

# THE GENERAL DATA PROTECTION REGULATION ([EU] 2016/679): WHITE PAPER

## PREFACE

*This White Paper was written at the instigation of Prof. Dr. Luciana Duranti, Project Director of the international research group InterPARES Trust for which I have been active as a pro bono professional consultant. It builds on my previous analyses of the General Data Protection Regulation's intermediate drafts, articles which appeared in "Mousaion" and "Archivar". (Details of these can be found in the bibliography.)*

*This research was originally intended to result in a practical manual on how the Regulation might be applied in real life, including concrete examples. This rapidly revealed itself to be too optimistic: my analyses made clear that the difficulty of interpreting the archives-specific exceptions would render such an attempt irresponsible. Instead, this analysis highlights the archives-relevant areas that are clear but, more often than not, those that are not clear. While this may not be of great help to an archivist attempting to apply the Regulation in a given situation, I hope that it may at least provide some therapeutic benefit in showing that others have puzzled over the same sections.*

*In European data protection legislation terms, archives have arrived –though where, exactly, is still to be discovered. It is to be hoped that the efforts of the European Archives Group in drafting a code of conduct will succeed in giving form to the archival exceptions and making them workable in practice. The many open questions which this analysis identifies will, hopefully, provide fodder for other researchers. (Indeed, some of them would make excellent dissertation topics.)*

*Readers will notice that this analysis is written in extremely plain language, rather than in an academic legal style. There are a number of reasons for this: first, most readers will not be native English speakers, so that adopting a more traditional register would have been needlessly confusing; secondly, the analysis is meant to provide as much practical help to practitioners and non-specialists as possible, as a 'working document'; and thirdly, the only hope of communicating the Regulation's extreme complexity lies in striving for an extremely straight-forward style of explanation. It may occasionally come across as slightly repetitive, but this was unfortunately unavoidable due to the way in which the Regulation is structured.*

*I am grateful to those who answered technical questions, suggested helpful further sources, or read drafts, notably Prof. Dr. Martin Nettesheim, Prof. Dr. Gerald G. Sander, Dr. Martin Stingl, Antoine Meissonnier, and Fiona Aranguren Celorrio. I must also thank Odile Vanreck of InterPARES Trust, who provided detailed comments on a previous draft. This analysis may prove to be somewhat controversial –in particular, I anticipate that some may disagree with my assessments of individual Recitals and the extent to which they illicitly attempt to modify the content of the Regulation– so I would like to emphasise that all opinions expressed are entirely my own.*

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## INTRODUCTION

In April of 2016 the EU's new General Data Protection Regulation was passed. Although it represents the most far-reaching data protection legislation to date —since it will have direct effect (which means that it will be immediately applicable and enforceable) in all the EU Member States beginning on 25 May 2018— it must first be placed within the wider context of the European legal landscape on data protection. The most relevant pieces of EU legislation in this context are Directive 95/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data (which the Regulation replaces), and the EU's Charter of Fundamental Rights, specifically Articles 7 (Respect for private and family life) and 8 (Protection of personal data).<sup>1</sup> (Other related laws include Regulation (EC) No. 45/2001, which established the European Data Protection Supervisor, and Directive (EU) 2016/680, which deals with data protection in the context of criminal investigations.) It is also important to note the influence of the Council of Europe, a separate organisation to the EU whose legislation has had a significant impact on the development of EU law:

not only has its European Convention for the Protection of Human Rights and Fundamental Freedoms (1950) shaped the EU's Charter of Fundamental Rights, but more specifically in the context examined by this analysis, the Council of Europe's Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data from 1981 (ETS No. 108) has been highly influential.<sup>2</sup> The treaties on European union themselves also provide a legal basis for passing legislation to protect personal data: Article 39 of the Treaty on European Union (TEU), and Article 16 of the Treaty on the Functioning of the European Union (TFEU).<sup>3</sup>

## HOW MUCH HAS CHANGED?

The 1995 Directive did not explicitly mention archives. Instead, the Directive was interpreted in such a way as to read archives into the expressions "historical and scientific research" and "historical research" (see, for example, the exceptions in Article 11 (2) and Article 32 (3): the latter notes that "Member States may provide, subject to suitable safeguards, that data kept for the sole purpose of historical research need not be brought into conformity with Articles 6, 7 and 8 of this Directive.")<sup>4</sup> The Commission, in guidance on the interpretation of the Directive, has made clear that this included archives.<sup>5</sup>

This interpretation was abandoned at certain points during the legislative process which eventually produced the new General Data Protection Regulation, for example in the "Inofficial [sic.] Consolidated Version" of 2013, in which separate exceptions were inserted for archival purposes on the one hand and research purposes on the other – distinctly privileging the latter.<sup>6</sup> This divorcing of archives from research purposes was mended in the final version of the Regulation, which in its drafting takes into consideration many of the concerns voiced by archival lobbyists in the course of the legislative process. It provides broadly similar exceptions for both archival purposes and research purposes.

