : cinq morts en quatre jours*" ("Series of tragic accident in the Tournai area: five deaths in four days") of contemporary or historical interest when G. submitted his request to the domestic courts in 2012? That is open to doubt. However, the fact that the article was not of such interest does nothing whatsoever to diminish the seriousness of the acts for which G. was convicted and subsequently rehabilitated. Let me be quite clear about that.

[2] See, in this regard, the practice direction issued by the President of the Court on 14 January 2010.

That being said, it is not the continued online availability of the article that is under discussion here, but solely the continued mention of G.'s first name and surname in the publicly accessible digital archive. Consequently, the issue is not whether the article, as such, is of contemporary or historical interest, but rather whether the mention of G.'s identity is of such interest. In that regard I have difficulty discerning how his identity is relevant to the information contained in the article, especially twenty years after the events.

19. In this connection we know that in cases involving a classic conflict between the rights guaranteed by Articles 8 and 10 of the Convention, the Court usually gives precedence to the Article 8 rights where the publication in question does not contribute to a debate of public interest and where the persons concerned are not well known (see, in particular, *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, 27 June 2017, and, conversely, *Couderc and Hachette Filipacchi Associés*, cited above). Of course, this case-law does not concern digital press archives, but the assessment criteria are also of relevance in the present case and, indeed, are among the factors to be taken into consideration outlined in the judgment (see paragraph 205).

20. As to the harm alleged by the parties, G. claimed to have suffered, in his capacity as a doctor, as a result of the accessibility of the press archive mentioning his name (to which access was completely free at the time). The Liège Court of Appeal sought to describe the harm suffered by G. on account of the continued online availability of the article twenty years after the events, and weighed this up against the harm alleged by the applicant. Referring to the various letters sent to the applicant by G. giving reasons for his request, it noted that the request for anonymisation had been "based on valid grounds relating to [G.]'s professional and family circumstances".

G. had been rehabilitated in 2006, with the result that his conviction was erased from the criminal records. However, the fact that the article was kept online and disclosed his identity created a "virtual criminal record" which undermined his efforts to reintegrate.

To my mind, it has not been demonstrated before the Court that the damage sustained by the applicant as a result of the anonymisation of the digital version of the article in the online archives was greater than the damage alleged by G. if he were to continue to be identified. In truth, it is not clear to me how replacing G.'s first name and surname with the letter X could have caused serious harm to the applicant.

21. It is true that, after the Liège Court of Appeal judgment, the Court found in its judgment of 28 June 2018 in *M.L. and W.W. v. Germany* (cited above) that the German courts' refusal of the requests to prohibit the publication of personal data featuring on a radio station website and in a weekly magazine and a daily newspaper did not amount to a violation of Article 8 of the Convention. However, a number of important factors distinguish that case from the present one. Firstly, the judicial facts

underlying the published data complained of in *M.L. and W.W.* had attracted "considerable public attention" (see *M.L. and W.W. v. Germany*, cited above, §§ 98 and 106). Secondly, the applicants in that case had acquired a certain notoriety because of the publicity surrounding their trial (ibid., § 106). Thirdly, the Court was especially critical of the conduct of the applicants in that case, who had "contacted the press" (ibid., § 108) in order to publicise their application for reopening of the criminal proceedings leading to their conviction. These three factors played a decisive role in *M.L. and W.W.* and do not apply in the present case. Furthermore, in *M.L. and W.W.* the criterion of contribution to a debate of public interest was satisfied (ibid., § 106).

22. The principle of the integrity of digital archives is cardinal and must constitute the "guiding principle". Nevertheless, in exceptional circumstances this principle, despite its cardinal nature, may yield to an interest derived from another competing right guaranteed by the Convention. This may be the case where an individual is referred to by name in an article although the disclosure of his or her identity has no bearing on the information conveyed and/or causes, or is liable to cause, significant harm to his or her physical or psychological integrity. Consider, for instance, the case of a person who makes statements in an article or expresses a viewpoint therein, and who is later subjected to serious threats because of that position. Or the case of a person who is mentioned incidentally in a newspaper article in connection with an activity which she does not wish, or no longer wishes, to be a matter of public knowledge on an ongoing basis (see *Khelili v. Switzerland*, no. 16188/07, 18 October 2011).

