IN THE EUROPEAN COURT OF HUMAN RIGHTS

Application No. 57292/16

BETWEEN

HURBAIN

Applicant

- and -

BELGIUM

Respondent Government

WRITTEN COMMENTS OF

ARTICLE 19: Global Campaign for Free Expression
Centre for Democracy and Rule of Law
Prof. David Kaye
Digital Security Lab Ukraine
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
International Press Institute
Times Newspapers Ltd
Mass Media Defence Centre
Media Defence
Nyugat
Open Net Association

21 January 2022

INTRODUCTION

1. This third-party intervention is submitted on behalf of the above named organisations (jointly the Interveners) pursuant to leave granted on 7 January 2022 by the President of the Grand Chamber under Rule 44(3) of the Rules of the Court. The Interveners are grateful for the opportunity to make these interventions and would seek to supplement them with oral submissions of no more than fifteen minutes at the Grand Chamber hearing. As directed, these submissions do not address the facts or merits of the Applicant's case.

2. In the Interveners' view this case provides the Court with an opportunity to clarify the scope of the so-called 'right to be forgotten' as it relates to media archives in the digital form. Namely, the Grand Chamber is to determine an appropriate balance that should be struck between the freedom of expression rights of the media and the public and the protection of individuals' private lives in relation to digital media archives. It provides the Court with an important opportunity to set out the principles that should be applied by domestic courts when determining whether and in what circumstances the media can justifiably be ordered to remove content from their digital archives that is both true and public.

3. The Interveners recall that a fundamental aspect of the right to freedom of expression is the right of the media to perform its essential function as a "public watchdog" in a democratic society. The media discharges this function where it informs and educates the general public about public interest matters. Any barrier or obstacle that prevents the media from being able to discharge this function will inevitably have an adverse effect on the right to receive and impart information and ideas on matters of public concern. While there is a balance to be struck between the right to freedom of expression and the right to protection of private life, the permanent removal of information from the media archive in the digital form is not a proportionate restriction on freedom of expression and will have a deleterious impact on the integrity of that archive, which is an essential component of modern-day newsgathering and reporting. The weight of the right to freedom of expression under Article 10 is not diminished by the passing of time. There is always a fundamental importance in ensuring access to accurate information on matters of public concern. It allows the media to play their role of public watchdog in relation to past conduct.

4. The Interveners are concerned that the decision at the chamber level failed to reflect the previous jurisprudence of the Court as well as comparative standards on the 'right to be forgotten.' The Grand Chamber guidance is therefore necessary to ensure that, in the case-by-case assessment of cases, 'right to be forgotten' orders are considered proportionate only in exceptional circumstances. This guidance would also facilitate easier access to remedy for individuals pursuing their 'right to be forgotten' as they would better understand when their request would be likely to be approved or denied, what kind of requests can be made and by whom.

5. In order to assist the Grand Chamber in its deliberation, in the submission, the Interveners provide comments on the following matters:
   a) The importance of the media archives and public access to the archives;
   b) The original scope and current interpretation of the 'right to be forgotten' as a remedy available to individuals under international and comparative law;
   c) The EU legal framework on the 'right to be forgotten' as it relates to the media;
   d) The arguments as to why any interference with the integrity of the media archive should be subject to the strictest scrutiny;
   e) The relevant factors that should be considered when 'right to be forgotten' requests are made against the media archives.

SUBMISSIONS

(a) Importance of the 'media archive' and the need to ensure its integrity

6. The Interveners recall that this Court has recognised the importance of media archives, noting that they "constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free"[1] and that the public has a "right to be informed about past events and contemporary history, in particular through the use of digital press archives."[2] This Court has highlighted that in addition to its role in communicating information and ideas the press has an additional function, that of building up archives from already-published information and making those archives available to the public.[3] This constitutes an essential resource for teaching and for historical research and an important tool for journalists and other 'public watchdogs' to research, locate and gather information, to follow investigative leads, and to discover relevant facts.

7. The previous jurisprudence of this Court makes it clear that media archives are protected under Article 10 of the Convention, that it is not the role of the judicial authorities to "engage in rewriting history" and that courts should defer to editorial judgement on the content of the archives and how they are managed.[4] Interfering with the availability and the integrity of information online runs contrary to the values protected by Article 10 of the Convention. It prevents individuals from knowing about that information, thereby impairing their task of investigating and uncovering information of public interest. It also creates a risk of cancelling or altering historical memory and creating an inaccurate and selectively distorted account of the past, hindering decision making and accountability.

