Note to European Center for Not-for-Profit Law on privacy and data protection issues arising from Dutch government proposals on non-profit funding disclosure

15 February 2019

1. Right to privacy (Article 7 EU Charter, Article 8 ECHR)

The right to private and family life is enshrined in European human rights instruments and plainly extends to individual donors to charities and non-profit organisations. While the Dutch government asserts that it may legitimately restrict this right by demanding the publication of donations over 15,000 Euros in the public interest in knowing who funds a particular organisation, this must be demonstrably necessary and proportionate. It is clear that, contrary to the claims made by the Dutch government in its explanatory memorandum, a mandatory requirement affecting all non-profit organisations regardless of their size, activities or mandate and absent any meaningful safeguards for the affected individuals meets either of these tests.

While the draft legislation makes provision for organisations to request that the personal data of certain donors be suppressed from publication in the interests of protecting those individual donors, this will be at the discretion of the Minister for Legal Protection.[1] Similarly, despite a reference to future provisions allowing for the exemption of certain types of organisations from the requirement to publish donor data altogether,[2] it remains quite unclear how and to which types of organisations these exceptions may be granted. As such the proposed legislation itself does not contain adequate safeguards and it is difficult to foresee how these discretionary exemptions could offer meaningful guarantees in practice.

It should also be noted that the European Court of Human Rights has been asked to rule on the privacy implications of precisely these kinds of statutory provisions (the "Foreign Funding Law") in Hungary in a case bought by the Hungarian Civil Liberties Union, the Hungarian Helsinki Committee and other NGOs.[3] The European Commission has also initiated infringement proceedings against Hungary at the EU Court of Justice on the grounds that its Foreign Funding Law violates, *inter alia*, the rights to the protection of private life, the protection of personal data and freedom of association.[4]

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[1] Draft Act, Article 2(7).
[2] Draft Act, Article 2(10) and Article 3(6).
[3] ***Társaság a Szabadságjogokért and Others v Hungary***, no. 83749/17, ECHR; see also"**14 Hungarian NGOs Bring ECHR Case Against New Anti-Civil Society Bill**", 31 January 2018: https://www.liberties.eu/en/news/fourteen-hungarian-ngos-have-brought-an-action-before-the-ecthr/14186.
[4] See "**European Commission steps up infringement against Hungary on NGO Law**", 4 October 2017: http://europa.eu/rapid/press-release_IP-17-3663_en.htm.

2. Processing and publication of data, including 'special categories' (Article 9 GDPR, Article 8 EU Charter)

Article 9 of the EU General Data Protection Regulation (GDPR) prohibits the processing of special categories of data, including "personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership… data concerning health or data concerning a natural person's sex life or sexual orientation". Data protection is included in the EU Charter of Fundamental Rights (Article 8). Contrary to the argument made by the Dutch government in its Explanatory Memorandum to the proposal, it is inevitable that publishing the personal data of individuals who support a particular non-profit will also publicly reveal details about some of these special categories of data, in contravention of their fundamental rights. It would also appear self-evident from the alarming trend we have witnessed across Europe in recent years that such action could result in a high risk to individual data subjects who may be subject to attacks on their reputation or even their physical person as a result of the forced disclosure of their philanthropic activities.

While Article 9 of the GDPR contains an express derogation permitting the processing of special categories of data for reasons of substantial public interest, this must be demonstrably 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. It is again clear that, contrary to the claims made by the Dutch government in its explanatory memorandum, mandatory requirements affecting all non-profit organisations regardless of their size, activities or mandate and absent any meaningful safeguards for the affected individuals meets none of these tests.

Moreover, the draft legislation requires that both the names *and* places of residence of donors are to be made public in the interests of transparency and accountability. Such processing is surely excessive and could clearly exacerbate the aforementioned risks to data subjects. It also contradicts one of the fundamental data protection principles on which the GDPR is based: that data processed must be adequate, relevant and limited to what is necessary to the purpose of the processing.[5] The significant risks associated with the publication of both names and places of residence pursuant to the draft legislation are also contrary to the risk-based approach that the GDPR requires.[6]

[5] GDPR, Article 5.
[6] GDPR, Recitals 75-78.