Dismissing out of hand any possibility of conducting a balancing exercise, in the name of an absolute principle of the integrity of digital archives, could prove problematic in terms of the competing requirements of Article 8, which, according to our case-law, deserve equal respect (see *Satakunnan Markkinapörssi Oy and Satamedia Oy*, cited above, § 123). Moreover, the integrity of the archives cannot enjoy absolute protection under Article 10 of the Convention, in so far as that provision does not guarantee an absolute right.

C. "Right to remember" versus "right to be forgotten"?

23. Personally, I am not fully persuaded by the recognition under Article 10 of the Convention of a "right to remember" in favour of the press, as a kind of counterbalance to the "right to be forgotten" under Article 8.

The Court must be particularly careful in appropriating such concepts in order to avoid employing notions that create more questions than answers. In this instance, my reservations relate primarily to the fact that, while an individual may invoke a personal right to protection of his or her reputation under Article 8 (see *Pfeifer v. Austria*, no. 12556/03, § 35, 15 November 2007), I struggle to see how a journalist or a news publisher can possess, on

the basis of Article 10, a (personal) right "to remember" on behalf of the community as a whole.

D. The accessibility of the impugned article

24. Another significant factor in the present case, in my view, concerns the fact that the anonymisation of the online version of the impugned article does not affect access to the full version. I quote the Liège Court of Appeal in this regard, as its findings are important: "No request was made for the impugned article to be removed from the archives, but simply for the electronic version to be rendered anonymous; the paper archives remain intact and [the applicant] can still ensure the integrity of the original digital version" (see paragraph 29 of the present judgment).

25. It is true that the operative part of the Liège Court of Appeal judgment, regrettably, sows a seed of doubt, "[upholding] the first-instance judgment in its entirety". That judgment – given by the Neufchâteau Court of First Instance – ordered the anonymisation of the version of the article featured on the website www.lesoir.be, but also "in any other database for which [the applicant] [was] responsible".

Nevertheless, anyone reading the judgment of the Liège Court of Appeal will be left in little doubt in this regard, as it refers throughout its reasoning solely to the continued online availability of the article in non-anonymised form. In particular, it states that "[t]he most effective means of protecting [G.]'s privacy without interfering to a disproportionate extent with [the applicant]'s freedom of expression is to anonymise the article *on the website of Le Soir* by replacing [G.]'s first name and surname with the letter X" (emphasis added). The judgment further states that "[t]here is of necessity a causal link between [the applicant's] wrongful decision to *keep the article of 10 November 1994 online* without anonymisation and the damage referred to above" (emphasis added).

The fault found to have been committed under Article 1382 of the Civil Code therefore consisted in keeping the article in question online without anonymisation. It did not lie in the fact that the applicant kept the article in non-anonymised form in all the databases for which he was responsible.

26. As to the accessibility of the article, it should not be overlooked that the anonymisation complained of does not affect the possibility of searching for the article in the online archives on a basis other than G.'s first name and surname.

27. In this connection, can it be assumed that searches carried out on the basis of a person's name in the digital archives are for scientific or historical purposes? That seems doubtful, although I do not consider it necessary to dwell on this aspect.

E. Should alternative means have been given precedence in the present case?

28. Lastly, the present judgment considers some alternatives to the anonymisation order complained of (see paragraphs 240 to 254 of the judgment). This issue cannot be dealt with in a theoretical manner. It must be addressed in the light of the actual and specific context of the dispute brought before the domestic courts, taking into account the facts which they were called on to examine, the requests made before them by the parties and their own powers.

29. Thus, instead of focusing on the applicant, should G. have directed his complaint against the search engines? I hear the argument that in a case such as the present one priority should be given to taking action against the search engine operators[3]. However, there is no need to discuss this issue since we learn from the case file that the applicant himself contacted Google Belgium on three occasions (by letters of 29 December 2010, and 24 January and 23 February 2011) prior to the commencement of the domestic court proceedings, without success (see paragraph 16 of the present judgment). G. therefore had good grounds for believing that a request for delisting was bound to fail.

