Judicial Dialogue and Digitalization

CJEU Engagement with ECtHR Case Law and Fundamental Rights Standards in the EU

by **Evangelia Psychogiopoulou***

Abstract: The aim of this article is to study CJEU engagement with ECtHR case law in cases concerned with new technologies and digitalization via CJEU references to ECtHR rulings. The article examines the nature, extent and key characteristics of CJEU engagement with ECtHR case law and explores the effects of ECtHR judgments on CJEU adjudication. The analysis builds on CJEU decisions that address various aspects of digital innovation, attesting to the array of legal issues raised by digitalization and the distinct ways in which ECtHR case law is used by the CJEU. It shows that in cases dealing with digital change and transformation, CJEU interaction with ECtHR case law is not cosmetic: ECtHR case law corroborates, enriches and sometimes substantiates CJEU reasoning.

Keywords: Judicial dialogue; digitalization; new technologies; Court of Justice of the European Union (CJEU); European Court of Human Rights (ECtHR)

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A. Introduction

1 New technologies and digitalization are altering people's lives. The digital economy, the rise of platforms, social media, search engines and the expansion of a wide range of digital services are changing how individuals communicate, connect, consume, spend their free time and do business. During the past few years, legislators and policy-makers have increasingly sought to address the challenges digitalization raises for law and regulation. Courts have also been confronted with cases pertaining to digital transformation. In a European setting in particular, the Court of Justice of the European Union (CJEU) and the European Court of Human Rights (ECtHR) have ruled on a number of cases with a digital component. In doing so, they have decided disputes with fundamental rights implications, particularly for the right to freedom of expression and its corollary, the right to information, the right to respect for private and family life, the right to protection of personal data and the right to intellectual property, amongst others.

2 The aim of this article is to explore engagement of the CJEU with the case law of the ECtHR specifically via references to the rulings of the latter in cases ruled by the former that deal with digital innovation. Does the CJEU use the jurisprudence of the ECtHR in its case law? If so, to what extent and in what ways? What are the effects of the jurisprudence of the ECtHR on the reasoning of the CJEU?

3 Judicial dialogue between the CJEU and the ECtHR has been a matter of extensive scholarly debate,[1] in light

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1 See indicatively Gráinne de Búrca, 'After the EU Charter of Fundamental Rights: The Court of Justice as a Human Rights Adjudicator? (2013) 20(2) *Maastricht Journal of European and Comparative Law* 168; Francesco Cherubini, 'The Relationship

of the complexities surrounding the relationship of the European Union (EU) and the European Convention on Human Rights (ECHR). The EU has not so far become a party to the ECHR, despite the fact that Article 6(2) of the Treaty on European Union (TEU) requires the EU to accede to the ECHR. Non-accession puts the EU Member States in an awkward position, even if the *Bosphorus* doctrine, developed by the ECtHR, attenuates this to some degree.[2] As aptly observed in the literature, "to the extent that the Member States have transferred many powers to the EU in fields covered by [the ECHR], they can no longer fully ensure compliance with their international obligations [under the Convention], and there arises a potential gap in the protection of human rights".[3] This gap has been partly filled by the CJEU through use of the ECHR as a "source of inspiration" that provides "guidelines" for the development of the general principles of EU law. The CJEU has typically proclaimed the following: "... fundamental rights form an integral part of the general principles of law, the observance of which [the CJEU] ensures. For that purpose the CJEU draws inspiration from ... the guidelines supplied by international treaties for the protection of human rights on which the Member States have collaborated or to which they are signatories ... .The European Convention on Human Rights has special significance in this respect ...".[4]

4 For the CJEU, the ECHR has thus "special significance" but "does not constitute a legal instrument which has been formally incorporated into the legal order of the EU".[5] Only "as a result of the EU's accession the ECHR ... would", by virtue of Article 216(2) of the Treaty on the Functioning of the European Union (TFEU), "be binding upon the institutions of the EU and on its Member States, and would therefore form an integral part of EU law".[6] Such a position has been nuanced to some extent by Article 6(3) TEU, which declares that fundamental rights, as guaranteed by the ECHR, shall constitute general principles of the Union's law. Article 6(3) TEU makes clear that the rights set forth in the ECHR are more than sources of "inspiration", offering "guidance" for the general principles of EU law: they are general principles of EU law *themselves* and should be respected as such. At the same time, Article 52(3) of the Charter of Fundamental Rights (CFR) of the EU states that the CFR rights which correspond to rights guaranteed by the ECHR shall have the same meaning and scope as the corresponding ECHR rights and adds that the EU can grant more extensive protection than the ECHR. By means of Article 52(3) CFR, the ECHR is accordingly provided for as a *minimum* standard of human rights protection in the EU. Significantly, the *Explanations to the Charter* stipulate that the scope and meaning of the ECHR-corresponding rights of the CFR shall

between the Court of Justice of the European Union and the European Court of Human Rights in View of the Accession' (2015) 16(6) *German Law Journal* 1375; Cathryn Costello, 'The Bosphorus Ruling of the European Court of Human Rights: Fundamental Rights and Blurred Boundaries in Europe' (2006) 6(1) *Human Rights Law Review* 87; Sionaidh Douglas-Scott, 'A Tale of Two Courts: Luxembourg, Strasbourg and the Growing European Human Rights Acquis' (2006) 43(3) *Common Market Law Review* 629 and by the same author, 'The Court of Justice of the European Union and the European Court of Human Rights after Lisbon', in Sybe de Vries, Ulf Bernitz and Stephen Weatherill (eds), *The Protection of Fundamental Rights in the EU After Lisbon* (Hart Publishing 2013) 153; Federico Fabbrini and Joris Larik, 'The Past, Present and Future of the Relation between the European Court of Justice and the European Court of Human Rights' (2016) 35(1) *Yearbook of European Law* 1; Lize R. Glas and Jasper Krommendijk, 'From Opinion 2/13 to Avotinš: Recent Developments in the Relationship between the Luxembourg and Strasbourg Courts' (2017) 17(3) *Human Rights Law Review* 567; Guy Harpaz, 'The European Court of Justice and its Relations with the European Court of Human Rights: The Quest for Enhanced Reliance, Coherence and Legitimacy' (2009) 46(1) *Common Market Law Review* 105; Jasper Krommendijk, 'The Use of ECtHR Case Law by the Court of Justice After Lisbon: The View of Luxembourg Insiders' (2015) 22(6) *Maastricht Journal of European and Comparative Law* 812; Tobias Lock, *The European Court of Justice and International Courts* (Oxford University Press 2015); Laurent Scheeck, 'The Relationship between the European Courts and Integration through Human Rights' (2005) 65 *Heidelberg Journal of International Law* (ZaöRV) 837.

2 In *Bosphorus* (see *Bosphorus Hava Yolları Turizm ve Ticaret Anonim* Şirketi *v Ireland* App no 45036/98 (ECtHR, 30 June 2005)), the ECtHR accepted that state action taken in compliance with "international legal obligations" is justified as long as the "relevant organization" protects fundamental rights "in a manner which can be considered at least equivalent to that for which the Convention provides" (para 155). Should such equivalent protection be considered to be provided by the EU, the presumption should then be that an EU Member State does not depart from the requirements of the ECHR when it does no more than implementing its EU membership obligations (para 156). The presumption can be rebutted, if in the circumstances of a particular case, the protection of Convention rights is considered to be "manifestly deficient" (para. 156).

3 Bruno de Witte, 'The Use of the ECHR and Convention Case Law by the European Court of Justice', in Patricia Popelier, Catherine Van de Heyning and Piet Van Nuffel (eds), *Human Rights Protection in the European Legal Order: The Interaction Between the European and the National Courts* (Intersentia 2011) 17, at 20.