8. Consistent with this approach, this Court, in *M.L. and W.W. v Germany,* distinguished between the primary publisher and search engines, noting that the work of the primary publisher "is generally at the heart of what freedom of expression is intended to protect," contrasting this with the role of search engines, which it described as facilitating public access to information about individuals.[5] The Court recognised that while the rights of a person who is the subject of content available online are important, "these rights must also be balanced against the public's right to be informed about past events and contemporary history, in particular through the use of digital press archives."[6] The Court in that case considered that the inclusion of the name of an individual in a report is part of a journalist's editorial judgement.[7] Furthermore, the Court took into account that the availability of the information online was not likely to attract the attention of Internet users not seeking information about the concerned individuals.[8] In emphasising that media archives are entitled to protection under Article 10, it noted that particularly strong reasons must be provided for any measure limiting access to information which the public has the right to receive, in particular where the content relates to contemporaneous court reporting.[9] The Court also expressed concern about the chilling effect 'right to be forgotten' requests would have on media organisations with respect to archived content. The Interveners agree.

(b) Original scope and the current interpretation of the 'right to be forgotten' in international and comparative law

9. The 'right to be forgotten' is not an international legal standard. It came to the fore with the decision of the Court of Justice of the European Union (the CJEU) in *Google Spain*[10] in which the CJEU held that data protection principles apply to the publication of search results of search engines. It held that individuals should be able to ask search engines operating in the EU to delist search results obtained by a search of their name if the links were "inadequate, irrelevant or no longer relevant, or excessive." The scope of the 'right to be forgotten' was limited in a number of ways, including to search engines, and imposed the requirement to de-list search results associated with an individual's name.[11] It did not extend to the underlying content in

issue, for example newspaper archives. One of the factors the CJEU considered in reaching its decision was that, unlike a primary publisher, a search engine could create a "more or less detailed profile" of individuals through a structured overview of information concerning them.[12]

10. Subsequently, the 'right to be forgotten'[13] was formalised in the EU General Data Protection Regulation (GDPR);[14] Article 17 of which provides for "right to erasure ('right to be forgotten')." However, exceptions to the right to erasure under the GDPR are provided for exercising the right of freedom of expression and information as well as "for processing carried out for journalistic purposes" (Article 85 of the GDPR).[15] The conditions for requesting the erasure are far stricter than for delisting/de-indexing.[16] The fact that the GDPR provides for exceptions in instances where "processing is carried out for journalistic purposes" indicates the importance of the media and the role it plays in disseminating information to the public.

11. Outside of the EU, the 'right to be forgotten' is not expressly recognised in international human rights instruments or in national constitutions. Its scope remains largely undefined: it ranges from a more limited right provided through existing data protection law to broader notions encompassing the protection of reputation, honour and dignity. Importantly, many jurisdictions do not recognise the 'right to be forgotten' or an approximate equivalent,[17] or go further and affirmatively require public access to certain types of information.[18]

12. Since Google *Spain,* the CJEU has repeatedly emphasised that "the right to the protection of personal data is not an absolute right but must be considered in relation to its function in society and be balanced against other fundamental rights, in accordance with the principle of proportionality."[19] Moreover, already in *Google Spain*, the CJEU made it explicit that there is a different balancing exercise to be undertaken between a historical newspaper archive and a data subject's interest than between a search engine and data subject's interest.[20]

13. At the same time, the scope of the 'right to be forgotten' is still an evolving issue with limited case law in other jurisdictions. For instance, from a comparative perspective, courts in Argentina[21] and India[22] have applied the remedy of de-indexing against search engines (or against social media) but have generally refused requests made against the news outlets or the news archives. Even in relation to search engines, in connection to erasure of information from online archives, the Supreme Court of Japan held that "any decision to delete information from search results should prioritise the public's right to information."[23] In India, the judge of the Madras High Court rejected a request to redact the identity of an individual from court archives based on 'the right to be forgotten' in a case where the defendant was ultimately acquitted. The Court held that 'the right to be forgotten' cannot be exercised if the information is required for the performance of a task carried out in the public interest.[24]

(c) The 'right to be forgotten' and the news media in the EU

14. Article 17(3)(a) of the GDPR contains explicit derogations to the right to erasure, which provides that this right will not be applicable when the processing is necessary for the exercise of freedom of expression; Article 17(3)(d) provides an exception for that right when the processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes as long as the erasure renders impossible or seriously impairs the achievement of the objectives of the processing. These are derogations that don't require transposition and apply directly.