30. The applicant's representatives argued before the Court that another alternative to anonymisation existed, in the form of the de-indexing of the article, and stressed that this alternative had not been considered by the Belgian courts although it was less detrimental to freedom of the press than anonymisation. However, it must be observed that the applicant had opposed de-indexing in the domestic court proceedings and made no such request before the Court of Appeal, despite being the appellant in those proceedings. Hence, I do not see how the Court of Appeal can be criticised for not applying a measure which the applicant had deemed not to be appropriate and which had not been requested in the proceedings before it.

F. Conclusion

31. In view of all the foregoing, I agreed with the majority of my colleagues that there had been no "strong reasons" (see paragraph 11 above) permitting the Court to substitute its own view for that of the domestic courts in balancing the rights guaranteed by Articles 8 and 10 of the Convention in the present case.

[3] This still leaves the question as to which ones exactly? Only Google or also others? And if so, which others?

III. As regards the scope of the present judgment

32. Ultimately, does the present judgment sacrifice press freedom in favour of an undue and dangerous focus on the right to respect for private life, by forcing news publishers to systematically anonymise their archives? Most assuredly not.

33. The Court was called upon to rule only on the case brought by G. against the applicant in the Belgian courts. Hence, its finding of no violation of Article 10 of the Convention relates only to the specific circumstances of the present case. It would therefore be erroneous to infer from the present judgment any obligation for news publishers to systematically anonymise all the material in their online archives.

First of all, any measure concerning digital press archives can only be taken in response to an express request (see paragraph 209 of the present judgment).

Next, that request must be duly substantiated and a "threshold of severity" is required in order to be able to claim an infringement under Article 8 of the Convention (see paragraphs 210 and 231 of the present judgment).

Lastly, only if that threshold has been reached should a balancing exercise be carried out between the competing rights under Articles 8 and 10 of the Convention, on the basis of the criteria set out by the Court in paragraph 205. Those criteria include the contemporary, historical or scientific interest of the article and whether the person concerned is well known.

34. In the present case, taking into account the fact that these elements were lacking, the domestic courts found that the scales were tipped in favour of Article 8. That does not mean that the scales should always tip in that direction. In other cases the historical interest of the information may produce the very opposite result without the Court seeing any objection from the standpoint of Article 8 of the Convention.

35. The risk alleged before the Court that a finding of no violation of Article 10 of the Convention in the present case would be tantamount to condoning, or even encouraging, spurious attempts to falsify and rewrite history appears to me to lack foundation. Firstly, I honestly fail to see any link with the case concerning G. which the Court was called upon to examine. Secondly, the criteria laid down in paragraph 205 of the present judgment ensure that such a risk can be prevented effectively.

DISSENTING OPINION OF JUDGE RANZONI JOINED BY JUDGES KŪRIS, GROZEV, EICKE AND SCHEMBRI ORLAND

(Translation)

I. Introduction

1. The present case concerns a civil judgment against the applicant, the publisher of the Belgian daily newspaper *Le Soir*, ordering him to anonymise, on grounds of the "right to be forgotten", the electronic version of an article contained in the online archives which mentioned the full name of G., the driver responsible for a fatal road-traffic accident in 1994. Relying on Article 10 of the Convention, the applicant alleged that the order for him to anonymise the archived version of the article on the newspaper's website constituted a violation of freedom of expression, freedom of the press and freedom to impart information.

2. Thus, the case raises the novel issue of the application of the "right to be forgotten" by means of direct intervention affecting the integrity of the information contained in an article in the digital press archives whose initial publication was lawful and which was archived for journalistic purposes. The main issue at stake is to determine the methodological approach to be applied in cases of this kind and the relevant criteria to be taken into consideration.

