
I. Introduction

Churches very much appreciate the approach taken by the European Commission to strengthen data protection and citizen's rights by revising directive 95/46/EC. They support the Commission in its attempt to strengthen fundamental rights in the EU and are committed to guarantee a high level of data protection in their own structures. Churches welcome the opportunity to explore different approaches and to discuss further options on how to strengthen data protection in the current Draft of a data protection regulation while protecting other fundamental rights and the status of Churches under national law according to Article 17 (1) TFEU.

The following comments and suggestions reflect the current state of discussion of Churches' legal advisers with regard to the current proposal and represent neither a complete nor final account of suggestions.

II. Legal foundations

Article 17 (1) TFEU states that the European Union "respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States". The Churches' specific rights, duties and guarantees regarding data protection that derive from their Member States' internal, constitutional or international public law are part of the status of Churches. Thus, the European Union has to respect and not to prejudice these rights, duties and guarantees, they are to be preserved and safeguarded.

The right to self-determination lies at the core of a state-church relationship. It is, therefore, part of the Churches' status. The right to self-determination includes, e.g. in Germany, the right of Churches to adopt their own data protection rules - provided they meet a sufficient level of data protection - as well as the establishment of independent Church supervisory authorities which monitor the application of these rules. As part of the Churches' status, these rules are to be respected and preserved in European Law, this is the legal essence of article 17 (1) TFEU.

Furthermore, the Draft Regulation has to respect and to be in conformity with the Charter of Fundamental Rights [CFR], especially with the individual and collective freedom of religion embodied in article 10 CFR. The right to self-determination of Churches is an integral part of the religious freedom guaranteed in article 10 CFR, as confirmed by the European Court of Human Rights [ECtHR] on many occasions with regard to article 9 of the European Convention on Human Rights (see reference in Article 52 (3) CFR).

From a legal point of view, the protection of the national law status as well as the fundamental rights of Churches is best reflected in the establishment of a scope exemption from the Draft regulation, to be added in Article 2 (5) of the Draft Regulation (see Churches' Common Paper from 13 December 2011).

However, also Chapter IX which focuses on subsidiarity and the balancing of the right to privacy with other fundamental rights and public interests provides a possible framework to take into account the national law status of Churches as protected in article 17 (1) TFEU as well as their right to religious freedom as recognized by the ECtHR.

III. Suggestions concerning Chapter IX of the Draft regulation (Provisions relating to specific data processing situations)

A suitable mechanism to reconcile the rules governing the freedom of religion and the national law status of Churches with the right to privacy can be established in line with the general approach of Chapter IX. Obviously, the freedom of religion must not be treated as being of less importance than the freedom of expression; both freedoms are essential constituents of a free and democratic society. Thus, it is appropriate to amend the articles 80 pp. of the current Draft Regulation by adding a similarly drafted exemption regarding the freedom of religion and the national law status of Churches.

Such an exemption could easily be integrated in the already existing structure of article 80 (1) of the Draft regulation or be added in a separate new article drafted along the lines of article 80 of the current Draft. The wording of a new Article 80 (1) (b) could be for example as follows [amendments to the current draft of article 80 are highlighted in ***bold italics***]:

Article 80 of the Draft regulation

“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 the transfer of personal data to third countries and international organizations in Chapter V and the independent supervisory authorities in Chapter VI [...¹] for the processing of personal data carried out

(a) solely for journalistic purposes or the purpose of artistic or literary expression only if they are necessary to reconcile the right to the protection of personal data with the rules governing freedom of expression.

¹ The final listing of Chapters to which Member States shall provide exemptions or derogations is yet to be determined depending on possible changes of the Draft regulation as well as the final version of the Regulation.

(b) for the purposes of carrying out the legitimate activities by churches, religious associations or communities, if they are necessary to reconcile the right to the protection of personal data with the right to freedom of religion or to ensure the respect of the status of these entities under national law, as recognized in Article 17 of the Treaty on the Functioning of the European Union.”

This article can be reinforced and clarified by another reference to article 17 TFEU in the recitals as it is already done in recital 77 of the Draft regulation. Churches very much welcome this recital, it could, however, be ameliorated in its wording and the numbering had to be adjusted. This could be achieved as follows:

Recital 77 of the Draft Regulation [change the number to recital 104]

“This Regulation shall be interpreted and applied in such a way as to ensure full respect and compliance with the safeguards contained in Article 17 of the Treaty on the Functioning of the European Union, which foresees that the Union respects and does not prejudice the status under national law of churches and religious associations or communities in the Member States, as recognised in Article 17 of the Treaty on the Functioning of the European Union.). The processing of personal data for the purposes of pursuing their legitimate activities should also qualify for exemption and derogation from the requirements of certain provisions of this Regulation in so far as this is necessary to reconcile the right to the protection of personal data with the right to freedom of religion, as guaranteed in particular by Art. 10 and 22 of the Charter of Fundamental Rights of the European Union, or to ensure the respect of the status of these entities under national law. Therefore Member States should adopt legislative measures, laying down the exemptions and derogations [...²]