15. Further, Article 85(1) of the GDPR states that "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." Under Article 85(2) of the GDPR, "[f]or processing carried out for journalistic purposes…Member States shall provide for exemptions or derogations

from…Chapter III (rights of the data subject)… if they are necessary to reconcile the right to the protection of personal data with the freedom of expression and information." Article 85(2) of the GDPR does not state which exemptions or derogations have to be made at the Member State level nor does it prescribe which exceptions would be undesirable. The Interveners observe that the need for clear exceptions was raised at different moments of the legislative process leading to the adoption of the GDPR. Notably, the Parliaments of Estonia and Romania, as well as the EU Parliament and the Council referred to the need for Article 17 to have specific safeguards of direct application for freedom of expression.[25] Additionally, the European Data Protection Board has stressed the publisher's activity "is at the heart of what freedom of expression aims to protect from" and that the balance between freedom of expression, including free access to information against the data subject's rights "is an intrinsic part of Article 17 GDPR."[26]

16. The Interveners submit that the Grand Chamber should consider that most EU countries transposed Article 85 of the GDPR in a way that made clear that the right to erasure does not apply to data processed for journalistic purposes, although there is some variation on how the exemption is applied, including on whether activities must be solely or purely for journalistic purposes, and on whether the exception is absolute or subject to a balancing test. The right to freedom of expression in journalistic exception cases is interpreted in accordance with the media's role in imparting information to the public, a role crucial to democracy, and the public's right to receive information; that Article 10 right is then balanced with interests in the right to privacy.

17. The majority of European countries exempt the media from all or most of its data processing provisions, including that which has to do with a data subject's right to erasure. Austria,[27] Denmark,[28] Finland,[29] Greece,[30] Iceland,[31] Ireland,[32] Latvia,[33] Netherlands,[34] Norway,[35] Sweden,[36] Portugal,[37] Slovakia[38] and the UK[39] provide a general exception for data processing in connection to journalistic activities, and explicitly exempt journalistic activities from GDPR Article 17 or domestic provisions regarding the right to erasure. Although - as noted above - there are slight differences in how the exemptions are applied, and whether processing must be "solely" or "purely" for journalistic purposes or simply for journalistic purposes, journalists may generally rely on national provisions transposing the GDPR in these countries against right of erasure claims, including claims against the media archives.

18. Some of these countries that have an exception for journalistic activities employ a balancing test, where they balance the public interest against the rights of data subjects. The requirement for a balancing test is sometimes explicit in national laws transposing the GDPR (e.g. Latvia,[40] Ireland[41] or the Czech Republic[42]). Some countries' transposition of the GDPR is unclear as to the journalistic exception specifically in relation to the right to erasure. Many countries have a journalistic exception to major portions of their data protection acts, yet none of the provisions explicitly refer to a right of erasure, or do not define erasure as part of the definition of "processing" (e.g. Lithuania,[43] Luxembourg,[44] Italy[45] or Estonia[46]). Even in countries that either do not have a journalistic exception in their national laws transposing the GDPR, or the journalistic exception clearly does not apply to the right to erasure, such as Germany, the right to erasure is used mostly in connection to potential restrictions on mentioning again events that happened in the past but does not interfere with the legality of the articles that have already been published.[47] In these countries, and in the countries outside of the EU, the standard set by the jurisprudence of this Court remains the only significant basis for protecting freedom of expression against data protection overreach based on the GDPR (e.g. Hungary).

19. Although there is no definite framework on the application of the 'right to be forgotten' against media archives in the EU countries, the Interveners note that the scope of the right has been

mostly limited to search engines and has not been extended to digital media archives. Moreover, even in cases where courts have expanded the 'right to be forgotten' and associated privacy rights to newspapers and publishers of the original content, they did not order the original information to be completely erased.[48]

(d) Any interference with the integrity of the media archive should be subject to the strictest scrutiny

20. The Interveners submit that any interference with the integrity of the media archive should be subject to the strictest scrutiny. They are already concerned about the effect the application of the 'right to be forgotten' against search engines is having on media archives. Although content that is delisted from search engines may still remain available on the original website, for the vast majority of the public it becomes much more difficult to access that content because of delisting. If the 'right to be forgotten' is expanded even further, as in the present case, there is a substantial risk that media outlets would take steps to avoid having to deal with potential 'right to be forgotten' claims. Applying the 'right to be forgotten' to media archives would impose a vague standard to which publishers and editors would be likely to apply an over-cautious approach, for example through not maintaining online archives or exercising excessive caution to avoid individualised elements in their reports.[49] This could severely restrict media freedom, not least because "the inclusion in a report of individualised information such as the full name of the person concerned is an important aspect of the press's work."[50] It is difficult to reconcile this outcome with the purpose of archives, which contain information that might become relevant at a future, unknown date.