3. In that connection I am unable to subscribe to the approach taken by the majority of the Grand Chamber, who, to my mind, view the present case through the wrong prism and deal with it using a set of instruments devised in different circumstances and ill-suited to the requirements of the modern communications era and the challenges posed by digital press archives and their accessibility. The majority opted to consider the case from an extremely narrow perspective, confined to the particular circumstances of the case and on the basis of an unduly benevolent interpretation of the domestic judgments. Accordingly, they did not conduct a thorough examination of the novel issues arising in this context and of the applicable principles, but instead took a minimalist approach that does not seem fitting for a Grand Chamber case such as this. Moreover, the approach taken by the majority risks considerably weakening freedom of the press.

4. In the following paragraphs I will not address in detail the shortcomings in the majority's reasoning and the criteria which they apply. Instead, I would like to outline briefly the way in which the Court, in my view, should have examined the case, which would have led to a finding of a violation of Article 10 of the Convention. That is the outcome for which I voted, in disagreement with the majority.

II. Alternative approach

(A) Factors to be taken into consideration

5. The Grand Chamber's task in this case was to determine what value it should attach to online press archives, but also to media archives in general. Do we wish to allow a situation in which the media are required in future, on a virtually permanent basis, to make subsequent changes to articles that were originally published in a lawful manner? What would the consequences be? I believe, in particular, that if the media were to face a constant threat of being compelled to alter the content of previously published material, they would feel obliged to display far greater restraint in their coverage of events. They would also have a powerful incentive to agree to requests for the alteration of archived information in order to avoid costly court proceedings and the risk of being on the losing side in those proceedings. All these factors would undermine the role of the press as defined by the Court's settled case-law and would undoubtedly have a chilling effect, as observed by the Court, for instance, in *M.L. and W.W. v. Germany* (nos. 60798/10 and 65599/10, §§ 103-104, 28 June 2018), in which it referred to "[the] risk that the press might refrain from keeping reports in its online archives or that it would omit individualised elements in reports". As far back as the judgment in *Times Newspapers Ltd v. the United Kingdom (nos. 1 and 2)* (nos. 3002/03 and 23676/03, § 27, ECHR 2009), the Court had stressed that the maintenance of archives was "a critical aspect of [the Internet's] role". In *Węgrzynowski and Smolczewski v. Poland* (no. 33846/07, § 65, 16 July 2013) it went further still, referring to the risk of "rewriting history", even in the context of material that was defamatory, which is not the situation in the present case.

6. Accordingly – and especially in the current geopolitical and social climate – the Court should be reinforcing press freedom and the importance attached to online press archives rather than weakening them. In that connection it should protect the collective memory and hence the "right to remember" and not, on the contrary, jeopardise it by giving precedence to the "right to be forgotten" using inappropriate and disproportionate means.

7. The alternative approach proposed here is wholly consistent with the trends emerging in numerous member States, in which claims of entitlement to be forgotten are being made with increasing frequency. These trends result from a combination of the lasting presence of information on the Internet and the functionalities of search engines. It should be borne in mind that what defines the parameters of the current debate on what is termed "the right to be forgotten", and triggers the increasing number of requests for protection of privacy, is primarily the power of search engines to make information accessible. Without those search engines the framework of the debate would be entirely different. There is therefore a need to highlight this reality and especially to emphasise that the search engines should, accordingly, be the

first port of call in seeking a response to claims of entitlement to be forgotten. This is consistent with the Court's findings in *M.L. and W.W. v. Germany* (cited above, §§ 89, 97 and 102), in which it stressed "the essential role played by the press in a democratic society" and drew a distinction between search engines, with their "amplifying effect", on the one hand, and the original publisher of the information, "whose activity is generally at the heart of what freedom of expression is intended to protect", on the other. The fact is that, prior to today's judgment, the Court had not upheld any measure removing or altering information published lawfully for journalistic purposes and archived on the website of a news outlet (see paragraph 199 of the judgment).

8. In my view, the Grand Chamber should have adopted a judgment which reflects these realities. Likewise, it should not have ignored the increasing migration of the press towards digital technology and the proliferation of news portals. To my mind, "conventional" press archives, and especially those in print form, will gradually disappear; already, numerous newspapers are published exclusively online. This makes it vital to take account of this trend and to devise a realistic response that is tailored to the demand for access to information to be restricted or even prevented.