4 Case C-260/89 *ERT* [1991] ECLI:EU:C:1991:254, para 41.

5 Opinion 2/13 [2014] ECLI:EU:C:2014:2454, para 179.

6 Ibid, para 180.

also be determined by the case law of the ECtHR.[7] The non-regression clause of Article 53 CFR further proclaims that the CFR shall not "be interpreted as restricting or adversely affecting human rights and fundamental freedoms as recognized … by international agreements to which the Union or all the Member States are party", including the ECHR.

5 In light of the above, the rulings of the ECtHR enjoy authority in EU law and indeed, up until 2009 when the CFR took effect, it was customary for the CJEU to defer to the ECHR and the jurisprudence of the ECtHR in fundamental rights cases. As was noted, no other body of "foreign" case law was cited on such a frequent basis by the CJEU.[8] Post-Lisbon, the incidence of human rights adjudication before the CJEU has significantly increased. The coming into force of the CFR, the EU's own binding list of fundamental rights, has encouraged CFR-centrism on behalf of the CJEU.[9] However, this has not eliminated CJEU references to ECtHR case law. By mandating reliance on the ECHR for the interpretation of CFR rights that correspond to the ECHR, Article 52(3) CFR has allowed citations of ECtHR case law to persist. In fact, Opinion 2/13,[10] which thwarted EU accession to the ECHR on the terms specified in the Draft Accession Agreement,[11] has not hindered the ability of the CJEU and the ECtHR to determine the volume and breadth of their jurisprudential interaction. In cases concerning digital technologies and digitalization, the CJEU may have actually good reasons to look for insight into the jurisprudence of the ECtHR. The pace of technology's evolution creates numerous hurdles for judges with particularly complex questions of both facts and law permeating judicial decision-making. Judicial dialogue can help address the novelty of the factual and legal context and also bring broader benefits to the fore, in particular adjudicative coherence, which is imperative in fundamental rights disputes.[12]

6 CJEU case law addressing various aspects of digital innovation has blossomed over the past years. There is indeed a broad array of rulings where the CJEU has been confronted with legal issues arising from digital transition. Relevant cases range from cases in the fields of intellectual property and taxation of digital business to cases regarding the responsibilities of digital intermediaries, consumer protection in the digital marketplace, cybersecurity and data retention to name a few. Here the analysis builds, without purporting to be exhaustive, on cases focused on digital communication, expression and creativity in the digital ecosystem. This article focuses on CJEU cases that attest to the various ways in which digital innovation and technologies have influenced the ways in which content and information is produced, distributed and accessed and therefore how we think about and conceptualize freedom of expression, freedom of information, freedom of the arts and other rights and freedoms that may be relevant in this context. It concentrates therefore on those fundamental rights which enhance the autonomy to communicate and to seek, receive and impart information using digital innovation, rather than those rights which are put at risk by the ways in which use of these innovative technologies is generally made. It is structured as follows. Part B explores the input of ECtHR case law in copyright cases with a digital dimension, focusing on cases concerning digital publishing and creative expression with digital tools. Parts C and D respectively discuss judicial interaction with the ECtHR in cases concerning online publication requirements set forth in EU or Member States' legislation and cases that ponder questions concerning privacy, data protection and conflicts with freedom of expression in the digital environment. Part E examines use of ECtHR rulings in case law concerned with the interception of online communications. The cases explored testify to the variety of legal issues raised and also demonstrate the distinct ways in which ECtHR case law is employed by the CJEU, reflecting the manifold effects of ECtHR jurisprudence on CJEU assessment.

7 See Explanations relating to the Charter of Fundamental Rights [2007] OJ C303/17. Pursuant to Article 52(7) CFR, the Explanations "shall be given due regard by the courts of the Union and of the Member States".

8 See Douglas-Scott (2006) (n 1) 650; Glas and Krommendijk (n 1) 569; Harpaz (n 1) 109; and de Witte (n 3) 25.

9 See de Búrca (n 1) 174-175.

10 On Opinion 2/13, see, amongst others, Leonard F.M. Besselink, Monica Claes and Jan-Herman Reestman, 'A Constitutional Moment: Acceding to the ECHR (Or Not)' (2015) 11(1) *European Constitutional Law Review* 2; Bruno de Witte and Šejla Imamović, 'Opinion 2/13 on Accession to the ECHR: Defending the EU Legal Order Against a Foreign Human Rights Court' (2015) 40(5) *European Law Review* 683; Tobias Lock, 'The Future of the European Union's Accession to the European Convention on Human Rights After Opinion 2/13: Is It Still Possible and Is It Still Desirable? (2015) 11(2) *European Constitutional Law Review* 239.

11 See Fifth Negotiation Meeting Between the CDDH Ad Hoc Negotiation Group and the European Commission on the Accession of the European Union to the European Convention on Human Rights, Final Report to the CDDH, Strasbourg 10 June 2013, <www.coe.int/t/dlapil/cahdi/Source/Docs2013/47_1_2013_008rev2_EN.pdf>, accessed 22 December 2021.

12 On the benefits of judicial dialogue and interaction, see de Búrca (n 1) and Amrei Müller and Hege Elisabeth Kjos, 'Introduction', in Amrei Müller (ed, in collaboration with Hege Elisabeth Kjos), *Judicial Dialogue and Human Rights* (Cambridge University Press 2017) 1.

B. CJEU Copyright-Related Case Law with A Digital Dimension

7 Cases like *Funke Medien*, *Spiegel Online* and *Pelham and others*, which have dealt with the interpretation of *Directive 2001/29/EC* (the Copyright Directive),[13] have created ample room for the incorporation of ECtHR interpretative standards in the reasoning of the CJEU.[14] The preliminary questions raised with the CJEU in these three cases underlined the tension that exists between copyright as a fundamental (intellectual property) right, protected under Article 17(2) CFR, and other fundamental rights, in particular freedom of expression, which enjoys protection under Article 11 CFR.[15] Domestic courts have sought guidance on the adequacy of the EU copyright legislation to address this tension fully, cognizant of the fact that the Copyright Directive seeks *itself* to achieve a *fair balance* of rights and interests by combining the recognition of exclusive rights for rightholders (i.e. authors, performers and other members of the creative community) with an exhaustive set of copyright exceptions or limitations (all optional save one[16]) to the benefit of the users of protected content. Whereas the exclusive rights laid down for authors and other members of the creative community reflect their interest in the protection of their fundamental right to intellectual property, the exceptions and limitations foreseen in the Copyright Directive reflect the interests of users in the protection of their fundamental rights, covering protection of freedom of expression. When interpreting relevant rules, the CJEU has purposefully built on ECtHR case law to construe EU copyright law in compliance with free speech safeguards.

8 *Funke Medien* was about the unauthorized online publication of military reports of the German government containing information on the deployment of federal armed forces abroad. The leaked documents had been published by a daily newspaper in an unedited form and with no commentary. The German government sought an injunction claiming that the newspaper had infringed its copyright over the reports. *Spiegel Online* revolved around a controversial book publication on sexual offences committed against minors. The author, a German politician, had sought to prove, when he was a candidate in parliamentary elections, that the meaning of his book had been altered. He had therefore published the manuscript and the contested text on his website, accompanying the latter with a statement on each page dissociating himself from relevant content. An Internet news outlet, Spiegel Online, had yet published an article contending that there had been no alteration and had made available, by means of hyperlinks, the manuscript and the publisher's version of it, without the latter bearing the politician's message of dissociation. The publication was challenged as an infringement of the politician's copyright.