21. The Interveners submit that routinely requiring newspapers to anonymise articles in their digital archives would restrain investigative work of journalists and other actors. Investigative journalism often requires journalists to find potentially embarrassing or damaging information about individuals. Connected to this, news reports generate interest because they tell stories about those individuals.[51] The ability to search for someone's name is therefore often crucial to finding relevant information. Where information is anonymised, that is bound to have an impact on the important journalistic task of investigating and uncovering information of public interest. Same considerations apply to the activities of other actors performing the "public watchdog" role in societies, such as NGOs, bloggers or popular social media users.[52] These actors' work, being the principal source of impartial information in a number of Council of Europe Member States, might be impeded with the excessive or over-cautious enforcement of the 'right to be forgotten' by the editors, who might be under constant threat of severe penalties for non-compliance.

22. The requirement to anonymise a news story is fundamentally different from a requirement to delist/de-index that story. Delisting/de-indexing will prevent readers from finding information and may mislead them into believing that the information they are looking for does not exist. When a search does not reveal information, many users may conclude that there is nothing to be found about a particular person, when in fact there is information, but it has simply been delisted. This problem applies *a fortiori* where original source content is anonymised with the result that information loses relevance and becomes anodyne. It also means the archive presents a skewed and incomplete version of history for those seeking access to information. Anonymisation of news reports is even more restrictive than de-listing in terms of the media archive and its public interest function. There is also the potential for the original information to become completely lost and inaccessible to the public if it is removed from all media archives rather than just from search results. The information may not just become difficult to find; it may cease to exist at all.

23. While delisting/deindexing remains a significant infringement of the right to receive or impart information and ideas, it is a less restrictive remedy as it does not impact on the integrity of media archives and allows access to the original source for journalists, researchers or others who have a specific interest in the past events reported in that source. Furthermore, if people are not able to freely search for delisted information through Internet search engines such as Google, the practical consequence is that the delisted information will become significantly harder to access. Where that information is anonymised from the primary publisher it is effectively censored from public view.[53]

24. The Interveners also fear that extending the 'right to be forgotten' to media archives will lead to an enormous amount of requests to media outlets and online archives to have content removed, altered or anonymised. This would not only lead to an enormous or additional administrative burden for certain media outlets and archives, but also to a risk of over-reacting in terms of deleting, altering or anonymising online content in order to avoid legal proceedings or eventual liability. We note that in the case of news outlet PrimaDaNoi, recently examined by this Court in *Biancardi v Italy*, it was reported that the decision taken by the national courts to order the deletion of a two-year-old article related to a criminal proceeding triggered a series of similar requests, including 240 legal demands, 40 of which ended up in court. Given the high costs of litigation in these cases, PrimaDaNoi had to close.[54]

(e) Appropriate test for 'right to be forgotten' requests against the media archives

25. Article 10 of the Convention protects freedom of expression as a comprehensive fundamental right, which includes "the freedom to hold [and disseminate] opinions, and to receive and impart information and ideas without interference by public authority and regardless of frontiers". It also protects the right of users of the Internet to access information freely. Article 10 further protects "freedom and pluralism of the media," including journalists' ability to investigate stories, sort and collect information, and make information readily available to the public.[55] In interpreting Article 10 of the Convention, the Court has said that "[f]reedom of expression constitutes one of the essential foundations of a democratic society" and that exceptions "must be narrowly interpreted and the necessity for any restrictions must be convincingly established."[56]

26. When determining whether the restriction on access to, or removal of, content is necessary and proportionate, a court must ensure that an applicant's interest in restriction or removal has been sufficiently balanced against the right to freedom of expression and press freedom. The exercise the Court must undertake in this context is an assessment of proportionality. This entails an assessment of whether the proposed limitation satisfies a "pressing social need" and whether the measure is the least restrictive way to achieve the aim. The Grand Chamber should recognise that such restrictions can only rarely be justified and require exceptional circumstances.

27. Based on the standards outlined in the previous sections, the Interveners believe that in 'right to be forgotten' requests against the digital archives of newspapers and the media, the following factors should be considered.