9. The distinguishing characteristic of the present case is the fact that it concerns the digital version in the online archives, rather than the original version, of a lawfully published article. It should be added that the article was archived on the website of a media outlet for the purposes of journalism, a matter which goes to the heart of freedom of expression as protected by Article 10 of the Convention. In my view, the method and criteria employed hitherto by the Court in order to resolve a conflict between the rights guaranteed by Articles 8 and 10 of the Convention respectively are not applicable to such cases, at least not in the same way as when the initial publication of an article is being examined. As already mentioned, a body of litigation concerning the "right to be forgotten" is emerging at European level. It is not a matter of claiming a right whose contours have already been defined and which simply requires "fine-tuning". The Grand Chamber should have taken due account of this context, which differs from that of cases concerning initial publication. It should also have drawn inspiration from the domestic case-law instead of going against a clear trend.

10. In fact, the present case relates more to the "right to remember" under Article 10 than to the "right to be forgotten" under Article 8. In any event, an individual's claim of entitlement to be forgotten cannot acquire the status of a right to obtain the alteration of facts that were published lawfully and are recorded in the Internet archives.

11. Taking into account the characteristic role of press archives, which is to preserve information, the effects of the passage of time should not be accorded too much weight in determining whether an article in the archives may be altered. Information published about a past event, which is initially relevant only as recent news concerning a person not in the public eye, may

subsequently become more relevant if the person concerned comes to the forefront of public attention. Furthermore, archived information may have acquired historical, research-related or statistical interest or continue to have value for the purposes of placing recent events in context (see paragraph 222 of the judgment). All these factors weigh in favour of conserving journalistic information that was published lawfully, irrespective of its contribution to a current debate of public interest.

12. Data subjects are not obliged to contact the original website, either beforehand or simultaneously, in order to exercise their rights *vis-à-vis* search engines, as these are two different forms of processing, each with its own grounds of legitimacy and with different impacts on the individual's rights and interests (see paragraph 208 of the judgment). Thus, to my mind, the distinction between the activities of search engine operators and those of news publishers – who may rely on the freedom of expression protected by Article 10 of the Convention – is a crucial aspect to be considered in the assessment that should be made of any interference with freedom of expression. Unfortunately, the majority make too little of this distinction in their judgment.

13. In these circumstances, and particularly in the light of the principle of the integrity of digital press archives and their crucial importance, the examination of a request for the alteration of journalistic content stored in the online archives should not entail a balancing exercise between two rights of equal standing. Rather it should involve an assessment of necessity under the second paragraph of Article 10, that is to say, a thorough examination of the existence of a pressing social need and of the requirement of strict proportionality. The guiding principle should be that digital press archives, as a general rule, must retain their authenticity and integrity, especially if the lawfulness of the original article has not been called into question.

14. The main considerations in conducting such an examination, and which form the core of the approach proposed in my alternative, would be the following.

(a) In cases concerning the protection of a person's social or professional reputation under Article 8 of the Convention, the Court has held that an attack on a person's reputation must attain a certain level of seriousness and be made in a manner causing prejudice to personal enjoyment of the right to respect for private life (see paragraph 189 of the judgment). Regard being had to the circumstances of the present case, for the alteration of a lawful article stored in a digital press archive to be justified, the harm alleged by the person concerned on account of the article must be serious and duly substantiated. Thus, the interference with freedom of expression can be regarded as necessary only for particularly compelling reasons involving serious harm caused by the continued availability of the information in question on the Internet. Such harm must stem from the particularly sensitive nature of the published information and/or from the vulnerability of the person concerned,

and its extent will depend on the degree of accessibility of the specific information.

(b) If, owing to the existence of serious harm, measures are required to protect the reputation or the rights of others, they must be aimed primarily at limiting access to the original publication so as to lessen the impact on freedom of expression, on the archives and hence on the "right to remember". This can be achieved, in particular, by means of delisting of the article by the search engines. Only where this is not possible should retrospective alteration of the archived content be considered, and then solely as a measure of last resort.