This, in and of itself, is an extremely noteworthy development. The direct naming of archives and archival exceptions in the new Regulation is the fruit of tireless activism by archivists (including archival professional associations in Member States), think-tanks, individual analysts, and IGOs, such as the International Holocaust Remembrance Alliance.<sup>7</sup> Evidence of the latter's successful lobbying can be seen in Recital 73, and Recital 158, which recognises the importance of authorising "Member States [...] to provide for the further processing of personal data for archiving purposes, for example with a view to providing specific information related to the political behaviour under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes." In particular, representations to the Article 29 Working Party by InterPARES Trust and others appear to have been fruitful. The development of the legislation therefore represents a trajectory from apparent complete unawareness of archival needs at the beginning of the process,<sup>8</sup> via explicit but unsatisfactory archival exceptions in the intermediate drafts, to this comparatively better-framed version of the Regulation.

There is now a definition of archives in Recital 158 (although the word 'archives' itself is not explicitly used), as the French National Archives have highlighted – a Recital which also makes it clear that archives are explicitly encompassed by the Regulation.<sup>9</sup> Archives are defined in this Recital in the following way: "Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest."

This Recital is of importance because it appears that only bodies which fall within its definition, i. e. are established or mandated under a statute, are to benefit from the derogations contained within the Regulation. This interpretation is supported by the law firm Bird & Bird's analysis, that the derogations "should only be relied upon by bodies or authorities that have an *obligation* to interact with records of 'enduring value for general public interest' *under Member State or Union law*" (Emphasis added.)<sup>10</sup> This has the potential to leave private archives which do not operate under such an obligation in a difficult position; the gap could, perhaps, be filled by passing suitable Member State legislation.

There is, however, another problem with the definition. The wording makes it appear that the archive must have a legal obligation to undertake *all* these activities in order to qualify as an archive in the context of the Regulation. Since many archives are underpinned by a statute that refers to their obligation to make archival material 'generally usable,' but not to promoting or disseminating it, this raises the alarming possibility that some public archives might be excluded from benefiting from the derogations. A teleological interpretation of this provision, however, would encourage a less literalist

reading to encompass all archives founded by statute: it is not consistent with the legislation's purpose to inadvertently exclude certain archives based on the precise activities that are mandated in the statute that governs them.

From another point of view, it is noteworthy that the definition appears to be clear enough to bypass the problems usually encountered with the term 'archive' in international legislation. In some European languages the word "archive" can mean both historical archives and current records.<sup>11</sup> The definition here makes clear that only historical archives are meant.

A number of concrete improvements in the legal position of archives can also be discerned in the Regulation as contrasted with the Directive. For example, since there was no explicit exception allowing processing of data for archiving purposes in the Directive, there was of course no stipulation allowing archives to process sensitive data either, but this is provided in the GDPR, which in this respect furnishes archives with greater legal certainty.<sup>12</sup>

Overall, however, it is impossible to generalise about the differences between the new situation facing archives and their position under the previous Directive, because, as is well known, the Member States implemented the Directive in different ways. As Bird & Bird have pointed out, "Many of the same categories of derogations and special conditions apply as provided for in Directive 95/46 EC" (although, as previously noted, these did not relate specifically to archives in the Directive itself; the Directive was interpreted so as to include archives in these exceptions), but the ultimate degree of divergence from the Directive cannot be predicted, since the derogations depend on Member States legislating to activate them.<sup>13</sup> Some Member States may already have legislation in place allowing them to benefit from some or all of the derogations and may only have to introduce slight alterations to existing laws, some may need to introduce new legislation right across the board, and, overall, there is a risk that flawed legislation may be introduced. With regard to the derogations, it is clear that precisely the same patchwork of varying and inconsistent regulation across the European Union threatens to develop in the specific area of archives as was the case in general with the Directive's implementation, and which was one of the major reasons for replacing the Directive with the Regulation. The derogations for archives, and how well they will work in practice, currently constitute one of the most uncertain areas of the new law, as the following discussion will demonstrate.

## THE DEROGATIONS: AN IN-DEPTH ANALYSIS

There are two different sets of exceptions by way of derogation for archives in this regulation. Article 89 is the pivotal article for archival exceptions. Articles which contain their own exceptions refer to the safeguards in Article 89 (1), and Article 89 (3) itself also contains further exceptions to other articles, which again must respect the safeguards that Article 89 (1) contains.

It is therefore best to begin with a consideration of the safeguards. Article 89 (1) reads as follows: "Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner."

