DSR.03 Freedom of Expression & Information

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Only one data subjects' right is explicitly restricted in favour of freedom of opinion and information:

Art. 17 III a: "Paragraphs 1 and 2 [right to erasure] shall not apply to the extent that processing is necessary for exercising the right of freedom of expression and information."

Otherwise, Member States must reconcile freedom of expression and information with the right to data protection (Art. 85 I) or provide for exemptions or derogations from the GDPR (Art. 85 II). The tense relationship between freedom of expression and information on the one hand and data protection on the other is largely unresolved.

The situation is aggravated by the fact that the regulatory competence for freedom of the press, broadcasting, art and opinion, which are very extensively protected in Germany by Art. 5 Basic Law, does not lie with the EU. These freedoms can therefore only be indirectly regulated under European law. A European law regulating the right of expression does not exist. The limits of what is permissible vary greatly from one member state to another due to different historical and cultural experiences. During the GDPR negotiations, there was obviously a reluctance to define a clear exemption for these areas. A significant part of the processing of personal data on the internet is carried out in the exercise of the aforementioned fundamental rights. With a sectoral exemption, a significant part of the politically intended regulation, in particular of social media platforms, internet search engines, online archives or directory enquiry services, would thus be largely exempt from the application of the GDPR.

Although the legislator recognised this conflict, he obviously only wanted to resolve it by ordering the member states in Art. 85 I GDPR to resolve the tension with corresponding (special) national laws in order to reconcile them with the GDPR. In Art. 85 II GDPR, it has prescribed a minimum level of exemptions from the provisions of the GDPR for processing for journalistic, scientific, artistic or literary purposes. This is necessary because many data subjects' rights are often in irreconcilable conflict with, for example, the press's right to research and the public's interest in information. The supervision of a data protection authority with far-reaching powers is also incompatible with the requirement of the independence of the press, the prohibition of censorship and the general freedom of expression and opinion. Art and literature often thrive on crossing borders. For example, a satire that reveals a person's beliefs and thus "special categories of personal data" is unlikely to obtain the consent of the person concerned.

The question of whether and to what extent Art. 85 GDPR is sufficient to eliminate the concern of the EU exceeding its competence ("ultra vires") with the inapplicability of the GDPR in the area of application of

Art. 5 Basic Law in Germany does not arise at least for the area of the "classical" media. Here, the *Länder* have created extensive and explicit exemptions from the GDPR in regulations on broadcasting and the press. However, comparable regulations are lacking for other subjects of fundamental rights, who are actually just as free to express, disseminate and receive their opinions "orally, in writing and in pictures", as this is not a privilege only of the holders of official press cards in Germany.

While in some EU member states - for example in Austria or Sweden - the legislator has defused this conflict in favour of "everyone" by means of general opening clauses and there the exercise of freedom of expression "in case of doubt" takes precedence over conflicting provisions of the GDPR, the German legislator has so far failed to determine comparable provisions to protect the existence of Art. 5 GG against disproportionate restrictions by the GDPR. The reference to existing provisions, such as the Art and Copyright Act (KUG) for images, which has existed since 1907, is not sufficient, as these have not been notified to the EU as explicit exemption provisions, contrary to Art. 85 III GDPR.

Since concrete proposals for solutions, as discussed in individual state parliaments and in the Bundestag, have so far not progressed beyond the draft stage, this leads to thoroughly serious and unresolved legal conflicts in all aspects of the non-journalistic exercise of the fundamental right of freedom of information and opinion. The German Federal Constitutional Court reacted to this, at least for a partial area, with decisions of 6 November 2019 (**"Right to be Forgotten I"** and **"Right to be Forgotten II"**), when it affirmed the application of Art. 5 GG, at least for online archives of the press and search engines, also in the regulatory area of the GDPR, and at the same time affirmed a follow-up review in the context of a constitutional complaint. Therefore, Art. 5 GG could also be applied directly alongside Art. 6 I a-f and Art. 9 II GDPR as a further exemption to the ban on processing personal data. However, the lower courts often do not follow this, but rather increasingly adapt the case law that was favourable to freedom of expression before the GDPR came into force to the more restrictive values of data protection (cf. for example **VG Hannover, judgement of 27.1.2019 - 10 A 820/19**).