(c) The national courts should therefore be particularly vigilant in examining requests, grounded on the right to respect for private life, for alteration of the electronic version of a lawful press article in the archives. Consequently, they should take into account all possible alternatives so as to be satisfied that no measures exist that would be less restrictive of freedom of expression than alteration of the wording of the original article (for an overview of such alternatives see paragraph 241 of the judgment). The idea is not that the courts should impose such measures in breach of the disposition principle applicable in civil proceedings. That has nothing to do with the disposition principle, but the national courts should ascertain in their proportionality assessment whether any such less restrictive measures exist and, if necessary, reject the request from the person concerned to alter the online archive.

15. In my view, the considerations outlined above should be applied to the circumstances of the present case in the following manner (although I will refrain from setting out the reasoning in too much detail in this separate opinion).

(B) Existence of a pressing social need

16. As regards, firstly, the nature of the archived information, the Court, in its recent case-law, has characterised data relating to criminal proceedings as sensitive (see *Biancardi v. Italy*, no. 77419/16, § 67, 25 November 2021). It has also noted that the approach to covering a given subject is a matter of journalistic freedom (see *Satakunnan Markkinapörssi Oy and Satamedia Oy v. Finland* [GC], no. 931/13, § 186, 27 June 2017, and *M.L. and W.W. v. Germany*, cited above, § 105). In any event, in the case of press articles about criminal proceedings, the inclusion of individualised information such as the full name of the person concerned is an important aspect (see *Fuchsmann v. Germany*, no. 71233/13, § 37, 19 October 2017).

17. The impugned article reported on a number of road-traffic accidents, including the one caused by G. The facts were thus of a judicial nature and were not particularly sensitive. G. did not provide evidence that he had suffered serious harm, nor did the national courts demonstrate specifically

that the continued availability of the article online was a source of such harm to his reputation. They merely found that the electronic archiving of the article created a "virtual criminal record" for a person who had been rehabilitated. The majority of the Grand Chamber endorsed that assessment without any further reasons to justify it, an approach that is at odds with the requirements set out in paragraphs 231-233 of the judgment. In my view, the published information was not, in itself, capable of justifying a measure as damaging to freedom of expression as the anonymisation of a newspaper article.

18. Secondly, with reference to the situation of the person claiming entitlement to be forgotten, it should be observed in particular that G. was not a vulnerable individual who could claim special protection such as the alteration of a press archive.

19. Thirdly, as regards the accessibility of the information in the digital archives, it is worth noting that in the present case the archives were available without restrictions and free of charge. However, that fact in itself can likewise not justify a measure entailing the alteration of a newspaper article in the online archives. Moreover, at the time of G.'s request to the applicant for anonymisation of the article the latter had already been available on the Internet for over two years, making the absence of any actual evidence of serious harm all the more striking.

20. All of the foregoing leads me to conclude that in the circumstances of the present case there was no "pressing social need" justifying the alteration of the text which had been published originally in a lawful manner. That in itself would suffice, in my view, to find a breach of the requirements of Article 10 of the Convention. Nevertheless, even examining separately the proportionality of the measure imposed I arrive at the same conclusion, as I will demonstrate below.

(C) Proportionality of the measure

21. In order to assess the seriousness of the measure imposed on the applicant and its impact on freedom of the press, and more specifically on the "right to remember", it must be ascertained whether the national courts examined the proportionality of the measure chosen and considered whether other measures less restrictive of freedom of expression were possible.

22. G. did not seek to defend his interests through an action against the operators of the search engines, but instead lodged an action against the applicant. He sought primarily the anonymisation of the article and, in the alternative, its de-indexing in the newspaper's internal search engine.

23. However, the absence of a prior delisting request should not prevent the national courts, in the context of an action against the publisher of a media website, from taking the alternative measures into account in examining the case. Not – as already stated (see paragraph 14 above) – with a view to imposing them, and thereby potentially breaching the disposition principle,

but at least with the aim of examining whether such measures might better protect the private life of the person concerned (see, as regards the consideration of other available measures, *Węgrzynowski and Smolczewski*, cited above, §§ 12 and 66) and, if necessary, refusing his or her request for alteration of the digital archive.