This section is unhelpfully ambiguous. It appears that the list of measures given in Article 89 (1) is merely inclusive (i. e. it provides examples, as hinted by the phrase "may include") and not exhaustive, an interpretation which is supported by Thompson when she comments that "Art 89 (1) specifies *some* necessary features of these safeguards" (Emphasis added).<sup>14</sup> How 'appropriate' is to be understood is also not altogether clear, and Thompson points out that the precise scope of the requirement to pseudonymise is insufficiently defined.<sup>15</sup>

We can further attempt to illuminate the concept of safeguards by examining Recital 156. This contains the note that safeguards "should ensure that technical and organisational measures are in place in order to ensure, in particular, the principle of data minimisation. The further processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is to be carried out when the controller has assessed the feasibility to fulfil those purposes by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist (such as, for instance, pseudonymisation of the

data). Member States should provide for appropriate safeguards for the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.“ It also notes that, in the context of Member States passing legislation to activate derogations for archival purposes, “The conditions and safeguards in question may entail specific procedures for data subjects to exercise those rights if this is appropriate in the light of the purposes sought by the specific processing along with technical and organisational measures aimed at minimising the processing of personal data in pursuance of the proportionality and necessity principles.” The use of the word ‘may’ suggests that Member States are allowed to give more weight to data subject rights despite the derogations offered for archives, though the meaning of the stipulation is far from clear (i. e. what does ‘appropriate’ mean here?) Taken together with the derogations for archives in the Regulation, this appears to create a logical circle, as follows: Member States may provide exceptions for archives, under certain conditions and safeguards, but these conditions and safeguards may bring in train (other, undefined) exceptions from the stated exceptions, to allow the data subjects to exercise their rights despite the archival exceptions. This, however, appears to be permitted only if appropriate in the light of the archival processing’s purposes, in addition to the principle of data minimisation which is otherwise also present in the stipulations governing archives in the rest of the statute.

Such a result seems nonsensical, and can surely not have been intended by the legislator. Recitals, it should be noted, can only be used as aids to interpreting the rest of the statute but cannot add anything substantially ‘new’ to it. On this principle, it would probably be best to disregard Recital 156’s apparent backtracking on the exceptions for archives.

Our French colleagues believe that these safeguards will be more precisely defined by a code of conduct developed under Article 40 of the Regulation, in the drafting of which the European Archives Group is apparently still involved – this was first mooted by Guilia Barrera in 2012.<sup>16</sup> It must be noted that in Article 40 itself, there is no reference either to archives or to Article 89. While there is a very vague note in Recital 98 that “Associations or other bodies representing categories of controllers or processors should be encouraged to draw up codes of conduct, within the limits of this Regulation, so as to facilitate the effective application of this Regulation, taking account of the specific characteristics of the processing carried out in certain sectors and the specific needs of micro, small and medium enterprises,” this seems to be aimed more at the business world, and does not really suggest that such a code of conduct could flesh out grey areas in the statute itself, but only facilitate its application. Given the overall purpose of the Regulation, however, there is no reason to exclude archival bodies from benefiting from these provisions. If it has indeed been accepted by the Commission that archival associations are allowed to develop a code of conduct to illuminate the issue of safeguards in Article 89 (1), then that is most welcome, even though the Regulation provides no explicit basis for it. The intention to allow archival actors to develop codes of conduct can, however, be discerned behind the scenes in a Note from the Presidency to the Council of 1. December 2014: “Codes of conduct may contribute to the proper application of this Regulation, including when personal data are processed for archiving purposes in the public interest by further specifying appropriate safeguards for the rights and freedoms of the data subject. Such codes should be drafted by Member States’ official archives or by the European Archives Group. Regarding international transfers of personal data included in archives, these must take place without prejudice of the applying European and national rules for the circulation of cultural goods and national treasures.”<sup>17</sup>

### **Exceptions contained in Article 89 and not in the Articles themselves**

As already noted, Article 89 (3) lists a number of exceptions to some of the articles in the Regulation. Unfortunately, in the articles themselves (with the exception of Article 21) there is no cross-referencing, i. e. no mention of any archival exception or of Article 89. The articles to which exceptions are contained in Article 89 (3) are 15 (right of access by the data subject), 16 (right to rectification), 18 (right to restriction of processing), 19 (obligation of notification to the data subject regarding rectification or erasure of personal data or restriction of processing), 20 (right to data portability), and 21 (right to object to processing). As Bird & Bird note, although archives and research purposes otherwise share the same exceptions in Article 89, the exception to Article 20 is the ‘extra’ archival exception, meaning that archival purposes are actually, from this point of view, privileged over research purposes in the Regulation. (However, it should be noted that Bird & Bird’s assertion that the derogation to the right to erasure/the ‘right to be forgotten’ is also to be found in Article 89 is inaccurate: it is contained in Article 17 itself.<sup>18</sup>)

Looking at Recital 156, however, it seems that this privileging of archival over research purposes was not deliberate. There is a conflict between the content of Article 89 and Recital 156, since the latter envisages exceptions to the right of data portability for research purposes as well as for archival purposes. (However, this goes beyond mere interpretative help and constitutes a material change to

the content of the Regulation, so that it is very doubtful that research purposes would be able to claim a derogation to data portability based on the Recital alone.)

