



European Network of Councils for the Judiciary (ENCJ)

Réseau européen des Conseils
de la Justice (RECJ)

Proposal for a regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation)

The European Network of Councils for the Judiciary (ENCJ) presents its compliments to the Directorate General for Justice of the European Commission and takes note of the proposal for a Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and the free movement of such data ("the proposed Regulation") and the proposal for a Directive on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data ("the proposed Directive").

One of the objectives of the ENCJ under its Statutes is co-operation between members within the framework of the creation of the European Area of freedom, security and justice on the provision of expertise, experience and proposals to European Union institutions and other national and international organizations.¹

The ENCJ fully appreciates the significance of data protection as a fundamental right in the legal order of the European Union, as provided for in Article 16 of the Treaty on the Functioning of the European Union ("TFEU") and Article 8 of the Charter of Fundamental Rights of the European Union. However, the ENCJ has considered the texts of the proposed Regulation and the proposed Directive and has identified a number of issues of concern, touching upon -

- the independence and immunity which should attach to judges in administering justice and
- the integrity of court records

which it respectfully wishes to draw to the attention of the Directorate General.

The ENCJ recommends that revisions be made to the current texts of the proposed Regulation and the proposed Directive with a view to addressing these concerns, which revisions, it respectfully submits, are fully compatible with the exercise of the right to protection of personal data aforementioned

¹ Article 4 of the ENCJ Statutes.

Judicial independence and immunity

Recital (16a) of the proposed Regulation states:

“While this Regulation applies also to the activities of courts and other judicial authorities, Union or Member State law could, within the limits of this Regulation, specify the processing operations and processing procedures in relation to the processing of personal data by courts and other judicial authorities. The competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of judges in the performance of their judicial tasks.”

Recital (99) provides:

“While this Regulation applies also to the activities of national courts, the competence of the supervisory authorities should not cover the processing of personal data when courts are acting in their judicial capacity, in order to safeguard the independence of judges in the performance of their judicial tasks. However, this exemption should be strictly limited to genuine judicial activities in court cases and not apply to other activities where judges might be involved in, in accordance with national law.”

Article 51(3) of the proposed Regulation provides that “Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity”.

However, while courts when administering justice are thus excluded from a supervisory authority's remit, judges and courts are not – to the extent that they are data controllers or processors – expressly excluded when administering justice from the various requirements of a data controller or processor under the proposed Regulation (in particular those arising under Chapters II, III and IV), non-compliance with which may entitle a data subject to bring court proceedings against a data controller or processor under Article 75 or to seek compensation under Article 77.

While Article 17 of the proposed Directive provides that -

“Member States may provide that the rights of information, access, rectification, erasure and restriction of processing referred to in Articles 11 to 16 are carried out in accordance with national rules on judicial proceedings where the personal data are contained in a judicial decision or record processed in the course of criminal investigations and proceedings”,

a similar difficulty may arise in relation to this measure, in that Articles 52 and 54 of the proposed Directive provide, respectively, for a right to a judicial remedy against a data controller or processor for infringement of a data subject's data protection rights and for a right to compensation from a controller or processor for damage suffered due to non-compliance with the proposed Directive.

Amongst the rights of a data subject under the proposed Regulation are the right to -

- obtain from the controller at reasonable intervals and free of charge (...) confirmation as to whether or not personal data concerning him or her are being processed and where personal data are being processed access to the data and various items of information associated with the data, as well as a copy of the data (Article 15).

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- obtain from the controller the rectification of personal data concerning him or her which are inaccurate and, having regard to the purposes for which data were processed, the right to obtain completion of incomplete personal data, including by means of providing a supplementary statement (Article 16).

These rights are not – unlike other provisions contained in the proposed Regulation (see Articles 9, 17, 17a and 19) – restricted to the extent that the data processing concerned is required for the “establishment, exercise or defence of legal claims”.

On the face of it, this would allow for the possibility that judges’ notes taken during the course of a trial would be disclosable to a person in relation to whom those notes constituted personal data. This might also apply, for example, to electronic communications between judges on a bench for the purpose of arriving at a decision in a case.

This possibility raises, in the ENCJ’s view, very serious issues for the independence of the judicial function. Furthermore, the possibility that judges or courts when administering justice in a case might be exposed to legal proceedings and/or liable to pay damages for non-compliance with the obligations of a data controller would endanger judicial immunity, which itself underpins the independence of the exercise of the judicial function.

Data protection standards and the integrity of court records

A further matter for concern arises from the nature of the notes or records which a judge may require to take or keep in the course of court proceedings. Those notes or records may incorporate assertions made by parties in claims or defences to claims which may not satisfy criteria of adequacy, relevance, accuracy or being up-to-date, as required by Article 5. The retention of such material, in the form in which it has been submitted by a party for the purpose of a hearing or adjudication by the court in a case, and for the purpose of any later appeal or review, is a necessary part of the administration of justice and should not expose a judge to liability under data protection law.

The proposed Regulation does not appear to take into account the specific nature of documents such as court pleadings, sworn documents and records of court hearings. By contrast the proposed Directive seeks to make allowances for the nature of court records. In recital (21), it states:

“The principle of accuracy of data should be applied taking account of the nature and purpose of the processing concerned. In particular in judicial proceedings, statements containing personal data are based on the subjective perception of individuals and are in some cases not always verifiable. Consequently, the requirement of accuracy should not appertain to the accuracy of a statement but merely to the fact that a specific statement has been made.”

This distinction is reflected in Article 6 of the proposed Directive, paragraph 2 of which provides:

“Member States shall ensure that, as far as possible, personal data based on facts are distinguished from personal data based on personal assessments.”

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Suggested revisions

The proposed Regulation

Insofar as the proposed Regulation is concerned, the ENCJ considers that the independence of judges when administering justice would most effectively be protected by providing that data processing by a judge or court when administering justice be included in the list of personal data processing activities excluded from the material scope of the proposed Regulation by paragraph 2 of Article 2. Article 2(2)(e) already contains an exception for personal data processing by "competent public authorities for the purposes of prevention, investigation, detection or prosecution of criminal offences and, for these purposes, the maintenance of public order, or the execution of criminal penalties."

As a complementary measure, paragraph (1) of Article 21 (Restrictions) should be revised to include the independence of the judicial function in the administration of justice as one of the objectives the safeguarding of which may justify restriction by legislation under Union or Member State law of the scope of the obligations and rights mentioned in Article 21(1).

The proposed Directive

Appropriate revisions to the proposed Directive would also be necessary to ensure that the independence and immunity which a judge should enjoy when administering justice are adequately safeguarded.

Article 52 of the proposed Directive provides for a right of every natural person to a judicial remedy against a data controller or processor should that person's rights under the Directive be infringed as a result of processing of their personal data in non-compliance with the Directive. Article 54(1) of the proposed Directive provides that Member States shall provide for a right to every person suffering damage as a result of unlawful processing or an action incompatible with the Directive to receive compensation from the controller or the processor for the damage suffered.

The ENCJ recommends that these provisions should be qualified as not applying so as to affect a judge when administering justice.

The ENCJ makes all of the aforementioned recommendations solely with a view to ensuring that the fundamental principle of judicial independence in the administering of justice is safeguarded within European and Member State national legal orders, an object which it would see as in no way undermining or being incompatible with the fundamental right to data protection in the legal order of the European Union.

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