

23 May 2013

Dear Sir / Madam

Ahead of June's Justice Council meeting, where the proposed Regulation on data protection will be a focus of discussion, we would like to draw to your attention to **several points which have significant implications for the press sector in Europe and need further attention:**

1. The need to preserve editorial press freedom in the proposed Regulation (vital for a free and independent press).

An exemption for journalistic data processing is **essential to ensure that journalists and publishers can continue fulfilling their democratic mission as regards investigating, reporting, writing and publishing editorial content without any obstacle**, and to ensure that sources are adequately protected. It has to be ensured that with the change to a Regulation the current level of protection will not be lowered.

It is therefore imperative that changes are made to **Article 80** so that it becomes directly binding, so the relevant chapters of the Regulation – which we believe extend beyond those proposed by the Commission – automatically do not apply to journalistic data processing (i.e., without having to depend on implementation by Member States).

This **direct application of the exemption is consistent with the subsidiarity principle**. The journalistic activities which are foreseen to be excluded from the data protection Regulation via the exemption for journalistic data processing, can still be covered by media, libel and privacy laws. These are mainly characterized by national laws and are therefore covered by Member States' fundamental rights. This means they are thus open to legal action via Member States' constitutional courts.

We believe that the ITRE Committee Opinion and JURI Committee Opinion have taken the right approach, which is reflected in several amendments tabled in the LIBE Committee (see Annex). It is key that **professional journalism in particular is properly recognised and clearly protected**.

2. The need to safeguard press distribution, particularly publishers' relationships with current and potential readers and subscribers, which is crucial to ensure the sustainability of newspaper and magazines' (consumer and business to business).

- a) By maintaining the inclusion of third parties in the "legitimate interest" clause, as set out in the current Directive

We support the approach of the IMCO Opinion, as well as the JURI and ITRE Committees' Opinions, as regards the "legitimate interest" clause (**Art. 6(1)f**). This reintroduces the possibility under the current Directive to process personal data for the legitimate interest of **third parties**, which is subject to specific information requirements and importantly a right to object for recipients. This, together with the Committees' support for data processing where there is a legitimate interest to process data where a change for purpose from the original data collection (**Art. 6 (4)**), are **crucial for publishers to reach interested parties** (see Annex).

Without this specific reference to third parties, publishers which are not technically data controllers at the moment that data is disclosed would not be covered. This would make well-established, legal practices for getting readers (which account for in many cases over 40% of subscribers) illegal and therefore **unnecessarily put thousands of publishers and their publications at risk, as well as an incalculable number of SMEs and jobs.**

- b) By ensuring that commercial communications is not hindered by a too restrictive definition of profiling


A balanced approach towards consent and profiling is crucial. In particular, it is important that commercial communications such as in the field of customer relationship management or customer acquisition **should not qualify as 'profiling'** under Article 20. Should such well-established, legal practices (e.g., selecting potential readers of a publication based on their postcode or preferences) be further restricted, this will make it unnecessarily difficult to continue to reach out to potential customers.

It would be detrimental if commercial communications (including direct marketing) were held to constitute profiling and subject to restrictions (e.g., such as having to pseudonymise data) which would in practice make such communications to a large extent impossible. This will negatively impact businesses, particularly SMEs, while hindering consumer choice.

We believe that the ITRE Committee opinion's approach – reflected by amendments tabled in the LIBE Committee - concerning the data subject's consent and profiling (see Annex) both provides clarification as well as striking a good balance.

It should be noted that many of the amendments adopted in the European Parliament's opinion giving committees have also been tabled in LIBE (see references below). Given their significance, we ask Member States to take them fully into account in the ongoing discussions.

Yours faithfully



CONTACTS:



ANNEX

ITRE and JURI Committee amendments to Article 80 (1) (also supported by amendments tabled in LIBE: AMD 2951, 2957, 2959)

**Proposal for a regulation
Article 80 – paragraph 1**

Text proposed by the Commission

1. Member States shall provide for exemptions or derogations from the provisions on the general principles in Chapter II, the rights of the data subject in Chapter III, on controller and processor in Chapter IV, on the transfer of personal data to third countries and international organisations in Chapter V, the independent supervisory authorities in Chapter VI and on co-operation and consistency in Chapter VII for the processing of personal data carried out solely 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 rules governing freedom of expression.