9 In both cases, the CJEU was asked to clarify whether freedom of expression, enshrined in Article 11 CFR, could justify an exception to copyright, beyond the exhaustive list of exceptions and limitations, formulated in Article 5 of the Copyright Directive. Although some of these exceptions, such as the exception for reporting of current events[17] and the exception for "quotations for purposes such as criticism or review",[18] had a free speech dimension, the referring judges had doubts about their applicability. The CJEU rejected the idea of an independent copyright exception on free speech grounds but acknowledged the importance of freedom of expression for the interpretation and application of the Copyright Directive.[19] A

13 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

14 Case C-469/17 *Funke Medien NRW* [2019] ECLI:EU:C:2019:623, Case C-516/17 *Spiegel Online* [2019] ECLI:EU:C:2019:625 and Case C-476/17 *Pelham and others* [2019] ECLI:EU:C:2019:624.

15 On the relationship between copyright and fundamental rights, including freedom of expression, see Elena Izyumenko, 'The Freedom of Expression Contours of Copyright in the Digital Era: A European Perspective' (2016) 19(3-4) *The Journal of World Intellectual Property* 115; Bernd Justin Jütte, 'The Beginning of a (Happy?) Relationship: Copyright and Freedom of Expression in Europe' (2016) 38(1) *European Intellectual Property Review* 11; Stijn van Deursen and Thom Snijders, 'The Court of Justice at the Crossroads: Clarifying the Role for Fundamental Rights in the EU Copyright Framework' (2018) 49 *International Review of Intellectual Property and Competition Law* 1080; Tuomas Mylly, 'The Constitutionalization of the European Legal Order: Impact of Human Rights on Intellectual Property in the EU', in Christophe Geiger (ed), *Research Handbook on Human Rights and Intellectual Property* (Edward Elgar 2015) 103; Tito Rendas, 'Fundamental Rights in EU Copyright Law: An Overview', in Eleonora Rosati (ed), *Routledge Handbook of EU Copyright Law* (Routledge 2021) 18.

16 On the implications of the discretion given to Member States in this regard, see Lucie Guibault, 'Why Cherry-Picking Never Leads to Harmonisation: The Case of the Limitations on Copyright under Directive 2001/29/EC' (2010) (1) *JIPITEC* 55.

17 See Article 5(3)(c) of the Copyright Directive (n 13).

18 Ibid., Article 5(3)(d).

19 For commentary see Sacha Garben, 'Fundamental Rights in EU Copyright Harmonization: Balancing Without a Solid

decisive role in this regard was attributed to the jurisprudence of the ECtHR and the framework the ECtHR has developed for balancing the right to intellectual property, protected under Article 1 of the First Protocol to the ECHR, and freedom of expression, safeguarded under Article 10 ECHR.

10 In *Ashby Donald and Others v France*,[20] the ECtHR ruled that domestic courts enjoy a particularly wide margin of appreciation when dealing with copyright-related interferences with the exercise of free speech in the case of *commercial* speech.[21] The case had stemmed from the conviction of the applicants for copyright infringement, following the online publication of fashion show photographs they had taken without permission, with the aim of selling them or charging a fee for their viewing. The ECtHR held that there had been an interference with the applicants' free speech, that the interference pursued the legitimate aim of protecting the intellectual property rights of the fashion designers concerned and that the interference was prescribed by law. However, the ECtHR found no violation of Article 10 ECHR, considering the interference to be "necessary in a democratic society". The ECtHR stated in particular that domestic judicial authorities had not overstepped their margin of appreciation in privileging respect for the right to intellectual property. Not only did the right to intellectual property enjoy protection under the ECHR (alongside freedom of expression);[22] also, the nature of the speech at issue should be taken into account.[23] As its purpose was commercial, it was not entitled to the same level of protection afforded to political expression and debate in the public interest.[24] The latter traditionally enjoys wide protection under the ECHR.

11 In *Ashby Donald and Others v France*, the ECtHR shed light on the intersection between copyright and freedom of expression. Copyright protection (i.e. the applicants' conviction for breach of copyright) was conceptualized as a restriction to the exercise of freedom of expression, coming within the scope of Article 10(2) ECHR concerning legitimate restrictions of free speech,[25] including restrictions for the purposes of protecting the "rights of others"; here, the right to intellectual property. The ECtHR observed that a balancing test was required between the right to intellectual property and freedom of expression.[26] It declared that domestic authorities enjoyed an important margin of appreciation when required to strike a balance between competing ECHR rights.[27] In the case at hand, as the publication of the photographs had been motivated by profit, domestic authorities had a *particularly wide* margin of appreciation.[28]

12 The type of speech at issue was thus of significance to the breadth of national courts' margin of appreciation for balancing the right to intellectual property and freedom of expression. It was this element that the CJEU integrated in *Funke Medien* and *Spiegel Online*.[29] In light of Article 52(3) CFR, the CJEU first observed that Article 11 CFR contains rights which correspond to those guaranteed by Article 10(1) ECHR.[30] Assuming in *Funke Medien* that the military documents at hand could be classified as copyright-protected works,[31] the CJEU noted that they had been published on the newspaper's website in a structured form with an introductory note, links

Framework: *Funke Medien, Pelham, Spiegel Online*' (2020) 57(6) *Common Market Law Review* 1909; Christophe Geiger and Elena Izyumenko, 'The Constitutionalization of Intellectual Property Law in the EU and the Funke Medien, Pelham and Spiegel Online Decisions of the CJEU: Progress, But Still Some Way to Go!' (2019) Center for International Intellectual Property Studies Research Paper No 2019-09; Caterina Sganga, 'A Decade of Fair Balance Doctrine, and How to Fix It: Copyright Versus Fundamental Rights Before the CJEU from Promusicae to Funke Medien, Pelham and Spiegel Online' (2019) 41(11) *European Intellectual Property Review* 683; Thon Snijders and Stijn van Deursen, 'The Road Not Taken – The CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – A Case Note on the Pelham, Spiegel Online and Funke Medien Decisions' (2019) 50(9) *International Review of Intellectual Property and Competition Law* 1176.

20 *Ashby Donald and Others v France* App no 36769/08 (ECtHR, 10 January 2013).

21 See Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45(3) *International Review of Intellectual Property and Competition Law* 316; Jütte (n 15).

22 *Ashby Donald and Others* (n 20) paras 40-41.

23 Ibid, paras 39 and 41.

24 On this, see *Mouvement raëlien suisse v Switzerland* App no 16354/06 (ECtHR, 13 July 2012) para 61.

25 *Ashby Donald and Others* (n 20) para 36.

26 Ibid, para 40.

27 Ibid.

28 Ibid, paras 39 and 41.

29 See *Funke Medien* (n 14) para 74 and *Spiegel Online* (n 14) para 58.

30 *Funke Medien* (n 14) para 73 and *Spiegel Online* (n 14) para 57.

31 *Funke Medien* (n 14) para 75.

and a space for comments.[32] Such a publication - arguably a contribution in the public interest - could "amount to 'use of works ... in connection with ... reporting'" and could therefore fall within the exception of the Copyright Directive for reporting of current events, "provided that the other conditions set out in th[e relevant] provision were satisfied" - an issue for the national court to verify.[33] In *Spiegel Online*, the CJEU did not explicitly pronounce on the effects of the use made of the "nature of speech" criterion.[34] It implied however that Spiegel Online had similarly contributed to a debate in the public interest by publishing documents that ultimately dealt with the credibility of a political figure. For the CJEU, what was essential in both cases was that national courts, when they apply the Copyright Directive (and its news reporting exception), rely on an interpretation that fully adheres to the free speech prerogatives of the CFR.[35]

13 Such a freedom of expression-oriented approach to the interpretation of the Copyright Directive was also followed in *Pelham and others*. Here, the point of contention was the practice of music sampling, i.e. the use of an extract from a protected phonogram in a derivative work, usually by means of digital technology,[36] and whether or not it comes within the scope of the right of reproduction pursuant to Article 2(c) of the Copyright Directive.[37] The latter requires Member States to provide for an exclusive right of phonogram producers "to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" of their phonograms.[38] The CJEU held that any reproduction of a sound sample, even if short, should in principle be regarded as reproduction "in part" of a phonogram and therefore as falling within the right of reproduction of phonogram producers.[39] Use of ECtHR case law on freedom of the arts enabled the CJEU to exclude the use of a sound sample that "becomes unrecognizable" in the new work from the right of reproduction.