IV. Suggestions concerning the clarification of Article 8 of the Draft regulation (Processing of special categories of personal data)

1. In addition to the incorporation of the Churches’ rights and national law status in Article 80 of the Draft regulation, it is essential to integrate and

² The exemptions and derogations necessary have to be determined with regard to the final version of the Regulation and parallel to the new Article 80 (1) (b).

clarify the articles 8 (2) (d) and 8 (4) of the current Data protection directive 95/46/EC as well as its recital 35 in a new data protection regulation. We are very grateful to notice that the Commission has already undertaken considerable steps in this direction in the Draft Regulation. This is all the more important for Churches or religious associations that cannot adopt their own data protection rules. These entities cannot make use of an exemption such as the one drafted above. Such entities depend in their very existence on the exceptions currently contained in the articles 8 (2) (d) and 8 (4) of the current Data protection directive 95/46/EC.

2. Churches welcome very much that Article 8 (4) of directive 95/46/EC has apparently been taken up in Article 8 (2) (g) of the Draft regulation, although the wording is different. It is essential to ensure that this provision in combination with recital 37 of the Draft regulation continues to allow for data transfer from State to Churches (for example for the purposes of collecting Church tax or the Church registration system).
3. Article 8 (2) (d) of directive 95/46/EC was incorporated in the new article 8 (2) (d) of the Draft Regulation. In the last few years, however, some questions regarding the interpretation of the current provision in directive 95/46/EC emerged in the practical application which can be clarified in the new provision of the Draft regulation. Such a clarification is in particular needed with regard to the processing of data of former members of a Church (e.g. concerning baptism records), of the family of a Church member (e.g. for purposes of social and pastoral care or tax assessment) as well as for canonical matrimonial proceedings (e.g. regarding marriage, declaration of the invalidity of a marriage). The first aspect is already taken up in the current article 8 (2) (d) of the Draft regulation, the others need to be added which could be done by modifying its wording in the following way:

Article 8 (2) of the Draft Regulation

"2. Paragraph 1 shall not apply where:

[...]

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other non-profitseeking body with a political, philosophical, religious or trade-union aim and on condition that the processing relates ~~solely~~ to the members or to former members of the body or to persons who have ~~regular~~ contact with it in connection with its purposes and that the data are not disclosed **outside that body** without the consent of the data subjects"

V. Follow-up changes

An equal treatment of the freedom of expression and the freedom of religion in the draft regulation as well as the due consideration of the status under national law of Churches under Article 17 TFEU in the Draft Regulation result in the necessity to establish the coherence with some other provisions of the Draft. Among those figure

- the Article 15 (3) (a) of the Draft Regulation: “The controller shall carry out the erasure without delay, except to the extent that the retention of the personal data is necessary: (a) for exercising the right of freedom of expression **or the right to freedom of religion** in accordance with Article 80”
- Recital 46 (Sentence 4) of the Draft Regulation: include “**for pursuing the legitimate activities of churches, religious associations or communities, philosophical and non-confessional organizations**”, after “exercising the right of freedom of expression”.
- Recital 118: “This Regulation respects the fundamental rights and observes the principles recognised in the Charter of Fundamental Rights of the European Union as enshrined in the Treaty, **and must be interpreted, in particular, in the light of** notably the right to respect for private and family life, the right to the protection of personal data, **the freedom of thought, conscience and religion**, the freedom of expression and information, the freedom to conduct a business, **the respect for cultural, linguistic and religious diversity and** the right to an effective remedy and to a fair trial”

Finally for reasons of further clarification it could be feasible to envisage the following changes in Recital 34. The same applies to Recitals 36, 43, 46, 106, 109, Article 15(3), letter b, Article 6(1), Article 8(2), letter i, Article 79(3), letter h, Article 83.

Recital 34 *“The processing of personal data for other purposes should be only allowed where the processing is compatible with those purposes for which the data have been initially collected, in particular where the processing is necessary for historical, statistical or scientific ~~research~~ purposes. In case that the other purpose is not compatible with the initial one for which the data are collected, the controller should obtain the consent of the data subject for this further purpose or should base the processing on another legitimate ground for lawful processing. In any case, also as regards this further purpose, in particular the application of the principles set out by this Regulation and in particular the information of the data subject on those other purposes should be ensured.”*