28. First, there should be a **presumption that the integrity of online media archives must be preserved**. While it is the principled position of the Interveners that de-indexing/de-listing, save in exceptional circumstances, represents an unjustified interference with media freedom, it does amount to a less restrictive remedy than anonymisation, as required under international freedom of expression standards. By the same token, using standard technical tools to prevent being indexed by search engines could be considered as less restrictive than the obligation to fully delete material from their archives. This is because the claim typically arises out of a

concern that a search for an individual's name generates a public profile of that person. The legality of the underlying publication, therefore, should not be at issue, since the publication itself did not create such a profile. The media should not be in constant fear of litigation with respect to the legality of their old publications. Further, the Court should have regard to the fact that interference with the media archive has an impact on the commercial viability of the press which, in turn, impacts on press freedom.[57]

29. Second, in cases where the 'right to be forgotten' is sought to be applied against newspaper publishers and other publishers of Internet content, the Court should consider the following **additional factors:**

i) Whether a claimant has suffered substantial damage or harm due to the availability of the content linked to their name

30. In weighing the rights to privacy and freedom of expression, the Court should consider whether complainants have demonstrated that they have suffered substantial damage or harm due to the availability of the search results linked to their name.[58] Such harm should be more than mere embarrassment or discomfort. Actual harm should be required and should be sufficiently specific. In our view, this is consistent with the jurisprudence of this Court.[59]

31. The "substantial harm" criterion is especially important in circumstances where the requests link to information which is both true and of a public nature. The Interveners submit that in such cases, complainants should be required to show that their privacy is significantly affected by the information remaining in the archive in the non-altered form.[60] The substantial harm in anonymisation cases should be considerably higher.

ii) Whether sufficient weight has been given to the purpose of the media archive, i.e., the relevance of media reports in the passage of time

32. This Court should further consider whether sufficient weight was given to the role that the media archive serves: sustaining the relevance of media reports despite the passage of time. Certain information may be of limited intrinsic value when published but it may acquire more significance over time. In fact, the public interest value of the information may increase over time, either because the individual in question may become a public figure, or simply from the perspective of academic, scientific, or historical research. The German Federal Constitutional Court came to a similar conclusion in a recent decision concerning news reports about a public figure's attempt to cheat in a bar exam several decades earlier. The Constitutional Court highlighted that the right of a free press to report on matters of public interest did not expire with the mere passage of time.[61] Old media articles and reports may also provide meaningful comparison or contrast to new content on other events or acquire new meanings. The media archive is created for the very purpose of maintaining the mutual relevance of old media reports and new media reports, and therefore personal data in them continue to be necessary exactly because we do not know in advance what relevance old media reports may have.

33. Certain types of information should always remain accessible due to the overriding public interest value in them. In particular, unless domestic law provides for information to be expunged after a period of time (for example to enable the rehabilitation of juvenile offenders), information about criminal proceedings including the outcome of any proceedings in open court, should always remain available.

34. Furthermore, if a piece of information is already in the public domain, there exists an interest in preserving it and keeping it available for research and archiving as well as for ensuring that historical memory is not altered and the past is not distorted through deleting information. The authorities responsible for the protection of data themselves consider that the collection of

historical and cultural data — including data of a personal character — must be encouraged and treated as a legitimate method of preserving data beyond the date of its initial publication.[62]

iii) The right to receive information remains an important factor to be given weight in this context

35. The Interveners also submit that individuals should not be empowered to restrict access to information concerning them published by third parties, except when this information has an essentially private or defamatory character that cannot be justified or when the publication of the information is not justified for other reasons.[63] In other words, personal information may equally "belong" to the public, in the sense that the public should be able to access it. For example, the fact that a person declared bankruptcy ten years ago is information concerning not only that person but also their debtors as well as the operations and fairness of the courts. A principle by which an individual would have the ultimate right to control this information does not take account of the broader right of the public to share and receive information even if that information is placed legally within the public domain.

36. The public interest in preserving information in the media archive is stronger when publications concern a significant public figure. The profession of individuals seeking the erasure of references to them might be especially relevant if the information is connected to their professional activity. It is arguable that the public has the right to know about the activities of individuals engaged in certain professions, where issues such as criminality, negligence, or recklessness might have an impact on how they are perceived by the public. Such information should remain available in the media archive in a non-altered form.

37. Further, erasing this information from newspaper archives could have an impact on the study of history of everyday life or on monitoring tendencies that cause or perpetuate a particular crime, such as corruption. The identity of individuals can also have important value for the research in the future, for instance, without the identity of the person involved, future researchers cannot assess things like disparate conviction rates, news coverage, etc. based on the person's age, gender or race.