14 Unlike the CFR which protects freedom of the arts under Article 13, the ECHR does not provide for freedom of the arts as an autonomous right. Notwithstanding, the ECtHR has recognized in several instances the artistic dimension of freedom of expression. Considering the technique of music sampling to constitute "a form of artistic expression which is covered by freedom of the arts",[40] the CJEU drew on ECtHR case law to exemplify the point that freedom of the arts, emanating from freedom of expression, has a bearing on the interpretation of the right of reproduction. Relying on ECtHR case law such as *Müller and Others v Switzerland* and *Karatas v Turkey*,[41] the CJEU affirmed that freedom of the arts, "in so far as it falls within the scope of freedom of expression ... affords the opportunity to take part in the public exchange of cultural, political and social information and ideas of all kinds".[42] When exercising freedom of the arts through sampling, users could modify the original sound sample to such an extent, resulting in the sample becoming unidentifiable in the new work. In such instances, sampling should not be construed as "reproduction". According to the CJEU, "to regard [such] a sample ... as constituting 'reproduction'... would ... fail to meet the requirement of [the Directive's] fair balance"[43] between the interest of phonogram producers in the protection of their right to intellectual property and users' right to artistic speech, protected under Article 11 CFR on freedom of expression and Article 13 CFR as *lex specialis*.

15 Use of ECtHR case law on freedom of artistic expression hence contributed in *Pelham and others* to the delimitation of the scope of the exclusive right of reproduction. Crucially, the distinction between sampling where the original sample remains recognizable in the derivative work and comes within the scope of the right of reproduction and sampling where the original sample becomes unidentifiable and does not come within the scope of the right of reproduction did not originate in the Copyright Di-

32 Ibid.

33 Ibid.

34 *Spiegel Online* (n 14) para 58.

35 *Funke Medien* (n 14) para 76 and *Spiegel Online* (n 14) para 59.

36 On this see Tracy Reilly, 'Good Fences Make Good Neighboring Rights: The German Federal Supreme Court Rules on the Digital Sampling of Sound Recordings in Metall auf Metall' (2012) 13(1) *Minnesota Journal of Law, Science and Technology* 153.

37 For commentary see Bernd Justin Jütte and João Pedro Quintais, 'The *Pelham* Chronicles: Sampling, Copyright and Fundamental Rights' (2021) 16(3) *Journal of Intellectual Property Law & Practice* 213.

38 See Article 2(c) of the Copyright Directive (n 13).

39 *Pelham and others* (n 14) para 29.

40 Ibid, para 35.

41 *Müller and Others v Switzerland* App no 10737/84 (ECtHR, 24 May 1988) and *Karatas v Turkey* App no 23168/94 (ECtHR, 8 July 1999).

42 *Pelham and others* (n 14) para 34.

43 Ibid, para 37.

rective. This was a distinction drawn by the CJEU itself in light of free speech concerns and relevant ECtHR case law. Seen in this light, ECtHR jurisprudence enabled the CJEU in this case to develop *new* concepts, shaping the scope and meaning of the right of reproduction beyond the standards set forth in the Copyright Directive.[44]

C. CJEU Case Law On Online Publication Requirements

16 The Internet differs as an information tool from other media. Its accessibility and capacity to store and communicate information to a wide audience magnifies the impact of content published online.[45] Thus, whilst the ECtHR has acknowledged that "the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information",[46] in support of freedom of expression and information, it has also recognized that "the risk of harm posed by content and communications on the Internet to the exercise and enjoyment of human rights and freedoms ... is certainly higher than that posed [for instance] by the press".[47] Seen in this light, disputes before the CJEU that focus on online publication requirements are related to digital change, its implications for free speech and the challenges it brings for the exercise of rights such as the right to privacy or the right to protection of personal data. They therefore form part of the analysis.

17 *Schecke* derived from domestic proceedings, initiated by an agricultural undertaking and a farmer, challenging the online publication, by domestic authorities, of data relating to them as recipients of funds from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD).[48] The referring court considered the publication obligation set forth in EU legislation[49] to be an unjustified interference with the right to protection of personal data, coming within the scope of Article 8 ECHR on the right to respect for private life.[50] It stayed proceedings and submitted a set of questions to the CJEU concerning, amongst other issues, the validity of the agricultural subsidies publication scheme. Reliance on ECtHR jurisprudence by the CJEU contributed to the partial invalidation of the relevant EU rules.[51]

18 The referring court framed its questions on the basis of the ECHR but the CJEU clarified from the outset that assessment would take place on the basis of the CFR,[52] emphasizing the "close connection" of the right to protection of personal data, enshrined in Article 8 CFR, with the right to respect of private life, protected by Article 7 CFR.[53] This straightforward "switch" from the ECHR to the CFR[54] did not preclude use of ECtHR case law on Article 8 ECHR. Taking note of the general limitations clause of Article 52(1) CFR, together with Articles 52(3) and 53 CFR,[55] the CJEU sought, through resort to ECtHR case law, to give meaning to what it called "the right to respect for private life with regard to the processing of personal

44 On the development of new concepts for copyright through fundamental rights analysis, see Evangelia Psychogiopoulou, 'Copyright and Freedom of Expression in the Digital Age: Unravelling the Complexities of Fundamental Rights Analysis by the Court of Justice', in Evangelia Psychogiopoulou and Susana de la Sierra (eds), *Digital Media Governance and Supranational Courts: Selected Issues and Insights from the European Judiciary* (Edward Elgar Publishing 2022, forthcoming) 91.

45 See Wolfgang Benedek and Matthias C. Kettemann, *Freedom of Expression and the Internet*, https://rm.coe.int/prems-167417-gbr-1201-freedom-of-expression-on-internet-web-16x24/1680984eae, 25, accessed 22 December 2021.

46 *Times Newspapers Ltd v the United Kingdom (nos. 1 and 2)* App nos 3002/03 and 23676/03 (ECtHR, 10 March 2009), para 27.

47 *Editorial Board of Pravoye Delo and Shtekel v Ukraine* App no 33014/05 (ECtHR, 5 May 2011), para 63. See also Wegrzynowski and Smolczewski v Poland App no 33846/07 (ECtHR, 16 July 2013), para 58.

48 Joined Cases C-92/09 and C-93/09 *Volker und Markus Schecke GbR and Hartmut Eifert v Land Hessen* [2010] ECLI:EU:C:2010:662.

49 Namely Articles 42(8b) and 44a of Council Regulation (EC) No 1290/2005 of 21 June 2005 on the financing of the common agricultural policy [2005] OJ L209/1, as amended by Council Regulation (EC) No 1437/2007 of 26 November 2007 [2007] OJ L322/1, and Commission Regulation (EC) No 259/2008 of 18 March 2008 laying down detailed rules for the application of Council Regulation (EC) No 1290/2005 as regards the publication of information on the beneficiaries of funds deriving from the European Agricultural Guarantee Fund (EAGF) and the European Agricultural Fund for Rural Development (EAFRD) [2008] OJ L76/28.

