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Working Party on the Protection of Individuals
with regard to the Processing of Personal Data

RECOMMENDATION 1/97

Data protection law and the media.

Adopted by the Working Party on 25 February 1997

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THE WORKING PARTY ON THE PROTECTION OF INDIVIDUALS WITH REGARD TO THE PROCESSING OF PERSONAL DATA

set up by Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995¹,

having regard to Articles 29 and 30 paragraph 3 of that Directive,

having regard to its Rules of Procedure and in particular to articles 12 and 14 thereof has adopted the present recommendation:

1. INTRODUCTION

Article 9 of directive 95/46/EC on the protection of individuals with regard to the processing of personal data and the free movement of such data ('the directive') reads as follows:

Member States shall provide for exemptions or derogations from the provisions of this Chapter, Chapter IV and Chapter VI for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to privacy with the rules governing freedom of expression.

The Working Party, following the mandate laid down in art. 30 1 a) of the directive, started discussions during its first meeting on the possible implementation of article 9. Working Documents were presented by the UK and the German delegations. During the debate it emerged that national laws currently differ as to the application of data protection provisions to the media.²

It was recognised that the Working Party could usefully give some guidance on the interpretation of article 9 of the directive. As a preliminary step it was agreed that the secretariat should collect information on the current legal situation and produce a report taking into account the report on 'Data Protection and the Media' issued by the Council of Europe in 1991.³

A questionnaire drafted by the Working Party was distributed on 21 February 1996.

The Working Party discussed a working document at its third meeting and reached some conclusions which were discussed in detail in the fourth meeting. In the light of the content of these conclusions a consensus emerged for adopting the document as a

¹ OJ no. L 281 of 23/11/1995, p. 31

² Unless otherwise indicated the term 'media' refers to all the different means of mass communication including the press, radio and television broadcasting etc.

³ *Data protection and the media*, study prepared by the Committee of Experts on Data Protection (CJ-PD) under the authority of the European Committee on Legal Co-operation (CDCJ), Council of Europe, Strasbourg, 1991.

recommendation within the meaning of article 30 paragraph 3 of the directive. The recommendation was adopted by the Working Party on 25 February 1997.

The following section outlines some general aspects of the application of data protection law to the media including the legislative history of article 9 of the directive. Section three summarises some of the main features of the current legislative situation at national level.⁴ The fourth section includes the conclusions of the discussion of the working party as to the application of data protection law to the media.

Article 9 provides for limitations and exemptions from the application of certain provisions of the directive in relation to processing of data for journalistic purposes as well as for purpose of artistic and literary expression. The debates of the Working Party focused on data processing by the media for journalistic purposes. The present recommendation therefore focuses on exemptions and derogations in relation to processing for journalistic purposes.⁵

2. GENERAL ASPECTS

2.1 Freedom of expression and the protection of privacy

Article 10 of the European Convention for the protection of Human Rights and fundamental freedoms (ECHR) establishes that:

Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and to impart information and ideas without interference by public authority and regardless of frontiers.[..]

This right is one of the fundamental human rights deriving from the constitutional traditions common to the Member States and is one of the most characteristic elements of the legal heritage of democratic societies. Historically it was one of the first human rights to be demanded and indeed guaranteed in law. The press in particular received special legal and constitutional guarantees, in particular against prior censorship.

The right to privacy is similarly guaranteed by article 8 of the ECHR. Data protection comes within the scope of the protection of private life guaranteed under this article. Derogations to the principles of data protection and to article 8 of the ECHR must be in accordance with the law and must respect the principle of proportionality.⁶ Equally limits to freedom of expression, such as the ones that might derive from the application of data

⁴ Further details on the national situation in each Member State are given in document XV D 5027/96.

⁵ The Swedish delegation made it clear that this Recommendation does not prejudice the constitutional freedom of each individual to express his views in the media in Sweden.

⁶ e.g. European Court of Human Rights (CHR) *Sunday Times*, Series A, N°30.

protection principles, must also be in accordance with the law and respect the principle of proportionality.⁷

However the two fundamental rights must not be seen as inherently conflicting. In the absence of adequate safeguards for privacy individuals may be reluctant to freely express their ideas. Similarly identification and profiling of readers and users of information services is likely to reduce the willingness of individuals to receive and impart information.

