

CO.09 Freedom of Expression

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The right to protection of personal data is not an absolute right, but must be balanced against other fundamental rights, in accordance with the principle of proportionality [[Title CO.01](#)]. The right to informational self-determination “must be balanced against the freedom to gather, process and use information for one’s own purposes, including for changing purposes” [[BVerfG, Order of 6 November 2019 - 1 BvR 16/13 -, para. 87](#)].

This multidimensionality of fundamental rights is insufficiently recognised by the GDPR as a whole. Among the rights and freedoms of natural persons that the GDPR seeks to protect, the fundamental rights of the controller are hardly explicitly taken into account.

Therefore, the fundamental rights of the Charter of Fundamental Rights must be used for the interpretation of the term "rights and freedoms". Insofar as the controller makes use of freedom of expression through data processing, this can be based on Art. 11 I CFR:

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

Freedom of expression naturally also includes the expression of opinions about another person. This creates a tension with data protection law, because if the expression of opinion is done by means of automated processing, the GDPR would be applicable "per se". However, only a few provisions of the GDPR cover this tension: Art. 9 II e, 17 III a and 85 GDPR and EC 153 GDPR. Art. 85 GDPR leaves the balance between data protection and freedom of expression largely to the law of the member states [for German Law see [Title GL.09](#)]

See in connection with the right to erasure also Rec. 65 sent. 5 GDPR:

“However, the further retention of the personal data should be lawful where it is necessary, for exercising the right of freedom of expression [...].”

In order to balance the rights of the data subject and the freedom of expression of the controller (see Practical Concordance, [Tile P.04](#)), the principle of proportionality (Art. 52 I CFR) must be applied in addition to the provisions of the GDPR. Cf. furthermore [Art. 1 II GDPR](#) and especially Rec. 4 (2) GDPR:

“The right to the protection of personal data is not an absolute right; it must be [...] balanced against other fundamental rights, in accordance with the principle of proportionality.” **[see also [Tile CO.01](#)].**