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BRE-JBZ

From: Kaai, Geran
Sent: vrijdag 3 april 2015 15:55
To: Verweij, Ellen
Subject: FW: Article 80: Processing of personal data and freedom of expression of the Draft General Data Protection Regulation
Attachments: letter to DAPIX_20October 2014_final.pdf
Importance: High

From: BRE-JUS
Sent: maandag 20 oktober 2014 16:08
To: Grave, Martijn-de; Ruiter, Mienieke-de; Alink, Marnix; Kaai, Geran; Sorel, Alexander; Luijsterburg, Sander; Zwart, Jan; Kroner, Laetitia; Leenders, Sophie; Rip, Jet; Dam, Caroline-ten
Subject: FW: Article 80: Processing of personal data and freedom of expression of the Draft General Data Protection Regulation
Importance: High

Van: [REDACTED]
Verzonden: maandag 20 oktober 2014 16:07:41 (UTC+01:00) Brussels, Copenhagen, Madrid, Paris
Aan: [REDACTED]
Onderwerp: Article 80: Processing of personal data and freedom of expression of the Draft General Data Protection Regulation

Dear member of DAPIX,

Following the European Council's orientation debate on the draft General Data Protection (GDPR) Regulation on 10 October we understand that the Working Party on Information Exchange and Data Protection will be discussing inter alia options for Article 80 on 21/22 October.

The undersigned, from organisations representing journalists, press publishers and radio broadcasters in Europe would ask the Member States to prevent any weakening of press freedom and give their full support to a **robust, directly applicable and legally binding exemption for journalistic data processing in Article 80 of the GDPR as originally proposed by the European Commission.**

Such an exemption from data protection rules is **indispensable to ensure that journalists and publishers [and all media/ broadcasters] are able to fulfil their daily mission.** This includes investigating, writing, reporting, publishing, storing and archiving information – and protection of sources of this information - in the interest of all citizens and our democratic society. Journalistic activities, although exempted from specific chapters of the GDPR, would continue to be regulated by Member States' national libel, defamation and media laws, including those relating to privacy and other fundamental rights, which are guaranteed in each Member State.

At present, Member States are obliged to provide for exemptions or derogations from specific Chapters of the existing Directive for the processing of personal data carried out for journalistic purposes. Up until now, the only text we had seen from the Council to amend Article 80 of the GDPR did not ensure this minimum guarantee for press freedom and journalism. This text, which now appears as Option I in the Annex of the

Presidency note of 16 October, requires Member States' law merely to "reconcile" the right of the protection of personal data with the right to freedom of expression. Such wording would open the door to new restrictions on press freedom under the GDPR, as it removes any obligation for Member States to exempt journalistic data processing from the relevant Chapters of the text and would thus, in effect, allow governments to apply any of the GDPR's provisions to journalistic works and editorial press content. Therefore we do not support Option I.

By leaving such a broad and unclear discretion to governments in the EU, **editorial teams of newspapers, magazines and other media will be subject to data protection law and therefore to the control of national data protection authorities.** Moreover, Member States willing to protect journalistic data processing might even be hindered to do so since it is not clear which form of reconciling "pursuant to the Regulation" would be in line with European law.

Option II, contained in the annex of the Presidency Note of 16 October concerning Article 80, could however form the basis of an alternative approach, but **only if three vital changes are made** to ensure that we can maintain a minimum level of protection for press freedom:

1. **Other fundamental rights shall be fully respected when applying this Regulation, in particular the freedom of expression, including the freedom to hold opinions and to receive and impart information and ideas and the freedom and pluralism of the media.**
2. **Member States ~~may~~ 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 from ~~the articles 73, 74, 76 and 79 to 79b of~~ 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 ~~if they are necessary~~ **IN ORDER** to reconcile the right to the protection of personal data with the freedom of expression.**

The reasoning for the above changes is:

- If a directly applicable exemption (our preference) cannot be agreed by Member States, the minimum acceptable solution is that **the exception is at least binding on Member States.** It is therefore indispensable to use the wording "shall provide" instead of "may provide", which makes the exemption optional. The obligation to foresee exemptions and derogations is currently mandatory in Article 9 of the 95/46/EC Directive. It is not acceptable to lower the level of protection of this exemption, especially when considering that the obligations set out in the Regulation will be directly applicable.
- The wording "if necessary to reconcile" leaves it again up to the Member States to decide if and how they implement an exception. **The exemptions and derogations have to be provided "in order to reconcile" rights to data protection with freedom of the press/expression** (as suggested in the Commission's original proposal). Compared to the current Article 9 of the 95/46/EC Directive this **binding wording is necessary since the Regulation is directly applicable.** The combination of "may provide" and "if necessary to reconcile" would allow Member States not to foresee an exemption, even though an exemption is necessary to reconcile data protection with the freedom of the press.