There is also an exception to Article 21 in Article 89 (3) amongst the exceptions for archival purposes. However, while Article 21 unusually cross-references to Article 89, the Article does not refer to processing for archival purposes at all: “Where personal data are processed for scientific or historical research purposes or statistical purposes pursuant to Article 89 (1), the data subject, on grounds relating to his or her particular situation, shall have the right to object to processing of personal data concerning him or her, unless the processing is necessary for the performance of a task carried out for reasons of public interest.” Perhaps the drafters in this case meant archives to fall under a wide interpretation of “historical research purposes,” similar to that which was read into the Directive, but this conflicts with the rest of the Regulation, which refers explicitly to archival purposes. Given the clear distinction drawn in Article 89 between archival purposes on the one hand and research purposes on the other, and having regard to the principle of *lex specialis* (the archives-specific provisions must be assumed to be those that are meant to apply to archives, while more general regulations do not), it logically follows that the omission of archival purposes in Article 21 was deliberate. Since there is no mention in Article 21 of the data subject’s ability to object to the processing of his personal information for archival purposes, the exception contained in Article 89 is in fact superfluous. Attempting a teleological approach to interpretation, in this case, does not bring us any further. It is worth noting that Article 21 is contradicted by the content of Recital 156, which refers to a right to “object when processing personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.” Again, however, reading Recital 156 into Article 21 would substantially change the latter, and is therefore inadmissible.

### **Is there any difference between the two groups of exceptions?**

With regard to the derogations mentioned in Article 89 (3) (Articles 15, 16, 18, 19, 20 and 21), these can only be invoked when four conditions are met: they are made available under Union or Member State law; such legislation takes account of the conditions and safeguards in Article 89 (1); the rights referred to in the articles themselves “are likely to render impossible or seriously impair the achievement of the specific purposes”; and “such derogations are necessary for the fulfillment of those purposes.” This means that these derogations are ring-fenced with particular care, so that they are not as easily available to archives as some of the other exceptions contained elsewhere in the Regulation.

With regard to the exceptions contained elsewhere, their conditions vary depending on the wording of the article containing them.

There follows a detailed discussion of these exceptions.

### **Exceptions contained in the Articles and not mentioned in Article 89**

These exceptions include Article 5 (further processing and storage), Article 9 (processing of special categories of data), Article 14 (information requirements), and Article 17 (right to erasure).

#### **Article 5: Data processing principles**

Article 5, which contains the “Principles relating to processing of personal data,” contains two exceptions for archives. First, there is an exception to the requirement for purpose limitation in Article 5(1)(b), which stipulates that personal data be “collected for specified, explicit and legitimate purposes and not further processed in a manner incompatible with those purposes.” Here, the exception states that “further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes.” (This is echoed by Recital 50: “Further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should be considered to be compatible lawful processing operations.”) It is notable that no Union or Member State legislation is required to enable archives to benefit from this derogation. The drafting is not as clear as it should be, since it does not explicitly refer to the necessity of compliance with the safeguards in Article 89(1), but merely alludes to the section vaguely. However, the wording of Article 89(1) itself makes clear that all processing of personal data for archival purposes must comply with its safeguards, which will ensure (for example) data minimisation, and may include pseudonymisation.

It is unsatisfactory that no mention is made of the archival exception to purpose limitation in Article 6 (lawfulness of processing). Article 6(4) states that “Where the processing for a purpose other than that for which the personal data have been collected is not based on the data subject's consent or on a Union or Member State law which constitutes a necessary and proportionate measure in a democratic society to safeguard the objectives referred to in Article 23(1), the controller shall, in order to ascertain whether processing for another purpose is compatible with the purpose for which the personal data are initially collected, take into account, inter alia,

(a) any link between the purposes for which the personal data have been collected and the purposes of the intended further processing;

(b) the context in which the personal data have been collected, in particular regarding the relationship between data subjects and the controller;

(c) the nature of the personal data, in particular whether special categories of personal data are processed, pursuant to Article 9, or whether personal data related to criminal convictions and offences are processed, pursuant to Article 10;

(d) the possible consequences of the intended further processing for data subjects; (e) the existence of appropriate safeguards, which may include encryption or pseudonymisation.”

The difficulty posed by this article is not only that there is no exception for archives to mirror the exception to purpose limitation in Article 5, but that archive services are not included in the list of objectives referred to in Article 23(1). It is regrettable that the Regulation seems to leave open this question of the lawfulness of archival processing in cases where consent has not been obtained from the data subject, and it appears to confront archives, in Article 6, with this demanding series of tests, in conflict with the exception in Article 5 to purpose limitation. This is probably another difficulty caused by insufficiently tight drafting. Looked at from a teleological perspective, it cannot be that the lawmakers intended Article 6 to defeat the effect of Article 5 where archives are concerned.