38. In the Interveners view, the public right to information is particularly important when the information at issue was published by the press. The Court itself has recognised that "not only does the press have the task of imparting information and ideas on matters of public interest: the public also has the right to receive them."[64] The latter is an important aspect of the balancing exercise that must take place between the right to freedom of expression and the 'right to be forgotten' but one that is only too frequently elided.[65]

CONCLUSIONS

39. In conclusion, the Interveners submit that although each member state of the Council of Europe is entitled to strike what it considers to be a fair and proper balance between the rights to freedom of expression and privacy and data protection, the Court must take into account the serious and negative impact the 'right to be forgotten' has, as a form of erasure on freedom of expression, access to information and media freedom. A 'right to be forgotten' request should be regarded as proportionate only if it is construed or framed extremely narrowly and the availability of the less restrictive remedy must be considered. The presumption of the integrity of online media archives should be preserved.

40. This submission also demonstrated that in the EU countries, the issue of whether 'the right to be forgotten' could be applied to the media archives will depend on the type of the transposition legislation of the GDPR in the country and the level of exceptions adopted for journalism purposes. EU Member States retain very considerable discretion as regards the

internal shape of the special expression regime. For these reasons, the Interveners urge this Court to ensure that any interference with the integrity of the 'media archive' is subject to the strictest scrutiny and to maintain the highest standards for the protection of media and journalistic freedom.

[1] The European Court (the ECtHR), *Węgrzynowski and Smolczewski v Poland, App no. 33846/07*, 16 July 2013, para 59.
[2] ECtHR, *M.L. and W.W. v Germany*, App nos. 60798/10 and 65599/10, 28 June 2018, para 104.
[3] ECtHR, *Observer and Guardian v the United Kingdom*, Series A no. 216, 26 November 1991.
[4] *Węgrzynowski and Smolczewski*, *op.cit.*, para 65.
[5] *M.L. and W.W. v Germany*, *op.cit.*, para 97.
[6] *Ibid.*, para 104.
[7] *Ibid.*, para 105.
[8] *Ibid.*, para 113.
[9] See ECtHR, *Timpul Info-Magazin and Anghel v Moldova,* App no. 42864/05, 27 November 2007, para 31; and *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)*, App nos. 3002/03 and 23676/03, ECHR 2009, para 41.
[10] The Court of Justice of the European Union (the CJEU), *Google Spain v AEPD & Mario Costeja Gonzalez*, 13 May 2014, C-131-12. ECLI:EU:C:2014:317.
[11] Since then, the Article 29 Working Party and Google's Advisory Council have published guidelines on the way in which 'right to be forgotten' requests under Google Spain should be treated. The Article 29 Guidelines state that there is an exception to not delist pages "for particular reasons, such as the role played by the data subject in public life," such that the data processing is justified by "the preponderant interest of the general public in having, on account of inclusion in the list of results, access to the information in question." The Working Party stressed the priority of public interest in deciding whether the links to private data should be delisted and recognised the relevance of the role of applicants in society, and emphasised that, as a rule, public interest overrules the interests of individuals. See Article 29, Working Party, Guidelines on the implementation of the Court of Justice of the European Union judgement on "Google Spain" Costeja Gonzalez" c-131/121. See also The Advisory Council to Google on the Right to be Forgotten, Final Report, pp. 11-12. The Council also recognised an exception for "information related to criminal activity", stating that the "severity of the crime, the role played by the requestor in the criminal activity, the recency and the source of the information", as well as public interest, are relevant factors to consider.