2.2 Legislative history of art. 9 of the directive.

According to article F paragraph 2 of the Treaty on European Union the Union shall respect fundamental rights as guaranteed by the ECHR and the constitutional traditions common to the Member States.

The Community legislator has acknowledged the particular case of the media and the need to strike a balance between protection of privacy and protection of freedom of expression.⁸

Art. 19 of the original Commission proposal⁹ provided that Member States might grant derogations from the provisions of the directive in favour of the press and the audiovisual media. The explanatory report made it clear that the key feature of this article is the obligation to balance the interests involved and that this balance may take into account the availability of other remedies or of a right of reply, the existence of a code of professional ethics, the limits laid down by the ECHR and the general principles of law.

Article 9 of the Commission's modified proposal¹⁰ made the granting of derogations for the media mandatory. The text was also modified as to include journalists and in order to limit the derogations to journalistic activities.

The article was further modified to its current drafting so that derogations may not apply indiscriminately to all the data protection provisions. Under the current text the derogations are indeed mandatory but 'only if they are necessary' meaning that the derogations to each specific principle of the directive must be granted only in so far (French "dans la seule mesure où" German "nur insofern vor, als sich dies als notwendig erweist") as it is necessary to strike a balance between privacy and freedom of expression. Furthermore these derogations may only concern the general rules on the lawfulness of the processing of personal data, the rules on transfer of data to third countries and the rules on the supervisory authority. According to recital 37 no derogations from the rules on security shall be possible and the supervisory authorities responsible for this sector

⁷ See lastly CHR *Goodwin v. United Kingdom*, 27.3.1996, not yet reported.

⁸ The need for balancing the interests protected by these sets of norms was recognised also by the Convention 108/81 ('the Convention'). Its explanatory report (*Explanatory report on the convention for the Protection of Individuals with regard to the Automatic Processing of Personal Data*, Council of Europe, Strasbourg, 1991) includes freedom of expression as one of 'the rights and freedoms of others' for the protection of which national legislators according to article 9.2.b) of the Convention can derogate from the basic data protection principles.

⁹ COM(90) 314 final- SYN 287.

¹⁰ COM(92) 422 final-SYN287.

should be provided at least with certain ex-post facto powers such as the power to publish regular reports or to refer matters to the judicial authorities.

2.3 Summary of the current situation in national law.

The different national laws currently address the issue by taking one of the following approaches:

- a) In some cases data protection legislation does not contain any express exemption from the application of its provisions to the media. This is the current situation in Belgium, Spain, Portugal, Sweden and the United Kingdom.
- b) In other cases the media are exempted from the application of several provisions of data protection legislation. This is the current situation in the case of Germany,¹¹ France, The Netherlands, Austria and Finland. Similar derogations are envisaged by the draft Italian legislation.
- c) In other cases the media are exempted from general data protection legislation and regulated by specific data protection provisions. This is the case in Denmark for all media and in Germany in relation to public broadcasters, which are not covered by federal or Länder data protection laws, but are subject to specific data protection provisions in the inter-Länder treaties which regulate them.

The differences between these three models should not however be over-estimated. In most cases, independently of any express derogation that may exist, data protection legislation does not apply fully to the media because of the special constitutional status of the rules on freedom of expression and freedom of the press. These rules place a de facto limit on the application of substantive data protection provisions or at least their effective enforcement.

On the other hand the ordinary data protection regime generally applies to non editorial activities performed by the media.

Data protection supervisory authorities when applying data protection law recognise the particularity of the media both where a special legal regime exists and where it does not.

The effective extent of the derogations furthermore cannot be assessed in abstract terms but it is dependent on the overall structure of the data protection legislation in each given country. Clearly the extent of the derogations needed is dependent on the extent to which the substantive rules would effectively have a bearing on the activities of the media.

The differences as to the application of data protection law to the media may also be explained by changing perspectives both on the role of data protection law and on the use of information technology by the media. In the early days of data protection the attention tended to focus on large mainframe-based databases. In those days the media seemed hardly concerned by such rules and no derogations from them therefore seemed necessary. The shifting emphasis of data protection law towards the notion of processing and the

¹¹ With a notable exception, for which see letter c).

extensive use of information technology by the media have fundamentally changed the situation.