In general, the further processing of personal data for archiving purposes is also affected by the provision in Recital 156: “The further processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is to be carried out when the controller has assessed the feasibility to fulfil those purposes by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist (such as, for instance, pseudonymisation of the data).” This leads to a number of questions and concerns. While the reference to pseudonymisation alone does not constitute an additional safeguard to those alluded to by Article 5 (further processing), the recital as a whole seems to be contradictory – if the controller establishes that the purposes cannot be met by processing data which has been de-identified, he must still follow appropriate safeguards, such as pseudonymisation (a form of de-identification). The legislators cannot have meant to contradict themselves and were probably attempting to shed further light on Article 5, rather than to obfuscate it. It is also not clear how the feasibility assessment is to be carried out, and what sort of concrete evidence would be needed to show that the data controller had fulfilled this duty. It appears that the requirement of a feasibility assessment here adds something new to the provisions in Article 5, rather than simply aiding in interpretation, and can therefore be disregarded.

Returning to Article 5, the second exception for archives that it contains is to the principle of storage limitation in S. 1(e), which requires that personal data be “kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed.” The exception states that “personal data may be stored for longer periods insofar as the personal data will be processed solely for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89 (1) subject to implementation of the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject.” Here again, there is no requirement for additional Union or Member State legislation to enable archives to invoke this article. The phrase ‘longer period’ is less than felicitous, since it implies an end to the period in view, when in fact archives preserve for eternity. It may be asked whether the safeguards in Article 89(1) are meant to apply here as well – is storage really processing? However, Article 4(2) makes clear that “any operation” on data, explicitly including storage, is to be viewed as a type of processing, so that the safeguards in Article 89(1) still apply. It is not clear why there is an extra mention of “the appropriate technical and organisational measures required by this Regulation in order to safeguard the rights and freedoms of the data subject” in this exception, compared with the exception to the purpose limitation in Article 5(1)(b). There is no indication that this means anything additional to the safeguards already contained in Article 89(1), so it may in fact be superfluous.

It should be noted that there are no derogations for archives to the other data processing principles in Article 5. These are 5 (1)(a): lawfulness, fairness and transparency; (c): data minimisation; (d): accuracy; (f): integrity and confidentiality; and (2): accountability. This leads (for example) to the

question of what exactly would constitute ‘transparency’ in an archival context. It probably would not be transparent (in the sense of clear or obvious) to the great majority of data subjects that information about them originally held by a government agency could be transferred to and held by an archive, and it is not clear that the archive itself would be in a position to do anything about this.

### **Article 9: Processing of special categories of data (what is commonly known as “sensitive personal data”)**

In contrast to the exceptions in Article 5, additional Union or Member State legislation is needed to allow archives to benefit from the derogation to the prohibition on processing of “personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership [...], genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation” contained in Article 9(2)(j). Such processing shall be allowed if “necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.” (This again is echoed by Recital 53, “Special categories of personal data [...] should be processed [...] for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, based on Union or Member State law which has to meet an objective of public interest.”) Here again, the safeguards as described in Article 89(1) can be assumed to apply despite the vagueness of the language used,<sup>19</sup> but the additional reference here to “suitable and specific measures” muddies the waters, while the allusion to “rights and interests” (as differentiated from the “rights and freedoms” of Article 89) is also unfortunate – how exactly are ‘interests’ to be defined? Consequently, Member States trying to pass legislation to take advantage of this exception for archive services are put in a very unclear position. Further clarification is certainly needed with regard to the precise scope of “suitable and specific measures” and “rights and interests.” The remark that the law “shall be proportionate to the aim pursued” introduces a further layer of vagueness with which Member States will also have to wrestle, given the heterogeneity of archiving purposes, while the reference to “the essence of the right to data protection” will similarly require further unpacking.

### **Article 14: notification to the data subject where personal information has not been obtained from the data subject**

Since most archival material is collected indirectly, the significance of Article 14 is immediately apparent. Under S. 5(b) of the Article, notification is not required where “the provision of such information proves impossible or would involve a disproportionate effort, in particular for processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, subject to the conditions and safeguards referred to in Article 89(1) or in so far as the obligation referred to in paragraph 1 of this Article is likely to render impossible or seriously impair the achievement of the objectives of that processing. In such cases the controller shall take appropriate measures to protect the data subject's rights and freedoms and legitimate interests, including making the information publicly available.”

This wording is not terribly clear. The section appears to mean that the notification requirement does not apply to archival accessioning in two different situations:

Situation 1: the provision of the notification itself is impossible or would involve a disproportionate effort. Here the conditions and safeguards in Article 89(1) must be met, while the data controller must (probably) also take additional “appropriate measures” (though again, the relationship between these and the safeguards in Article 89(1) is not clear);

Situation 2: achievement of the processing's objective (archival purposes) is made impossible by the requirement in Paragraph 1. (Paragraph 2 of Article 14 is not mentioned, opening up the absurd possibility that the archive would have to provide the data subject with the information specified therein while not providing the basic information specified in Paragraph 1. This, of course, would be impossible. This is clearly another instance of untidy drafting, and a teleological interpretation would lead to the conclusion that in this case, none of this information would have to be provided to the data subject.) Here, the data controller would again have to take “appropriate measures.” Since the safeguards in Article 89(1) apply to all archival processing, they can be assumed to also apply here, though as noted above, the role of the (additional?) “appropriate measures” in this context is far from clear.