24. Furthermore, it is apparent from the comparative-law survey that in several States measures that are less restrictive of freedom of expression have been examined by the competent courts and authorities, and that some supreme courts have not hesitated to set aside decisions of the lower courts which did not consider the possibility of graduated protection or intermediate measures less severe than the anonymisation or removal of an article in the online archives (see, for example, paragraphs 92, 121 and 132 of the judgment). In its own case-law the Court has also taken into consideration the fact that the applicants did not take any steps to compel the search engine operators to make the information concerning the applicants less easy to find (see *Fuchsmann*, § 53, and *M.L. and W.W. v. Germany*, § 114, both cited above) or to request that the information of which they complained be rectified (see *Węgrzynowski and Smolczewski*, cited above, §§ 66-67).

25. These considerations are especially important in the present case since G.'s grievance seems to have related not so much to the article published online on the news publisher's website, but rather to its continued accessibility following the indexing of the content by search engines. Moreover, the applicant and the Government agreed that the delisting of content by search engines was, as a general rule, preferable to alteration of the archives (see paragraphs 145 and 154 of the judgment) as a means of protecting freedom of expression to the greatest extent possible. The Belgian courts did not take this factor into consideration in their reasoning, but confined themselves to examining a few alternative measures referred to by the parties (see paragraphs 245-247 of the judgment). However, G. had several other measures available to him which, while producing a similar outcome for him, would have been significantly less damaging to freedom of the press and to the integrity of the archives.

26. In the light of the increasing migration of the press towards digital technology and the proliferation of online news portals, I also believe that when a request for alteration of a press article archived on the Internet is being examined, the fact that the print version of the same article remains intact, as in the present case, is not a factor to be considered. This approach does not appear to be contradicted by the practice of the competent authorities in the Council of Europe member States (see paragraphs 91 and 132 of the judgment). Like its journalistic aim, the historical purpose of a press archive that contributes to the creation of a collective memory is not changed by the fact that it is in digital format. Accordingly, in my view, online archives should be afforded the same protection as other types of archives, including those in print form. The majority, however, in attempting to limit the impact

of their judgment to the facts of the present case by referring to the continued existence of the paper archives, overlook the reality described above (see paragraphs 7-8) and refrain from addressing the systemic issue.

27. Lastly, the chilling effect on freedom of the press stemming from a requirement for a publisher to anonymise a lawful article cannot be ignored (see paragraph 5 above; see also, in this context, the position of the sixteen third-party interveners, summarised in paragraph 165 of the judgment). Indeed, an obligation to review at a later stage the lawfulness of keeping an article online following a request from a person claiming to be a victim of the situation entails the risk, *inter alia*, that the press may refrain in future from keeping reports in its online archives or that it will omit individualised elements in articles that are likely to be the subject of such a request at a later stage (see *M.L. and W.W. v. Germany*, cited above, § 104). This would be detrimental to press freedom as a whole and thus to the "right to remember".

28. Although the majority refer to the risk of a chilling effect in the principles of the judgment (see paragraph 209), this vital element does not appear to have played a meaningful role in the application of the principles to the case at hand (see paragraph 254 of the judgment). By opting merely to assess the impact on the newspaper *Le Soir*, the majority omit to draw the necessary and coherent inferences and take no account whatsoever of the potential impact on other press articles and on the functioning of the media in general.

29. In my view, in the light of the foregoing considerations, the anonymisation order made by the domestic courts in the present case likewise did not satisfy the proportionality requirement under Article 10 of the Convention.

III. Conclusion

30. In view of the factors analysed above – the absence of a pressing social need justifying the interference with freedom of expression and the non-fulfilment of the proportionality requirement – I conclude that the order to anonymise the electronic version of the impugned article on the newspaper's website was not "necessary in a democratic society" and that, accordingly, there has been a violation of Article 10 of the Convention.