50 *Schecke* (n 48) para 44.

51 For commentary see Michal Bobek, 'Joined Cases C-92/09 & C-93/09, Volker und Markus Schecke GbR and Hartmut Eifert, Judgment of the Court of Justice (Grand Chamber) of 9 November 2010' (2011) 48(6) *Common Market Law Review* 2005.

52 *Schecke* (n 48) para 46.

53 Ibid, para 47.

54 See Bobek (n 51) 2020.

55 *Schecke* (n 48) paras 50-51.

data", deriving from Article 7 CFR, construed in conjunction with Article 8 CFR.[56] The CJEU noted that such a right concerned "any information relating to an identified or identifiable individual",[57] with express reference to *Amann v Switzerland* and *Rotaru v Romania*, where the ECtHR had ruled that the concept of private life should be interpreted broadly.[58]

19 Echoing the CFR/ECHR consistency requirements pervading Article 52(3) CFR, the CJEU stressed that any limitations that could be lawfully imposed under the CFR "corresponded" to those tolerated by the ECHR.[59] Adopting clear ECHR language, the CJEU held that the legal requirements for the *ex post* publication of the names of the aid beneficiaries, together with the amounts granted and other data, constituted an *interference* with their private life within the meaning of Article 7 CFR.[60] The fact that the published data concerned activities of a professional nature was irrelevant. As the ECtHR had ruled that the concept of "private life" comprises activities of a professional or business nature,[61] the CJEU interpreted "private life" widely, stating that it encompasses information related to the funds received by the aid beneficiaries in their business capacity.[62]

20 Turning to the justification of the interference at issue, the CJEU structured its assessment with reference to Article 52(1) CFR: the interference should be "provided by law", it should meet an EU objective of general interest and it should be proportionate to the legitimate aim pursued. Particularly as regards the test of proportionality, the CJEU pointed to relevant ECtHR case law,[63] ascertaining that a two-stage assessment was required: the measure reviewed should be appropriate for attaining the objective pursued and it should not go beyond what was necessary to achieve it.[64] Concerning the second facet, the CJEU found that the EU legislator had not properly balanced the interests at stake: consideration could have been given to publication requirements that could effectively contribute to increased transparency in public spending whilst causing less interference with the rights of natural persons benefitting from EU aid under the CFR.[65] Regarding the publication of data relating to legal persons, however, and provided that legal persons could claim protection under Articles 7 and 8 CFR by identifying natural persons in their title,[66] the CJEU concluded that a fair balance had been struck.[67] The CJEU's reasoning built directly on ECtHR case law. Pursuant to the latter, any *positive obligations* deriving from the ECHR for state authorities should not entail an impossible or disproportionate burden imposed upon them.[68] For the CJEU, any steps taken to introduce publication requirements affecting less adversely the rights of legal persons should accordingly not result in an "unreasonable administrative burden": that would have been the case if domestic authorities had been required to examine, before publication, for each legal person, whether its title identifies any natural persons.[69]

21 *Schecke* shows multifarious use of ECtHR case law. The jurisprudence of the ECtHR was used to elucidate the concept of private life, which proved key to defining the scope of relevant rights safeguarded under Articles 7 and 8 CFR and "interference" with their exercise. ECtHR rulings also informed the CJEU's proportionality test and filled the gaps when no authority sprang from the CJEU on *positive obligations* under the CFR via use of the ECtHR's jurisprudence on *positive obligations* under the ECHR. In *Commission v Hungary*,[70] which should be seen in the context of the CJEU's efforts to uphold the rule of law and democracy in the EU, Hungary was found to have breached its obligations under the CFR (and the TFEU on free movement of capital) by requiring civil society organizations receiving financial support from abroad to disclose relevant information online, in addition to imposing specific registration and declaration obligations upon them, with accompanying penalties, including dissolution. Employing CFR language this time, the CJEU built on ECtHR case law to clarify the

56 Ibid, para 52.

57 Ibid.

58 See *Amann v Switzerland* App no 27798/95 (ECtHR, 16 February 2000), para 65 and *Rotaru v Romania* App no 28341/95 (ECtHR, 4 May 2000), para 43.

59 *Schecke* (n 48) para 52.

60 Ibid, para 58.

61 *Amann v Switzerland* (n 58) para 65 and *Rotaru v Romania* (n 58) para 43.

62 *Schecke* (n 48) para 59.

63 Ibid, para 72, mentioning *Gillow v United Kingdom* App no 9063/80 (ECtHR, 24 November 1986).

64 Ibid, para 74.

65 Ibid, para 88.

66 Ibid, para 53.

67 Ibid, para 87.

68 See *K.U. v Finland* App no 2872/02 (ECtHR, 2 March 2009) para 48.

69 *Schecke* (n 48) para 87.

70 Case C-78/18 *Commission v Hungary (Transparency of associations)* [2020] ECLI:EU:C:2020:476.

concept of *limitation* on the exercise of CFR rights, within the meaning of Article 52(1) CFR.

22 With express mention of Article 52(3) CFR, the CJEU noted that the right to freedom of association, enshrined in Article 12(1) CFR, corresponds to the right to freedom of association under Article 11 ECHR;[71] and that similarly, the right to respect for private life under Article 7 CFR corresponds to the right to respect for private life under Article 8 ECHR.[72] According to ECtHR case law, the right to freedom of association should be seen as "one of the essential bases of a democratic and pluralist society, inasmuch as it allows citizens to act collectively in fields of mutual interest and in doing so to contribute to the proper functioning of public life".[73] It did not only encompass the ability to create or dissolve an association but also the ability to operate as an association without unjustified interference by the state.[74] Legislation that thus rendered significantly more difficult the operation of associations[75] amounted to an interference with the right to freedom of association.[76] Such legislation, according to the CJEU, should similarly be construed as a limitation of the right to freedom of association under Article 12 CFR.[77] Against this backdrop, the CJEU held that the publicity obligations put in place in Hungary were a limitation of freedom of association: in stigmatizing the associations and foundations concerned, they deterred the channeling of financial support from abroad and therefore hindered their operation.[78]

23 Regarding the right to respect for private and family life, the CJEU referred to *Schecke* and ECtHR case law on Article 8 ECHR[79] to underline the point that whilst legal requirements for the disclosure of natural persons' data were an outright limitation of the right to privacy,[80] the publication of data relating to legal persons could amount to a limitation of the right to respect for private life, provided that the official title of the legal persons incorporated the name of natural persons.[81] Judicial assessment then addressed the argument advanced by the Hungarian authorities that donors should qualify as "public figures", entailing no limitation of the right to respect for private life under the CFR. According to ECtHR case law, Hungary submitted, public figures could not claim the same level of protection of their private life as private persons; the public's right to be informed (safeguarded under the right to freedom of expression) could extend to aspects of their private life.[82] However, the CJEU noted that relevant ECtHR case law suggested a strict interpretation of the concept of "public figures": it did not encompass persons who did not exercise a political role.[83] In *Von Hannover v Germany (No. 2)*, for instance, the ECtHR had ruled that a distinction should be drawn between reporting facts capable of contributing to a debate in a democratic society, relating to politicians in the exercise of their official functions, and reporting details of the private life of public figures who are well known to the public but do not exercise such functions.[84] According to the CJEU, the provision by natural and legal persons alike of financial support to civil society organizations should not be construed as exercising a political role.[85] The publication obligations set forth in the Hungarian legislation

71 Ibid, paras 110-111.

72 Ibid, para 122.

73 Ibid, para. 112, mentioning *Gorzelik and Others v Poland* App no 44158/98 (ECtHR, 17 February 2004) and *Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan* App no 37083/03 (ECtHR, 8 October 2009).