One important element that emerges from the current legislative situation in the Member States is that the media, or at least the press, are bound to respect certain rules which although not part of data protection legislation in a proper sense contribute to the protection of the privacy of individuals. Such legislation and the often rich case-law on the matter confer specific forms of redress which are sometimes considered a substitute for the lack of preventive remedies under data protection law.

The right to reply and the possibility to have false information corrected, the professional obligations of journalists and the special self-regulatory procedures attached to them, together with the law protecting honour (criminal and civil provisions concerning libel) must be taken into consideration when evaluating how privacy is protected in relation to the media.¹²

The moving of traditional media towards electronic publishing and the provision of on-line services seems to add further elements for reflection. The distinction between editorial activities and non-editorial activities assumes new dimensions in relation to on-line services which, unlike all traditional media, allow an identification of the recipients of the services.

3. CONCLUSIONS

The foregoing seems to confirm that a general reassessment of the legislative framework for the application of data protection law to the media is needed in each Member State. In this regard it is necessary to evaluate to what extent the application of each provision of chapters II, IV and VI of the directive needs to be limited in order to protect freedom of expression.

In doing so several elements must be born in mind

- Data protection law does in principle apply to the media. Derogations and exemptions may be granted only in relation to Chapter II on the general measures on legitimacy of data processing, Chapter IV on data transfers to third countries and Chapter VI on the powers of supervisory authorities. No derogation or exemption from the provisions on security may be granted. Supervisory authorities responsible for this sector must in all case retain certain ex-post facto powers.
- Derogations and exemptions under article 9 must follow the principle of proportionality. Derogations and exceptions must be granted only in relation to the

¹² One of the main findings of the Council of Europe's work in this area is that the existence of special remedies under the law of the media can justify derogations from data protection legislation, and by this very fact from article 8 of the ECHR, only under certain circumstances. The Council of Europe's report (*supra*) suggested that in order to compensate to the non application of certain data protection principles media legislation has to conform the resolution of the Parliamentary Assembly of the Council of Europe 428 (1970) on mass communication media and human rights and to the Resolution of the Committee of Ministers on the right of reply. The right of reply has been embodied in article 8 of the European Convention on Transfrontier Television (European Treaty Series, N°132/89).

provisions likely to jeopardise freedom of expression and only in so far as necessary for the effective exercise of that right while maintaining a balance with the right to privacy of the data subject.

- Derogations and exemptions under article 9 might not be necessary where the flexibility of various provisions of the directive or the derogations allowed under other specific provisions (which of course must also be interpreted narrowly) already allow a satisfactory balance between privacy and freedom of expression to be struck.¹³
- Article 9 of the directive respects the right of individuals to freedom of expression. Derogations and exemptions under article 9 cannot be granted to the media or to journalists as such, but only to anybody processing data for journalistic purposes.
- Derogations and exemptions may cover only data processing for journalistic (editorial) purposes including electronic publishing. Any other form of data processing by journalists or the media is subject to the ordinary rules of the directive. This distinction is particularly relevant in relation to electronic publishing. Processing of subscribers data for billing purposes or processing for Direct Marketing purposes (including processing of data on media use for profiling purposes) fall under the ordinary data protection regime.
- The directive requires a balance to be struck between two fundamental freedoms. In order to evaluate whether limitations of the rights and obligations flowing from the directive are proportionate to the aim of protecting freedom of expression particular attention should be paid to the specific guarantees enjoyed by the individuals in relation to the Media. Limits to the right of access and rectification prior to publication could be proportionate only in so far as individuals enjoy the right to reply or obtain rectification of false information after publication.
- Individuals are in any case entitled to adequate forms or redress in case of violation of their rights.¹⁴

In evaluating whether exemptions or derogations are proportionate, attention must be paid to the existing ethic and professional obligations of journalists as well as to the self regulatory forms of supervision provided by the profession.

¹³ E.g; in assessing whether exemptions from art. 11 are to be granted one has to consider that the obligation to inform the data subjects does not apply when this would involve a disproportionate effort.

¹⁴ No derogation or exemption from Chapter III of the directive is possible.

Done at Brussels, 25 February 1997

For the Working Party

The Chairman

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