[12] *Ibid.*, paras 37, 38 and 80.
[13] See e.g. Alan Westin, Privacy and Freedom, 1967.
[14] EU General Data Protection Regulation (GDPR): Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (GDPR).
[15] Derogations are allowed, and European countries have not been consistent in their transposing of this provision into their national laws.
[16] See Article 17(1) of the GDPR.
[17] See e.g. U.S. Court of Appeals of the 9th Circuit, *Garcia v Google*, Inc., 786 F.3d 733, 745 (9th Cir. 2015), finding that American actress could not force Google to remove her association with a video on YouTube, "such a 'right to be forgotten', although recently affirmed by the Court of Justice of the European Union, is not recognized in the United States;" or the Supreme Federal Court of Brazil, RE 1.010.606/RJ (Recurso Extraordinário 1.010.606 Rio de Janeiro), finding that "[the] right to be forgotten, understood as the power to prevent, due to the passage of time, the dissemination of truthful facts or data lawfully obtained and published in analogue or digital media is incompatible with the Constitution."
[18] See e.g. the requirement under Italian law that information concerning a company director and relating to the insolvency of that company should not be removed from the companies register – CJEU, Case C-398/15 Manni (Approximation of laws Data protection Freedom of establishment) ECLI:EU:C:2017:197.The Court noted the "considerable heterogeneity in the limitation periods provided for by the various national laws" and the corresponding difficulty of identifying a single period from which the inclusion of such data in a companies' register would no longer be necessary (para 55). The Court found that there was no right for natural persons to obtain the erasure of their personal data from such a register as a matter of principle after a certain period of time (para 57).
[19] See CJEU, C-507/17 Google LLC, successor in law to Google Inc. v Commission nationale de l'informatique et des libertés (CNIL), EU:C:2019:772, para 60; or C-136/17GC and Others v CNIL, para 57.
[20] *Google Spain*, *op.cit.*, para 82.
[21] See e.g. the Supreme Court of Argentina, *Rodriguez v. Google and Another*, R. 522. XLIX, 28 October 2014.
[22] See e.g. the Kerala High Court, *Rape Survivor's Right to Be Forgotten*, 2017.
[23] Supreme Court of Japan, 2016 (Heisei) No. 45, Third Section, decision of 31 January 2017; for the description of the case, see e.g. DLA Piper, Japan: Supreme Court rules on "right to be forgotten," 14 February 2017. See also 12th Civil Division of the Tokyo High Court, judgment of 12 July 2016, No. 192, *Google Inc. v Mr. M*.
[24] The Karnataka High Court, [*Name Redacted] v. The Registrar*, Writ Petition No 62038 Of 2016.
[25] See Parliament of Estonia - European Union Affairs Committee. Position on the data protection reform -COM(2012)10 and 11. Ref. Ares(2012)564691 - 08/05/2012; Parliament of Romania. Chamber of deputies. Opinion on the data protection reform -COM(2012)9, 10 and 11, 10 October 2012. See also the European Parliament legislative resolution of 12 March 2014 on the proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD)); Position of the Council at first reading with a view to the adoption of a the GDPR.
[26] See European Data Protection Board. Guidelines 5/2019 on the criteria of the Right to be Forgotten in the search engines cases under the GDPR (part 1) Version 2.0 Adopted on 7 July 2020.
[27] Austria, Data Protection Law, Section 48(1).
[28] Denmark, Data Protection Law, Law no. 502, Section 3(I)(8).
[29] Finland, Data Protection Law, Law No. 1050/2018, Section 27.