Amendment

Chapter II (General principles), Chapter III (Rights of the data subject), Chapter IV (Controller and processor), Chapter V (Transfer of personal data to third countries and international organisations), Chapter VI (Independent supervisory authorities), Chapter VII (Co-operation and consistency) as well as Articles 73, 74, 76 and 79 of Chapter VIII (Remedies, liability and sanctions) shall not apply to the processing of personal data carried out solely 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 rules governing freedom of expression.

Justification

The new draft legislation on data protection takes the form of a regulation and thus is directly applicable. If data protection law applies directly, the freedom of the press exception must also be directly applicable. An implementation by Member States should not lower down the current level of protection. Furthermore, the exemption should be extended to Articles 73, 74, 76 and 79 of Chapter VIII (on Remedies, Liabilities and Sanctions) because these Articles include new elements which go far beyond what is foreseen in the current directive and are not suitable for journalistic activities or pose a serious threat to press freedom.

IMCO (Am. 70) and JURI (Am. 47) Committee amendments on Article 6(1)f (also supported by ITRE opinion (Am. 100)) also supported by amendments tabled in LIBE: AMDS 878, 880, 882)

Article 6 – paragraph 1 – point f

Text proposed by the Commission

(f) processing is necessary for the purposes of the legitimate interests pursued by a controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.

Amendment

(f) processing is necessary for the purposes of the legitimate interests pursued by a controller, *or by the third party or parties in whose interest the data is processed*, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.

Justification

Data processing for legitimate interests of third parties must continue to remain possible, as under the Data Protection Directive 95/46/EC, provided that the necessary conditions are met. This form of data processing is indispensable for the legitimate, day to day business activities of many companies. The use third-party addresses, for instance, is particularly important for reaching new customers.

ITRE Committee amendment (Am. 110) to Article 6(4) also supported in JURI (Am. 49) and IMCO (Am. 77) also supported by amendments tabled in LIBE: 944, 945, 947, 948

Article 6 – paragraph 4

Text proposed by the Commission

4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract.

Amendment

4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (f) of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract.

Justification

It is important to also include legitimate interests, such as the sector-specific example of providing a more efficient energy supply chain through the provision of smart grids. Whereas a data subject's energy consumption may not have explicitly been collected for the purpose of providing a more efficient overall supply, if it is in the legitimate interest of the service provider to use this information to achieve this goal, flexibility should be provided to ensure this is possible.

ITRE Committee opinion amendment relating to consent (Article 4), also consistent with amendment 757 tabled in LIBE

Amendment 82

Article 4 – point 8

Text proposed by the Commission

(8) 'the data subject's consent' means any freely given specific, informed and **explicit** indication of his or her wishes by which the data subject, *either by a statement or by a clear affirmative action*, signifies agreement to personal data relating to them being processed;

Amendment

(8) 'the data subject's consent' means any freely given specific, informed and **unambiguous** indication of his or her wishes by which the data subject signifies agreement to personal data relating to them being processed. ***Silence or inactivity does not in itself indicate consent;***

ITRE Committee amendments on profiling (relating to Article 20) also consistent with amendments 513, 514 and 515 and 1556 tabled in LIBE, which we support together with related proposed amendments 1554, 1555, 1557, 1568, 1579)

Amendment 38

Proposal for a regulation

Recital 58

Text proposed by the Commission

(58) Every natural person should have the right not to be subject to a measure which is based on profiling by means of automated processing. However, **such** measure should be allowed when expressly authorised by law, carried out in the course of entering or performance of a contract, or when the data subject has given his consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention and that such measure should not concern a child.

Amendment

(58) Every natural person should have the right not to be subject to a measure which is based on profiling by means of automated processing **and which produces legal effects concerning that natural person or significantly affects that natural person. Actual effects should be comparable in their intensity to legal effects to fall under the scope of this Regulation. This is not the case for measures relating to commercial communication, like for example in the field of customer relationship management or customer acquisition.** However, a measure based on profiling by automated data processing **and which produces legal effects concerning a natural person or significantly affects a natural person** should be allowed when expressly authorised by law, carried out in the course of entering or performance of a contract, or when the data subject has given his consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention and that such measure should not concern a child.

Justification

The amendment clarifies that commercial communication, like for example in the field of customer relationship management or customer acquisition does not significantly affect a natural person in the sense of Article 20 paragraph 1. Actual effects must be comparable in their intensity to legal effects to fall under this provision.

Amendment 185

Article 20 – paragraph 2 – point a b (new)

Text proposed by the Commission

Amendment

*(ab) is based
on the legitimate
interests
pursued by the
data controller;*