

Draft General Data Protection Regulation

European journalists and press publishers urge Member States to not to lower the level of protection of Press Freedom

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EFJ, the European Federation of Journalists, ENPA, the European Newspaper Publishers' Association, EMMA, the European Magazine Media Association, and EPC, the European Publishers' Council, acknowledge the latest suggestions proposed by the Italian Presidency regarding Article 80 of the General Data Protection Regulation (GDPR), but remain extremely concerned about developments in the negotiations between Member States' delegations in the Working Party on Information Exchange and Data Protection (DAPIX).

As European journalists and press publishers have mentioned several times before, a robust, directly applicable, and legally binding exemption for journalistic data processing is indispensable for European press freedom. Publishers and journalists cannot investigate, report, publish, store, and archive information if they have to rely on the consent of the "data subject" or a legitimate interest, or would be subject to controls by data protection authorities.

Leaving a broad margin of flexibility to Member States as to how they implement the exemption is detrimental to press freedom for two reasons.

- An ambiguous wording, requiring the Member States to simply reconcile the rights to data protection with freedom of expression (rather than having an obligation to provide for exemptions for journalistic data processing as is the case in the current Data Protection Directive), opens the door to legislation which restricts the media. With so much flexibility, data protection law could easily become an efficient tool to control editorial content of the press, if it is not clearly exempted from applying to journalistic activities.
- An ambiguous wording would make it optional for Member States to implement clear exemptions in favour of press freedom and leave room for manipulation. For example, the current wording would create an imbalance between privacy rights and press freedom, setting the precedent of privacy rights over the latter. In practice, this means that an article cannot be published without the consent of e.g., a "data subject" referred to in the article. This will have a great impact on investigative journalism. It is clear that **current exemptions in national law** transposing Article 9 of the Directive **cannot be upheld** under an Article 80 of the Regulation falling far behind the current level of protection.

It is therefore crucial to have the legal certainty that Member States will continue to be obliged to – and indeed able to – introduce vital exemptions and derogations to data processing rules in order to allow for journalistic data processing. This is particularly crucial in the context of this directly binding Regulation which is introducing more stringent data protection rules. It is particularly important in this regard that in the wording of Article 80:

- a) the obligatory nature of the exemption (“Member States **shall** provide for exemptions...”), as set out in Article 9 of the current Data Protection Directive is maintained, together with the Commission’s original proposal “**in order to reconcile**” the right of to the protection of personal data with freedom of expression.
- b) the Chapters to be exempted for journalistic data processing are clearly enumerated and include Chapters II to VIII (inclusive).

We understand that the Italian Presidency’s latest suggested wording for Article 80 (of 24 October 2014) stipulates that Member States *may* provide for exemptions, *if they are necessary* to reconcile the right to the protection of personal data with the freedom of expression. This represents a major weakening of the current level of press freedom protection for the following reasons:

- It is **not mandatory for Member States to provide for exemptions at all**. Even in cases where an exemption is *necessary to reconcile* the conflicting rights, the exemption would still be optional for the respective Member States. Member States would be entitled to infringe press freedom by European law.
- The option to provide exemptions depends on a necessity test. Member States would therefore have to **justify their exemptions** in light of what is, in principle, the priority of the application of data protection law. This leaves the Member States with **less margin to shape their national protection** of press freedom.
- In order to ensure that there is a clear exemption for journalistic data processing, the exemption **needs to explicitly refer to data processing for journalistic purposes** rather than only referring to freedom of expression. Journalistic data processing cannot be compared with other forms of exercising the right to freedom of expression, as journalists are subject to an encompassing framework of media laws and self-regulatory rules, which are enforced respectively by national courts and self-regulatory bodies.
- The Chapters listed which are not to be applied to journalistic data processing **do not include Chapter VIII** (Remedies, Liability and Sanctions). It is important that remedies, liability and sanctions in the field of journalistic data processing are also excluded, as they are dealt with in the media, defamation, and libel law of the Member States.

It is important to underline that the current Article 9 of the Data Protection Directive, just like the robust exemption in the proposed Regulation, are a consequence of balancing fundamental rights and – in the case of the proposed Regulation – applying the Charter of Fundamental Rights of the European Union. Article 52(1) of the Charter does not require that its wording is transferred into the Regulation, but it rather defines the principle of proportionality when it comes to limitation of fundamental rights. It is important to bear in mind that **data protection is a limitation of the fundamental right set out in Article 11, which protects press freedom** against interference e.g. by means of a Regulation.

We therefore urge the Member States to stand up for a clear and directly binding exemption in Article 80, as suggested below. This will:

- give Member States the **broadest scope to balance the conflicting rights** in their respective national media laws
- ensure that **all** EU Member States will have to uphold a **minimum level of press freedom** by not applying stringent EU data protection rules to journalistic data processing.

The minimum solution to merely uphold the *acquis communautaire* as regards press freedom – in line with Article 9 of the Data Protection Directive - would therefore be an exemption as follows:

For the purposes of paragraph 1,¹ Member States shall provide for exemptions or derogations from the provisions in Chapter II (principles), Chapter III (rights of the data subject), Chapter IV (controller and processor), Chapter V (transfer of personal data to third countries or international organizations), Chapter VI (independent supervisory authorities), Chapter VII (co-operation and consistency), and Chapter VIII (remedies, liability and sanctions) for the processing of personal data carried out for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the right to freedom of expression.

Contacts:

Catherine STARKIE
Director Legal Affairs
EMMA
Catherine.starkie@magazinemedia.eu
+32 (0)2 536 06 02

Nikolas MOSCHAKIS
European Policy Adviser
EPC
nikolas.moschakis@epceur.ope.eu
+32 (0)2 231 12 99

Sophie SCRIVE
Deputy Executive Director
ENPA
sophie.scrive@enpa.be
+32 (0)2 551 01 90

Renate SCHROEDER
Director
EFJ
renate.schroeder@ifj.org
+32 (0) 2 235 2208

¹ The exemption could be implemented as Article 80 paragraph 2 after a general stipulation in paragraph 1. For other forms of exercising the right to freedom of expression another paragraph could be added making it optional for Member States to provide for exemptions if necessary.