3. Transparency requirements (Articles 12 and 13 GDPR)

As noted above, the draft legislation would impose a legal obligation on non-profit organisations to process the personal data of certain donors by publishing their names and places of residence. Under the GDPR, complying with a legal obligation is one of the six legal bases that can be relied upon for data processing,[7] and as such it does not require the data subject's consent (which is a separate legal basis). However, regardless of the legal basis relied upon for processing, data controllers are obliged to render their data processing operations transparent at the point of data collection.[8] In practice this means that non-profit organisations will be required to inform donors that they are legally obliged to publish donor personal data, so that donors can make an informed decision as to whether or not they want to provide their data, which under the draft legislation becomes inextricable from a decision as to whether or not to actually donate. Furthermore, in accordance with the risk-based approach that underpins the GDPR,[9] data controllers are required to evaluate the risks involved for the rights and freedoms of the data subjects (see further below), and should in turn describe those risks as objectively as possible to the data subjects when notifying them about the processing. In specific cases – donating to a controversial or unpopular cause for example – this may well include the risk of reprisals. Complying with these obligations would therefore appear highly likely to have a significant 'chilling effect' on individual donors, and with it certain organisations' capacity to fundraise, particularly those organisation working on controversial or sensitive issues.

4. Data Protection Impact Assessment (Article 35 GDPR)

In its explanatory memorandum to the proposal the Dutch government states that it conducted a Data Protection Impact Assessment (DPIA) and ascertained on that basis that there will be no contravention of Article 9 GDPR. Since Article 35 GDPR requires a DPIA be conducted "Where a type of processing… taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons", this is a welcome step. What is far from clear, however, is whether the government's DPIA followed internationally recognised best practice, which requires, *inter alia*, (i) consultation of the affected data subjects and other relevant stakeholders during the DPIA process; and (ii) publication of at least a summary of the DPIA findings.[10] While neither of these things appears to have happened in practice, we have not conducted exhaustive checks. Given these and other potential omissions in respect

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[7] GDPR, Article 6.
[8] GDPR, Articles 12 and 13.
[9] GDPR, Recitals 75-78.
[10] See "**Data protection impact assessments**": https://ico.org.uk/for-organisations/guide-to-data-protection/guide-to-the-general-data-protection-regulation-gdpr/accountability-and-governance/data-protection-impact-assessments/; "**Guidelines on Data Protection Impact Assessment (DPIA) and determining whether processing is "likely to result in a high risk" for the purposes of Regulation 2016/679**", 4 October 2017: https://ec.europa.eu/newsroom/document.cfm?doc_id=47711; "**ISO 31000:2009: Risk management — Principles and guidelines**": https://www.iso.org/obp/ui/#iso:std:iso:31000:ed-1:v1:en; and **"ISO/IEC 29134:2017: Information technology — Security techniques — Guidelines for privacy impact assessment**": https://www.iso.org/obp/ui/#iso:std:iso-iec:29134:ed-1:v1:en.

to the DPIA and its surprising findings with respect to the safety of the envisaged processing, it is imperative that the government at least publish the DPIA in accordance with internationally recognised best practice.

5. Prior consultation for high-risk processing (Articles 36 and 58 GDPR, Article 8(3) EU Charter)

Article 36 of the GDPR requires Data Controllers to consult their national data protection supervisory authority prior to processing "where a data protection impact assessment under Article 35 indicates that the processing would result in a high risk in the absence of measures taken by the controller to mitigate the risk". The processing may not begin until the supervisory authority has provided its opinion, which could include a prohibition on the processing or the exercise of other powers vested in supervisory authorities pursuant to Article 58 of the GDPR. Such consultation is not optional but mandatory under the GDPR, and the role of supervisory authorities is enshrined in the EU Charter (Article 8(3)). As noted above, it is self-evident from the alarming trend we have witnessed across Europe in recent years that the processing could result in a high risk to individual data subjects who may be subject to attacks on their reputation or even their physical person as a result of the forced disclosure of their philanthropic activities. The Dutch government appears to be cognisant of these risks insofar as it has suggested that some future exemptions may be necessary but by failing to explain exactly how these safeguards will work in practice it is conceivable that the government is in breach of Article 36(1) of the GDPR. However, this can only be properly assessed subject to disclosure of the DPIA.

6. Prior consultation for legislative proposals (Article 36(4))

Irrespective of the findings of the DPIA or the level of risk ascribed to the processing, Article 36(4) of the GDPR requires EU Member States to consult the supervisory authority "during the preparation of a proposal for a legislative measure to be adopted by a national parliament, or of a regulatory measure based on such a legislative measure, which relates to processing". This provision is designed to "ensure compliance of the intended processing with this Regulation and in particular to mitigate the risk involved for the data subject" (see Recital 96, GDPR). At the moment of drafting this note, we received an indication that the supervisory authority is developing an advice on the proposal but to the best of our knowledge the supervisory authority and the government have not yet publicly shared the details of this arrangement with the concerned stakeholders.

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