The muddled nature of the drafting is highlighted by a comparison of the foregoing interpretation with that of Thompson, who notes that:

“The relationship between the different conditions listed in Article 14(5)(b) needs to be clarified.

However, it appears to apply where:

- the provision of such information proves impossible or would involve a disproportionate effort; and
- the conditions of A. 89(1) are met or where applying the right would seriously compromise the purpose. In addition, the controller must take measures to protect data subject rights, including making the information publicly available.”<sup>20</sup>

That numerous different interpretations can result from the same article highlights the urgent need for clarification.

Recital 62 does not shed any light on this problem, since it states that “it is not necessary to impose the obligation to provide information (...) where the provision of information to the data subject proves to be impossible or would involve a disproportionate effort. The latter could in particular be the case where processing is carried out for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. In that regard, the number of data subjects, the age of the data and any appropriate safeguards adopted should be taken into consideration.” It should be noted that the test proposed for impossibility or disproportionate effort in the last sentence does not appear in Article 14 itself, and this, again, can be seen as an example of an attempt to introduce something additional into the Regulation via a Recital.

### **Article 17: The right to erasure (‘right to be forgotten’)**

Although, as Prorok notes, the right contained in Article 17 in general is very cloudy,<sup>21</sup> the exception for archives is relatively straight-forward, though not completely clear-cut. There is an exception in Article 17(3)(d) “for archiving purposes in the public interest [...] in accordance with Article 89(1) in so far as the right referred to in paragraph 1 is likely to render impossible or seriously impair the achievement of the objectives of that processing.” The exception does not require legislation. This provides archives with a clear exception to the right to erasure. This is backed up by Recital 65, which notes, in the context of the right to erasure: “the further retention of the personal data should be lawful where it is necessary [...] for archiving purposes in the public interest.”

It is not clear whether this exception applies to archival material online, since it is uncertain whether the presenting of information on the internet would be seen as a reasonable objective of archival processing – it is arguable that it is outside the core activities. This will depend on how the words “communicate, promote, disseminate and provide access” from the list of archival activities in Recital 158 are interpreted. It therefore seems wise for archives to continue with their general modus operandi of either not putting personal information online in the first place, or of complying speedily with requests for erasure from the data subjects. Recital 66 is also relevant in this context: “To strengthen the right to be forgotten in the online environment, the right to erasure should also be extended in such a way that a controller who has made the personal data public should be obliged to inform the controllers which are processing such personal data to erase any links to, or copies or replications of those personal data. In doing so, that controller should take reasonable steps, taking into account available technology and the means available to the controller, including technical measures, to inform the controllers which are processing the personal data of the data subject's request.” While archives are not mentioned, it is reasonable to interpret this as meaning that the controller in this scenario could also be an archive, though it could be argued that this would involve reading new material into the Regulation via the Recital. As Van Eecke points out, although what he calls ‘public interest archives’ are exempted from the right to erasure, the principle of data minimisation still applies as one of the safeguards required under Art 89(1), which may also require pseudonymisation.<sup>22</sup>

Since archives have an exception and will therefore rarely have to comply with the right to erasure, the actual content of the right and its relationship to other rights is perhaps not so critical for the archival sector. Nevertheless, a brief discussion of the ambiguities should be provided here.

While the Commission itself contends that there is no fundamental difference between the contents of the right to erasure in the Directive and the right to erasure in the Regulation,<sup>23</sup> a comparison of the two provisions suggests otherwise. Where the Directive simply stated in Art 12(b) that the data subject had the right to the erasure of “data the processing of which does not comply with the provisions of this Directive, in particular because of the incomplete or inaccurate nature of the data” (other brief references to erasure are also made in Article 6, Article 14, Article 28, and Article 32 of the Directive, provisions which are similar except for the fact that Article 32 adds storage of data “in a way incompatible with the legitimate purposes pursued by the controller” as a ground for erasure),

Article 17 of the Regulation contains additional explicit grounds for erasure. The Commission's contention that the contents of the rights are the same is undermined by the analysis of de Matteis, who traces the roots of the right to erasure in the Regulation to the 2010 Charte du droit à l'oubli numérique in France, court cases in Germany in 2008-2009, and 1995 court cases in Italy, though further details are not provided.<sup>24</sup>