[30] Greece, Hellenic Data Protection Authority Law, Law No. 4624), Article 28.
[31] Iceland, the Law on Data Protection and the Processing of Personal Data, Article 6.
[32] Ireland, Data Protection Act 2018, Section 43.
[33] Latvia, Data Protection Law, Section 32.
[34] Netherlands, Personal Data Law 2018 (UAVG), Article 43.
[35] Norway, Data Protection Law, Section 3.
[36] Sweden, Data Protection Law (Law 2018:218), Section 7.
[37] Portugal, Personal Data Protection Law, Law no 58/2019, Section 24(1)l and Section 24(2).
[38] Slovakia, Law No. 18/2018 Coll., Sections 78(2) and 23(4).
[39] UK, Data Protection Act 2018, Part 5 Article 26.
[40] Latvia exempts journalistic activities from all but one provision of its Data Regulation, but lays out specific conditions, namely that processing "does not affect interests of a data subject which require protection and override the public interest" and that processing is "for reasons of public interest; see Latvia, Data Protection Law, Section 32(2).
[41] Ireland requires that for processing to be exempt from compliance with GDPR provisions, compliance with the provision would be incompatible with "the right of freedom of expression and information in a democratic society; see Ireland, Data Protection Act 2018 Section 43(2).
[42] In the Czech Republic, Articles 17 and 20 of the Law No. 110/2019 Coll. combined provide an exception for personal data appropriately serving a journalistic purpose where the right to erasure is concerned, given controllers follow other civil laws and regulations surrounding mass media.
[43] In Lithuania, only a limited number of provisions of Lithuania's data protection law apply to processing of personal data by the media, with no provision referring to a data subject's right to erasure; see Law on Legal Protection of Personal Data, Article 8. Because this Law does not contain a provision in regards to the right to erasure, it is not clear whether journalists may refuse requests to erase personal data relying on the national journalistic exception.
[44] Luxemburg journalistic exemption provisions do not explicitly refer to the right of erasure, which also is not directly guaranteed in its domestic transposition of the GDPR, see Law of 1 August 2018, Article 62.
[45] The Italian law contains a provision indicating that data subjects are afforded a right to erasure under the GDPR, but the journalistic exception does not make clear what its relation is to processing for journalistic purposes; see Personal Data Protection Code, Section 100.
[46] Estonian law states that personal data may be processed and disclosed in the media for journalistic purposes without the consent of the data subject, balancing public interest and the rights of data subjects, but does not explicitly exempt journalistic activities from obligations in connection with the right to erasure; see Personal Data Protection Law, Section 4. There is no clear explanation of whether a data subject has any rights to erasure where journalistic activities are concerned; see Sections 4 and 25.
[47] See, e.g. Dr. Joris van Hoboken, The Proposed Right to be forgotten seen from the perspective of our right to remember, 2013.
[48] See Supreme Court of Spain, judgement 545/2015, 15 October 2015 (The Supreme Court emphasised that 'the right to be forgotten' does not guarantee retrospective censorship of information that was correct and rejected the order of the lower court to anonymise or censor the original article and delete the plaintiffs' personal data from the source code. It held that digital newspaper archives were in a special category protected by freedom of information, so past news contained therein can never be erased or altered retrospectively). See also Higher Regional Court, Hamburg, 7th Civil Division, 7U 29/12, 7 July 2015. See also ECtHR, *Biancardi v. Italy,* App. no. 77419/16, 25 November 2021, para 59.
[49] For examples, see e.g. Nicolas Kayser-Bril and Mario Tedeschini-Lalli, Offshore Journalism A project to maximise free speech by exploiting different jurisdictions Preliminary Report, June 2017.
[50] *M.L. and W.W. v Germany*, *op.cit.*, para 105.
[51] See e.g. *Guardian News and Media Ltd & Ors, Re HM Treasury v Ahmed & Ors* [2010] UKSC 1, 27 January 2010 and Lord Rodger's speech, para 63.
[52] See e.g. ECtHR, *Magyar Helsinki Bizottság v Hungary* [GC], App no. 18030/11, 8 November 2016, para 168.*Observer and Guardian v United Kingdom*, *Ibid.*, para 59.
[53] See e.g. ECHR, *Axel Springer v. Germany*, App. no. 39954/08, 7 February 2012; *Perinçek v. Switzerland [GC*], App. no. 27510/08, 15 October 2015; *Tagiyev and Huseynov v. Azerbaijan*, App. no. 13274/08, 5 December 2019.
[54] The New York Times, One Brother Stabbed the Other. The Journalist Who Wrote About It Paid a Price. 23 September 2019.
[55] See ECtHR, *Editorial Board of Pravoye Delo and Shtekel v Ukraine*, App no. 33014/05, 5 May 2011; *Mosley v the United Kingdom*, App no. 48009/08, 10 May 2011, para 129); *Observer and Guardian v the United Kingdom*, Series A, App no. 216, 26 November 1991; and *Bladet Tromsø and Stensaas v Norway [GC]*, App no. 21980/93, ECHR 1999-III.
[56] *Observer and Guardian v United Kingdom*, *Ibid.*, para 59.
[57] One Brother Stabbed the Other. The Journalist Who Wrote About It Paid a Price, *op.cit.*
[58] See NT1 and NT2 v Google LLC, [2018] EWHC 799 (QB). In that case, Warby J considered that the relevant harm was "that which is being or will be caused by the processing which the claimant seeks to prevent. He cannot place any great weight on harm which would result in any event [from his own conduct]" (§ 151). The element of time is therefore relevant to the assessment of the substantial harm criterion. Moreover, in that case, Warby J distinguished between the impact on the complainant's business life as opposed to his private life.
[59] ECtHR, *Karakó v Hungary*, App no. 39311/05, 28 April 2009, para 23; *Polanco Torres and Movilla Polanco v Spain*, App no. 34147/06, 21 September 2010, para 40.
[60] For a thorough analysis of how this criterion should be applied in practice, see NT1 and NT2, *op. cit*., para 151 ff.
[61] In the Proceedings on the Constitutional Complaint of M against the decision of the Federal Court of Justice from 25 March 2014 1 BvR 1240/14 – Rn. 1-34, BVerfG, decision of the 2nd Chamber of the First Senate, 23 June 2020.
[62] Contribution of the Belgian Data Protection Authority to the European Commission's consultation on the comprehensive approach to personal data protection in the European Union, Brussels 2011.
[63] See *mutatis mutandis*, In the Proceedings on the Constitutional Complaint of M against the decision of the Federal Court of Justice, *op. cit*. para 16.
[64] See e.g. ECtHR, *Fressoz and Roire v France [GC]*, App no. 29183/95, 21 January 1999, para 51.
[65] See e.g. Daphne Keller, Free Expression Gaps in the General Data Protection Regulation, Inform Blog, 6 December 2015.