74 Ibid, para 113, mentioning *Gorzelik and Others v Poland* (n 73), *Tebieti Mühafize Cemiyyeti and Israfilov v Azerbaijan* (n 73) and *Moscow Branch of the Salvation Army v Russia* App no 72881/01 (ECtHR, 5 October 2006).

75 For instance by imposing excessive registration requirements, by limiting the capacity of associations to receive financial resources, by rendering them subject to publicity requirements creating a negative image of them or by exposing them to the threat of penalties, in particular dissolution. See Ibid, para 114, mentioning *Republican Party of Russia v Russia* App no 12976/07 (ECtHR, 12 April 2011), *Parti nationaliste basque - Organisation régionale d'Iparralde v France* App no 71251/01 (ECtHR, 7 June 2007), *Grande Oriente d'Italia di Palazzo Giustiniani v Italy* App no 35972/97 (ECtHR, 2 August 2001) and *Moscow Branch of the Salvation Army v Russia* (n 74).

76 Ibid, para 114, mentioning *Grande Oriente d'Italia di Palazzo Giustiniani v Italy* (n 75).

77 Ibid.

78 Ibid, paras 115-116 and 118.

79 Ibid., para 123, with reference to *Von Hannover v Germany* App no 59320/00 (ECtHR, 24 June 2004) and *Tysiac v Poland* App no 5410/03 (ECtHR, 20 March 2007).

80 Ibid, para 124.

81 Ibid, para 125.

82 Ibid, para 129, mentioning *Von Hannover v Germany* (n 79) and *Von Hannover* v *Germany (No. 2)* App nos 40660/08; 60641/08 (ECtHR, 7 February 2012).

83 Ibid, para 130.

84 See *Von Hannover v Germany (No. 2)* (n 82) para 110. See also *Von Hannover v Germany* (n 79) paras 63-64.

85 *Commission v Hungary* (n 70) para 131.

were therefore a limitation of the right to respect for private life,[86] which as the CJEU further found, could not be justified under Article 52(1) CFR.

D. CJEU Case Law On Conflicts Between Privacy, Data Protection and Free Speech

24 Judicial dialogue and interaction can be particularly helpful when the balancing of distinct fundamental rights is at stake. ECtHR case law is well-developed on this aspect and addresses the reconciliation of ECHR rights from various perspectives and on the basis of a broad range of criteria. There is accordingly a large pool of ECtHR cases upon which the CJEU can usefully draw.

25 In *Buivids*,[87] use of ECtHR case law was made to assist domestic courts when seeking to balance the right to respect for private life and freedom of expression. The case originated in proceedings concerning the online publication on YouTube of a video recording, taken by an individual in a Latvian police station when making a statement. The Latvian Data Protection Agency had found the amateur online publisher to have breached national legislation for failure to inform the identified police officers of the specific purpose of the processing of their personal data.[88] Contesting the agency's decision, the video publisher argued before domestic courts that the video sought to "bring to the attention of society" alleged police malpractice.[89] Relevant claims were rejected and appeal proceedings before the Latvian Supreme Court resulted in a preliminary reference to the CJEU concerning the interpretation of Directive 95/46/EC (the Data Protection Directive, now repealed).[90]

26 The CJEU examined inter alia whether the video recording and publication at issue could be regarded as "processing of personal data for journalistic purposes". The Data Protection Directive required Member States to provide for exemptions or derogations from certain provisions of it "for the processing of personal data carried out solely for journalistic purposes", provided that such exemptions or derogations were "necessary to reconcile the right to privacy with the rules governing freedom of expression".[91] In light of past case law,[92] the CJEU ascertained that the journalistic derogation - now provided for in Article 85 of the General Data Protection Regulation (GDPR)[93] - applied to "every person engaged in journalism".[94] Journalism was not confined to an institutional media setting but encompassed all activities whose purpose was the disclosure to the public of information, opinions or ideas.[95] Despite such wide understanding of journalism, not all information published online should come under the concept of "journalistic activity".[96] In the case at hand, the journalistic derogation could be engaged, provided that the recording and publication of the disputed video were intended to disclose information, opinions or ideas to the public.[97] This was left to the referring court to determine.[98] Should the journalism definition be met, the journalistic derogation should apply only in so far as was *strictly necessary*.[99] To guide the domestic court in its assessment, the CJEU used ECtHR case law. Asserting, on the basis of Article 52(3) CFR, that Articles 7 and 11 CFR contain rights that correspond to those guaranteed by Articles 8 and 10 ECHR,[100] the CJEU pointed to a number of criteria established by the ECtHR for balancing the right to respect for private life and free speech.[101] These should receive proper attention by the national court and were the following: "contribution

86 Ibid, para 132.

87 Case C-345/17 *Buivids* [2019] ECLI:EU:C:2019:122.

88 Ibid, para 17.

89 Ibid, para 18.

90 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data [1995] OJ L281/31.

91 Ibid, Article 9.

92 Case C-73/07 *Satakunnan Markkinapörssi and Satamedia* [2008] ECLI:EU:C:2008:727.

93 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 [2016] OJ L 119/1.

94 *Buivids* (n 87) paras 52 and 55.

95 Ibid, paras 51 and 53.

96 Ibid, para 58.

97 Ibid, para 62.

98 Ibid, para 59.

99 Ibid, para 68.

100 Ibid, para 65.

101 The CJEU referred in particular to *Satakunnan Markkinapörssi Oy and Satamedia Oy v Finland* App no 931/13 (ECtHR, 27 June 2017).

to a debate of public interest, the degree of notoriety of the person affected, the subject of the news report, the prior conduct of the person concerned, the content, form and consequences of the publication, and the manner and circumstances in which the information was obtained and its veracity".[102]

27 In *GC and Others v CNIL*,[103] ECtHR case law was used to facilitate the balancing of the right to protection of personal data and the right to information, entrusted upon search engine operators when met with so-called "de-referencing" requests.[104] The request for a preliminary ruling focused on various aspects concerning the interpretation of the Data Protection Directive. It was lodged with the CJEU in the context of proceedings that challenged several decisions of the French Data Protection Authority, refusing to serve formal notice on Google to carry out de-referencing. Relevant de-referencing requests had been originally filed with, and denied by Google. They pertained to links in the list of search results obtained following name searches that led to content, mostly articles in the online press, containing "sensitive" personal data, within the meaning of Article 8(1) and (5) of the Data Protection Directive - now "special category" data under the GDPR.[105]

28 The contribution of ECtHR case law to CJEU reasoning focused on the de-referencing of such special category data regarding legal proceedings against an individual.[106] In accordance with EU data protection legislation, the processing of such data is subject to special restrictions[107] and various conditions of lawfulness.[108] The CJEU held that even when relevant requirements are not met, EU data protection law allows exemptions to the general prohibition of processing such data for reasons of "substantial public interest".[109] Search engine operators should accordingly examine whether data processing is "necessary for exercising the freedom of information of internet users".[110] The CJEU noted in particular that according to the jurisprudence of the ECtHR, in cases based on claims about breach of Article 8 ECHR due to the online publication of 'old' media reports of criminal proceedings, a fair balance has to be struck between the applicants' right to respect for private life and the public's freedom of information.[111]

29 Concerning the latter, in *M.L. and W.W. v Germany*, the ECtHR ruled that the public has both an interest in being informed about a topical event and in being able to conduct research into past events.[112] In this case, the applicants had alleged a violation of Article 8 ECHR due to the decision of the Federal Court of Justice not to prohibit various media outlets from making available on the Internet old reports concerning the applicants' trial and conviction for murder. The ECtHR had agreed with the refusal of the German court to issue an injunction forbidding different media organizations from allowing Internet users access to relevant reports, finding the public's interest in access to the "digital archives" of the press to be protected under Article 10 ECHR.[113] However, the ECtHR had also noted that the public's interest in access to information regarding criminal proceedings could vary in degree: it could evolve during the course of proceedings and also over time.[114]

30 The CJEU fully agreed with this point. On its basis, it held that when met with a de-referencing request

102 *Buivids* (n 87) para 66.