## A BRIEF DIGRESSION: THE REGULATION'S RIGHT TO BE FORGOTTEN VERSUS THAT IN *GOOGLE V SPAIN*

There is also the question of the relationship between the right to be forgotten in the Regulation and the right as formulated in *Google v Spain*, with reference to the right to freedom of expression and information in Article 11 of the EU's Charter of Fundamental Rights. From the judgment in *Google v Spain*, it is clear that the right to be forgotten as formulated in that case was derived by the court from Articles 7 and 8 of the Charter of Fundamental Rights.<sup>25</sup> As Heywood notes, the judgment "potentially confirms an existing 'right to be forgotten' online. In other words, the 'right to be forgotten', which has been the subject of intense political debate in connection with the draft EC data protection Regulation for the past three years or more, has, unbeknown to us all, been in existence since the passing of the 1995 Directive."<sup>26</sup>

The European Court of Justice essentially read a right to have one's name removed from a list of internet search results into Articles 12 and 14 of the 1995 Directive in the light of the Charter of Fundamental Rights:

"It follows from the foregoing considerations that the answer to Question 3 is that Article 12(b) and subparagraph (a) of the first paragraph of Article 14 of Directive 95/46 are to be interpreted as meaning that, when appraising the conditions for the application of those provisions, it should *inter alia* be examined whether the data subject has a right that the information in question relating to him personally should, at this point in time, no longer be linked to his name by a list of results displayed following a search made on the basis of his name, without it being necessary in order to find such a right that the inclusion of the information in question in that list causes prejudice to the data subject. As the data subject may, in the light of his fundamental rights under Articles 7 and 8 of the Charter, request that the information in question no longer be made available to the general public on account of its inclusion in such a list of results, *those rights override, as a rule, not only the economic interest of the operator of the search engine but also the interest of the general public in having access to that information upon a search relating to the data subject's name.* However, that would not be the case if it appeared, for particular reasons, such as the role played by the data subject in public life, that the interference with his fundamental rights is justified by the preponderant interest of the general public in having, on account of its inclusion in the list of results, access to the information in question."<sup>27</sup> (Emphasis added.)

When we contrast this judgment with the wording of Article 17, we find something quite different. In Article 17 (3) (a), it states that "Paragraphs 1 and 2 shall not apply to the extent that processing is necessary for exercising the right of freedom of information and expression." Comparing the two passages, it is quite clear that there has been a shift in favour of freedom of information and expression from the court case to the Regulation.

What happened in between *Google v Spain* and the passing of the Regulation? In a briefing paper from Summer 2015 by European Parliament rapporteur Jan Philip Albrecht, it was explained that "The partially contested "right to be forgotten" has been limited by the Parliament –only those publishing personal data in breach of data protection law are obliged to ensure every copy is deleted. The regulation demands for a meaningful balance between freedom of expression and freedom of information on the [one] hand, and the protection of personal data on the other."<sup>28</sup>

The final result in the Regulation not only mirrors Albrecht's comments, but is also markedly more consistent with the dissenting opinion of Advocate General Jääskinen in *Google v Spain* than with the court's final judgment. The Advocate General emphasised that the data subject's right to protection of his private life must be balanced with other fundamental rights, such as freedom of expression and information.<sup>29</sup>

Paradoxically, however, although the new version of the right to be forgotten in the Regulation conflicts with the Court's interpretation of the Directive in light of the Charter in *Google v Spain*, the balancing between the right to data protection (represented in this case by the right to erasure) and the right to freedom of expression and information in the Regulation is clearly more compatible with the Charter itself, in which there is no hierarchy between these rights – both are given equal weight.

As Singleton notes, the approach taken in *Google v Spain*, where it was said that the right to be forgotten overrides the right to freedom of expression and information, conflicts with the plain language of the Charter.<sup>30</sup> Indeed, Singleton diagnoses a rather unsteady approach to this very tension in the case law of the European Court of Justice in general.<sup>31</sup> It is therefore perhaps not surprising that, in this case, the Court simply overbalanced.

Since, according to Advocate General Jääskinen, the ECJ's role encompasses only defining “the scope of the data subject’s right of access and right to object already recognised by the Directive, (but) not the creation of new rights or widening the scope of EU law,” it would appear that the legislators have in effect restricted the scope of the *Google v Spain* judgment in the Regulation, scaling back the right to erasure/right to be forgotten to a point where it is finally consistent with the Charter itself.<sup>32</sup> This raises interesting theoretical questions about the respective roles of the EU institutions where interpretation of the Charter is concerned, but there is no space to consider them here.

## THE STATUS OF RECITAL 73

Recital 73 complicates the foregoing discussion of exceptions for archives. It appears to open up the possibility of additional derogations to data subjects’ rights, introduced by Union or Member State law, for “the further processing of archived personal data to provide specific information related to the political behaviour under former totalitarian state regimes or the protection of the data subject or the rights and freedoms of others, including social protection, public health and humanitarian purposes.” These derogations must be “in accordance with the requirements set out in the Charter and in the European Convention for the Protection of Human Rights and Fundamental Freedoms,” but, interestingly, there are none of the usual mentions of the safeguards from Article 89(1). The provisions to which it introduces the possibility of restrictions are “access to and rectification or erasure of personal data, the right to data portability, the right to object, decisions based on profiling, as well as the communication of a personal data breach to a data subject and certain related obligations of the controllers.” As we have seen, many of these are already covered by the explicit archival exceptions contained in the articles, but not all – notably the provision on profiling. This is problematic, because, as has been observed many times in this analysis, recitals can be used as interpretative aids but cannot add anything material. It is also unclear whether this Recital captures archives that are not ‘public interest archives,’ in contrast to the exceptions contained in the main body of the statute, since it does not refer to archives at all but only to “archived personal data.” This, again, would constitute a drastic change to the content of the statute, so that it seems that this interpretation would probably not be admissible.