- An enumeration of the Chapters II to VIII, each followed by its title in brackets – e.g. Chapter II (General Principles) – is necessary to assure a clear enumeration of the rules to be exempted. The Option II approach, which leaves out references to some articles in Chapter VIII (which concerns remedies, liability and sanctions), is **not legally coherent**: it is necessary to have a total exemption from this chapter as its application depends on other provisions/chapters from which we are exempted.

Failing to clearly exempt journalistic data processing would for example mean that journalists would need the consent of a politician in the case that they want to report about him or her, or would need to delete a respective article on the basis of the right to be forgotten; journalists would need to inform any concerned “data subject” about articles before they are published; journalists would be obliged to reveal their sources; and archiving articles without prior consent would be against the law. It therefore goes without saying that **press freedom requires the possibility to process personal data without prior consent by a data subject**.

While we support a harmonised data protection law ensuring better protection of citizens’ data, it would be a dangerous step back for European democracies to sacrifice press freedom in the process. **AER**, the Association of European Radios, **EFJ**, the European Federation of Journalists, **EMMA**, the European Magazine Media Association, **ENPA**, the European Newspaper Publishers’ Association, and **EPC**, the European Publishers Council, have raised serious concerns that the **existing level of protection guaranteed by the current Data Protection Directive is at risk of not being maintained^[1]**.

We therefore urge you to **support the proposed amendments to Option II**, to ensure the exemption is explicit and legally binding on all Member States.

Thank you for considering our urgent request.

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^[1] See petition by journalists and publishers associations: <https://www.change.org/petitions/art80>

Brussels, 20 October 2014

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Article 80: Processing of personal data and freedom of expression of the Draft General Data Protection Regulation

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- The wording “if necessary to reconcile” leaves it again up to the Member States to decide if and how they implement an exception. **The exemptions and derogations have to be provided “in order to reconcile” rights to data protection with freedom of the press/expression** (as suggested in the Commission’s original proposal). Compared to the current Article 9 of the 95/46/EC Directive this **binding wording is necessary since the Regulation is directly applicable.** The combination of “may provide” and “if necessary to reconcile” would allow Member States not to foresee

an exemption, even though an exemption is necessary to reconcile data protection with the freedom of the press.

- An enumeration of the Chapters II to VIII, each followed by its title in brackets – e.g. Chapter II (General Principles) – is necessary to assure a clear enumeration of the rules to be exempted. The Option II approach, which leaves out references to some articles in Chapter VIII (which concerns remedies, liability and sanctions), is **not legally coherent**: it is necessary to have a total exemption from this chapter as its application depends on other provisions/chapters from which we are exempted.









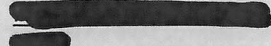






Failing to clearly exempt journalistic data processing would for example mean that journalists would need the consent of a politician in the case that they want to report about him or her, or would need to delete a respective article on the basis of the right to be forgotten; journalists would need to inform any concerned “data subject” about articles before they are published; journalists would be obliged to reveal their sources; and archiving articles without prior consent would be against the law. It therefore goes without saying that **press freedom requires the possibility to process personal data without prior consent by a data subject**.

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We therefore urge you to **support the proposed amendments to Option II**, to ensure the exemption is explicit and legally binding on all Member States.

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¹ See petition by journalists and publishers associations: <https://www.change.org/petitions/art80>

an exemption, even though an exemption is necessary to ensure data protection with the freedom of the press.

An exemption to the Chapter II is VII, which followed by its title in brackets - e.g. Chapter II (General Principles) - is necessary to ensure a clear exemption of the rules to be exempted. The Chapter II (General Principles) which is not exempted, is not exempted in Chapter VII (which contains various, detailed and technical) is not legally exempted. It is necessary to have a total exemption from the Chapter II as its application depends on other provisions which are exempted.

It is clearly evident that journalistic data processing would be exempted from the exemption would need the consent of a publisher in the case that they want to report about him or her, or would need to delete a respective article on the basis of the right to be forgotten. Journalists would need to inform any concerned 'data subject' about their activities before they are published; journalists would be obliged to reveal their sources and activities without prior consent would be against the law. It therefore goes without saying that press freedom requires the possibility to process personal data without prior consent by a data subject.

When we suggest a harmonised data protection law ensuring better protection of citizens' data, it would be a dangerous step back for European democracies to restrict press freedom in the present. AER, the Association of European Radio, EBU, the European Federation of Journalists, EBU, the European Magazine Media Association, EBU, the European Newspaper Publishers' Association, and EBU, the European Publishers' Council, have raised serious concerns that the existing level of protection guaranteed by the current Data Protection Directive is at risk of being weakened.

We therefore urge you to support the proposed amendments to Chapter II to ensure the exemption is explicit and legally binding on all Member States.

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