103 Case C-136/17 *GC and Others v Commission nationale de l'informatique et des libertés (CNIL)* [2019] ECLI:EU:C:2019:773.

104 For commentary, see Silvia de Conca, 'GC et al v CNIL: Balancing the Right to Be Forgotten with the Freedom of Information, the Duties of a Search Engine Operator (C-136/17 GC et al v CNIL)' (2019) 5(4) *European Data Protection Law Review* 561; and Jure Globocnik, 'The Right to Be Forgotten is Taking Shape: CJEU Judgments in GC and Others (C-136/17) and Google v CNIL (C-507/17)' (2020) 69(4) *GRUR International* 380.

105 See Articles 9 and 10 of Regulation (EU) 2016/679 (n 93).

106 The search results at issue linked inter alia to an article concerning a judicial investigation against one of the applicants and reports on a criminal hearing during which another applicant had been found guilty of sexual assaults on children. See *GC and Others* (n 103) paras 27-28.

107 Ibid, para 73, with reference to Article 8(5) of Directive 95/46/EC (n 90) and Article 10 of the GDPR (n 93).

108 Ibid, para 74, with reference in particular to Article 6(1)(c) to (e) of Directive 95/46/EC (n 90) and Article 5(1)(c) to (e) of the GDPR (n 93).

109 See Article 8(4) of Directive 95/46/EC (n 90) and Article 9(2)(g) of the GDPR (n 93).

110 *GC and Others* (n 103) para 75.

111 Ibid, para 76.

112 Ibid, mentioning *M.L. and W.W. v Germany* App nos 60798/10 and 65599/10 (ECtHR, 28 June 2018).

113 *M.L. and W.W. v Germany* (n 112) para 102.

114 Ibid. The ECtHR noted for instance that persons who had been convicted and whose release from prison approached had an interest in no longer being confronted with their acts in order to reintegrate in society. This would also be the case once a convicted person was finally released.

relating to links to special category data concerning an earlier stage of proceedings that "no longer correspond[s] to the current situation", search engine operators should assess whether the data subject has "a right to the information in question no longer [...] being linked with his or her name".[115] The CJEU clarified that the assessment carried out by the search engine operators should pay careful attention to the circumstances of the case, 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 [de-referencing] request, the content and form of the publication and the consequences of publication for the data subject".[116] Importantly, all these elements were criteria that had been assessed by the ECtHR when deciding *M.L. and W.W. v Germany*.[117]

31 Interestingly, the CJEU's reasoning did not end here. The CJEU chose to go one step further: should a search engine operator find that the public's right to information outweighs the right to privacy and the protection of personal data, the operator should "at the latest on the occasion of the request for de-referencing ... adjust the list of results in such a way that the overall picture it gives the internet user reflects the current legal position".[118] When refusing a de-referencing request, search engine operators should thus ensure that the list of results displayed offers Internet users the "current" state of legal affairs: links to third-party websites publishing information on the "current" legal situation should take precedence, appearing "in first place on the list".[119]

32 Judicial interaction with ECtHR case law may have offered inspiration here. The ECtHR accepted in *M.L. and W.W. v Germany* that it is primarily because of search engines that the information published by a media outlet can easily be found by Internet users.[120] The ECtHR also held that search engines amplify the scope of interference with the right to privacy resulting from a media outlet's decision to publish and maintain personal information online.[121] Because of this amplifying effect, the obligations of search engines towards the individual who was the subject of the published information could differ from those of media publishers.[122] The ECtHR yet also observed that the applicants had not informed of "any attempts to contact search-engine operators with a view to making the information concerning them less easy to find".[123] This may have induced the CJEU to acquiesce with requirements for making "old" publications that do not reflect the "current" situation "less easy" to find.

E. CJEU Case Law on the Interception of Online Communications

33 Reliance on ECtHR case law has also been visible in *WebMindLicenses*,[124] a case concerning alleged tax evasion through the conclusion of a licensing agreement for the operation of a website for the supply of interactive audiovisual services. The licensing agreement had been entered into with a company established in Portugal applying a lower standard value added tax (VAT) rate than that of Hungary where the company granting the licence was established. The request for a preliminary ruling arose in domestic administrative proceedings challenging the decision of the Hungarian tax authority that had found the licensing agreement to have circumvented national tax legislation. The commercial company that disputed the decision argued, amongst other issues, that the tax authority had used evidence obtained against it by means of intercepting telecommunications and seizing emails in the course of a parallel criminal procedure. The CJEU was asked therefore to clarify whether EU law prevented national tax authorities from using evidence obtained by such means.

34 The CJEU examined inter alia the implications of fundamental rights on the collection and use of the disputed evidence. Concerning the collection of evidence, the CJEU recalled that in accordance with Article 52(3) CFR, Article 7 CFR should be given the same meaning and scope as Article 8(1) ECHR.[125] In particular, the finding of an interference with Article 8(1) ECHR should also be seen as a *limitation*, within the meaning of Article 52(1) CFR, of the right to respect for private life, enshrined in Article 7 CFR.[126]

115 *GC and Others* (n 103) para 77.

116 Ibid.

117 See *M.L. and W.W. v Germany* (n 112) paras 98-115.

118 *GC and Others* (n 103) para 78.

119 Ibid.

120 *M.L. and W.W. v Germany* (n 112) para 97.

121 Ibid.

122 Ibid.

123 Ibid, at para 114.

124 Case C-419/14 *WebMindLicenses* [2015] ECLI:EU:C:2015:832.

125 Ibid, para 70.

126 Ibid, para 71.

In several rulings,[127] the ECtHR had ruled that the interception of telecommunications interfered with the exercise of the right to respect for private life under Article 8 ECHR.[128] The ECtHR had also reached the same conclusion concerning the seizure of emails in the course of searches at the professional or business premises of natural persons and at the premises of companies.[129] Drawing on relevant case law, the CJEU declared that the interception of telecommunications and the seizure of emails at issue amounted to a limitation of the right to respect for private life under Article 7 CFR.

35 Taking into account that the seizure of emails had occurred without judicial authorization, the CJEU referred to ECtHR case law where a number of safeguards had been identified against arbitrary interference,[130] with a view to facilitating the assessment of the necessity of the investigative measures by the referring court. The CJEU emphasized in particular requirements for a strict legal framework, limits on the powers of the state to order and effect searches without a judicial warrant, and adequate and effective safeguards against abuse both in law and in practice.[131] It also invited the referring court to verify whether the absence of prior judicial authorization could be remedied by an effective *ex post factum* judicial review relating to both the legality and the necessity of the seizure.[132] This was because in *Smirnov v Russia*, the ECtHR had ruled that such judicial review could act as a counterweight to the absence of a prior judicial warrant, provided that its efficiency was also proved.[133]

36 Concerning the use of the evidence obtained, the CJEU similarly held that it constituted a limitation on the exercise of the right to respect for private life; it had therefore to comply with the prescriptions of Article 52(1) CFR.[134] Particularly, as regards the legality criterion, the CJEU observed that according to ECtHR case law,[135] compliance implied that the legal basis enabling use of the evidence gathered should be sufficiently clear and precise, affording protection against arbitrary interference.[136] In *Malone v the United Kingdom*, the ECtHR had ruled that the legality condition did not merely refer to the existence of a legal basis enabling interference; it also related to the quality of the law and the existence of legal protection against arbitrary interference.[137] These were all crucial elements for the assessment, by the referring court, of the limitation in question. According to the CJEU, should the evidence be found to have been obtained or used in breach of Article 7 CFR, it should be disregarded.[138]