## WHITHER POSTHUMOUS DATA PROTECTION?

Recital 158 notes that “Where personal data are processed for archiving purposes, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons.” In the German legal context, this raises the question of the status of the restriction periods following the death of the data subject that are anchored in the legal concept of posthumous data protection –as developed in German jurisprudence— and which are stipulated in German archival statutes (for example, 10 years after death in the archives law of Baden-Württemberg or 30 years after death in the German federal archives law). There is a similar stipulation in Recital 160 on historical research purposes: “Where personal data are processed for historical research purposes, this Regulation should also apply to that processing. This should also include historical research and research for genealogical purposes, bearing in mind that this Regulation should not apply to deceased persons.” It seems that the German posthumous data protection framework would be accommodated by Recital 27<sup>33</sup> – “This Regulation does not apply to the personal data of deceased persons. Member States may provide for rules regarding the processing of personal data of deceased persons” – so that it will be permissible (in the German context) to continue to protect the privacy rights of the deceased, but the wording is rather vague. It is also problematic, for reasons already examined, that these stipulations appear in Recitals.

## THE FUTURE (CONCLUSION)

There will inevitably be a return – at least in part – of the problems in cross-border co-operation that Europe suffered under the Directive. This is due, as Thompson notes, to the fact that it is left to the Member States to make many of the derogations available through passing legislation: – “This flexibility enables Member States to take an approach that is socially acceptable and fits their existing

regulatory and governance system for research. However, this approach will also mean that cross-border research projects will face challenges in trying to comply with different approaches.”<sup>34</sup>

Regarding the question of the legislation that must be passed by Member States, it is possible to adapt existing archives laws to take advantage of the derogations, but close scrutiny and comparison of the existing legal provisions with those of the Regulation will be necessary. Under present circumstances, this will be extremely challenging given the previously noted unclear nature of many provisions in the Regulation, particularly those on safeguards. An adaptive solution will probably work best for Member States with a highly regulated approach to data protection. Other Member States may be better advised to develop an entirely new set of data protection laws based on the Regulation. Thompson believes that, with regard to the derogations for research, passing specific new regulations will be of most help to the research community,<sup>35</sup> and given the overlap between the two areas, this is likely to also be applicable to the archival sector.

It must be remembered that, compared with the previous, restrictive drafts, the final version of the General Data Protection Regulation is an improvement. However, the fact that the Member States will have to individually legislate the position of archives means that the archival sector is not yet secure. Consequently, archival associations need to encourage their governments to pass appropriate legislation before the date at which the Regulation will come into force: i. e. before the 25th of May, 2018.

While it needs to be acknowledged that the Regulation's lack of precision poses a great challenge, the vagueness on safeguards need not necessarily prevent suitable legislative action by the Member States. The situation is not unprecedented: the Directive that it replaces was also unclear as to the shape of the “suitable safeguards” that it required for the “further processing of personal data for historical [...] purposes” (Recital 29, Directive 95/46).

The foregoing critical analysis of the General Data Protection Regulation confirms the opinion of van Hoboken, who makes the apposite point that the Regulation is “notoriously vague” with respect to its specifications for archives.<sup>36</sup> He notes that “The application of the GDPR to sectors such as the archiving sector illustrates the problems of having such a general law to solve such a wide variety of different issues related to personal data, in a wide variety of contexts (and different prevailing norms).”<sup>37</sup> He believes that specific public sector regulation (i. e. a public archiving law) or tort law would have been a better approach to archives' unique situation, instead of the cumbersome framework of a general data protection law. However, now that we have the latter, “It is crucially important for the sector to pro-actively formulate practices that can be defended as compliant with the GDPR and give meaning to the (scope) of the exception.”<sup>38</sup>

While individual national archival associations should lobby their governments to introduce appropriate legislation that will allow archives to utilise the exceptions, it therefore also behoves them to collaborate with each other, not simply in order to achieve as much harmony between the national approaches as possible, but also to advocate for and entrench the optimal, archives-friendly interpretation of the various grey areas noted above. Finally, as Van Eecke emphasises, it will be of fundamental importance to build “procedures and tools for accommodating the Data Minimisation Principle.”<sup>39</sup> In doing so, within the internal archival sphere, it will be key to reconcile this principle with the demands of archival appraisal methodologies, so that archivists retain the freedom to appraise according to their own criteria and appraisal models.

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<sup>38</sup> van Hoboken.

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