F. Conclusion

37 Judicial dialogue has many facets: it extends from case law references and citations to judicial conferences and judicial networks connecting judges. The preceding analysis focused on judicial interaction by means of CJEU references to ECtHR case law. Admittedly, references to the rulings of peers do not all carry equal weight. Judges may only make a passing reference to the jurisprudence of others, sim-

127 See *Klass and Others v Germany* App no 5029/71 (ECtHR, 6 September 1978), para 41, *Malone v the United Kingdom* App no 8691/79 (ECtHR, 2 August 1984), para 64, *Kruslin v France* App no 11801/85 (ECtHR, 24 April 1990), para 26, *Huvig v France* App no 11105/84 (ECtHR, 24 April 1990), para 25 and *Weber and Saravia v Germany* App no 254934/00 (ECtHR, 9 June 2006), para 79.

128 *WebMindLicenses* (n 124) para 71.

129 Ibid, para 72, mentioning *Niemietz v Germany* App no 13710/88 (ECtHR, 16 December 1992), *Société Colas Est and Others v France* App no 37971/97 (ECtHR, 16 April 2002) and *Vinci Construction and GTM Génie Civil et Services v France* App nos 63629/10 and 60567/10 (ECtHR, 2 April 2015) .

130 Ibid, para 77.

131 Ibid, mentioning *Camenzind v Switzerland* App no 21353/93 (ECtHR, 16 December 1997), *Funke v France* App no 10828/84 (ECtHR, 25 February 1993), *Miailhe v France (no. 1)* App no 12661/87 (ECtHR, 25 February 1993) and *Société Colas Est and Others v France* (n 129).

132 *WebMindLicenses* (n 124) para 78, mentioning *Smirnov v Russia* App no 71362/01 (ECtHR, 7 June 2007).

133 *Smirnov v Russia* (n 132) para 45.

134 *WebMindLicenses* (n 124) para 80.

135 See in particular *Malone v the United Kingdom* (n 127) para 67 and *Gillan and Quinton v the United Kingdom* App no 4158/05 (ECtHR, 12 January 2010), para 77.

136 *WebMindLicenses* (n 124) para 81.

137 *Malone v the United Kingdom* (n 127) para 67.

138 *WebMindLicenses* (n 124) para 91. The CJEU also held that in accordance with the general EU law principle of observance of the rights of defence and Article 47 CFR on the right to an effective judicial remedy, the evidence should similarly be disregarded if the tax person was not given the opportunity, in the context of the administrative procedure, to access the evidence and be heard concerning it (paras 84-85 and 91); and if the national court was not empowered to verify whether the evidence had been collected and used in breach of the rights guaranteed by EU law, especially, the CFR (paras 87-89 and 91).

ply refer to it as part of the legal context of a case or substantively rely upon it. The jurisprudence of the CJEU dealing with new technologies and digitalization shows that engagement with ECtHR case law is not "cosmetic". Reference to ECtHR case law has corroborated and fed judicial reasoning by the CJEU on several occasions. The CJEU has used ECtHR jurisprudence to support, enrich and sometimes substantiate its reasoning.

38 The CJEU has resorted to ECtHR case law to give flesh to the rights of the CFR and their limitations under Article 52(1) CFR. ECtHR case law has been used to clarify the concept of fundamental rights enshrined in the CFR[139] and shed light on the nature of limitations to their exercise.[140] ECtHR rulings have also been used to elucidate the way in which limitations should be assessed, particularly as regards control of legality and proportionality.[141] In other cases, ECtHR case law has been employed to guide the balancing of competing rights. In copyright-related cases, for instance, ECtHR interpretative standards were used in the context of weighing the right to intellectual property with freedom of expression.[142] In *Buivids*,[143] which focused on the tension between European data protection rules and online free speech, the CJEU invited the national judiciary to pay attention to ECtHR criteria regarding the balancing of the right to respect for private life and freedom of expression. In *GC and Others* v *CNIL*,[144] the CJEU drew on ECtHR case law to advise on the obligations of search engine operators when balancing the right to protection of personal data and the right to information in response to de-listing requests.

39 Relevant case law indicates genuine interaction with ECtHR case law. ECtHR rulings are accommodated in CJEU decisions to facilitate and occasionally steer the CJEU's reasoning towards particular directions. In cases like *Funke Medien*,[145] for example, ECtHR standards on freedom of expression have played a key part in the construal of EU copyright legislation, encouraging a more relaxed interpretation of the exception of the Copyright Directive for reporting of current events. In other instances, ECtHR case law has been *creatively* used. *Pelham and others* is a clear illustration of this.[146] Here, ECtHR case law on freedom of artistic speech assisted the CJEU in shaping the right of reproduction, enriching it with elements beyond those codified in the Copyright Directive.

40 Having said this, clearly, a detailed account of the ECtHR rulings referred to is not always the case. Reliance on ECtHR case law does not necessarily involve a thorough discussion of relevant decisions. In fact, the CJEU usually points to the element in the jurisprudence of the ECtHR that is useful for its assessment, without considerable analysis. Reference to ECtHR case law is commonly made alongside reference to the horizontal clause of Article 52(3) CFR. Nonetheless, here too, a rather easy, undemanding endorsement of CFR/ECHR "equivalence" can be observed. The CJEU does not systematically explain what is the precise element, when it comes to the scope, meaning and limitations of the CFR rights, that corresponds to the ECHR and its interpretation by the ECtHR. This tendency of the CJEU to approach questions of consistency between the CFR and the ECHR rather effortlessly, by broad reference to ECtHR case law, confirms the "special significance" of the ECHR in the EU legal order but is not without risk. The CJEU could place much emphasis on the ECHR minimum standard, refraining from examining whether the EU should offer more extensive protection to the particular ECHR-corresponding right of the CFR. Such temptation to use the ECtHR's interpretation as both a minimum *and* maximum standard should be resisted.

41 *GC and Others v CNIL*[147] might be promising in this regard. Whilst the CJEU has directly drawn on ECtHR standards to inform the balancing of the right to protection of personal data and the right to information, it did not shy away from building on such standards, advancing its own understanding of the obligations of search engine operators when examining de-referencing requests. The CJEU put forward a data protection-sensitive reading of the duties of search engine operators even when the right to information outweighs the right to protection of personal data. When rejecting a de-refencing request, the CJEU ruled, search engine operators should, difficult and complex as it might be, afford precedence to links to information reflecting the "current" state of affairs. ECtHR case law may have offered some inspiration in this regard but the *dictum* was clearly of the CJEU. Now, with the EU's increased emphasis on regulatory intervention

139 See *Schecke* (n 48) and *Commission* v *Hungary* (n 70).

140 Ibid.

141 See *Schecke* (n 48) and *WebMindLicenses* (n 124).

142 See *Funke Medien* (14), *Spiegel Online* (n 14) and *Pelham and Others* (n 14).

143 See *Buivids* (n 87).

144 See *GC and Others* (n 103).

145 See *Funke Medien* (n 14).

146 See *Pelham and Others* (n 14).

147 See *GC and Others* (n 103).

that addresses the challenges of the digital era,[148] there may be ample opportunities for the CJEU to examine whether EU law may give more extensive protection to fundamental rights than the ECHR and the ways to do so.

148 See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 2030 Digital Compass: the European way for the Digital Decade, COM(2021) 118.