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# Beyond 'having a domestic'? Regulatory interpretation of European Data Protection Law and individual publication

*David Erdos* *

*Faculty of Law, University of Cambridge, UK*

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A B S T R A C T

Statutory Data Protection Authorities (DPAs) who act as the guardians of data protection across the European Economic Area (EEA) have faced unprecedented interpretative challenges as a result of the explosion of indeterminate publication by individuals in the form of blogs, social networking and other online forums. Through both a questionnaire and systematic review of EEA DPA websites, this article finds that these regulators have generally adopted a strict interpretation of the law here, although considerable internal variation is also present. Almost all see data protection as engaged, around half argue that publication in the general social networking context requires data subject consent and even when individual publication is targeted towards the collective public many DPAs demonstrate some reluctance to apply the special expressive purposes (aka the journalistic) derogation. This article argues for an alternative tripartite approach under the forthcoming Regulation which accommodates the competing free expression rights and also the limited capabilities reasonably to be expected of private individuals on a sounder and more consistent basis. The law's personal exemption should cover individual publication so long as this does not pose a serious prima facie risk to privacy or other fundamental data protection rights. The special expressive purposes derogation should protect individuals who are disseminating a message to the collective public without discrimination. Finally, the Regulation's new freedom of expression clause should ensure that individual publication which principally instantiates self-expression is subject only to the core of data protection's substantive and supervisory provisions.



From its inception, European data protection has sought to create a common space for processing personal data within which "the fundamental rights and freedoms of natural persons and in particular their right to privacy"[1] are safeguarded. Since the coming into force of the EU Data Protection Directive 95/46, this regime has also led to the mandatory creation and empowerment of statutory Data Protection Authorities (DPAs) across the European Economic Area

* Trinity Hall, University of Cambridge, Trinity Lane, Cambridge, CB2 1TJ, UK.
*E-mail address:* doe20@cam.ac.uk.

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[1] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and of the free movement of such data, art. 1. See similar article 1 of the Council of Europe *Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data* (1981).

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(EEA).[2] These regulators have become "the main actors protecting data protection rights",[3] playing a critical role in interpreting this legal framework. Unsurprisingly given their protective duties, both data protection law and the DPAs have established a relationship of some tension with the freedom to publish. This tension initially arose almost entirely in relation to the activities of organisations rather than private individuals. However, from the early 2000s, the emergence firstly of blogs and later social networking sites has resulted in a world where anyone can with relative ease "communicate his or her thoughts to the entire world"[4] with the consequence that "personal information is being posted online at a staggering rate".[5] These developments have presaged profound challenges for privacy, reputation and the structure of European data protection, resulting in an unprecedented interpretative dilemma for Europe's information regulators, the DPAs. Drawing on both an EEA DPA questionnaire and a website review, this article provides the first comprehensive empirical survey of how these critical actors have responded to this dilemma; building on this broad empirical base it then considers how legal interpretation could best evolve in the future under the forthcoming General Data Protection Regulation (GDPR).[6]

It is found that EEA DPAs have generally adopted a strict approach to the application of data protection law to individual publication, although considerable variation between the different regulators is also evident. The vast majority (although not all) DPAs hold that once personal information relating to somebody other than the publisher themselves is disseminated to an indefinite number, the personal exemption[7] cannot apply. There is also a consensus that the special expressive purposes derogation[8] covers far from all forms of indeterminate dissemination, with many holding instead that it only protects forms of expression undertaken by individuals which are patently akin to that of professional journalism. At the same time, there is a split between two groups of DPAs. The first clearly recognises that the regulation of individual publication may unduly impact on freedom of expression and, therefore, seek explicitly to interpret legal requirements with regard for this right, whilst the second instead presumes that publication outside the special expressive area should be expected to comply with default data protection in full. Within the latter group, the great majority goes further and holds that in general only consent can provide a proper legal basis for publication. As Van Alsenoy and others have argued, this has not only fuelled a strong "mismatch" with the "social practices of individuals" but, at least theoretically, seeks to fix individuals with duties which are "excessively burdensome and unrealistic",[9] especially when viewed from the perspective of the fundamental right to freedom of expression. In sum, the majority of DPAs have looked close to 'having a domestic'[10] with large swathes of individuals online, whilst a few others such as the UK and Ireland have developed equally extreme positions, which appear to ignore the responsibility of individual publishers here entirely. Looking to the future, the forthcoming GDPR provides the opportunity to develop a new tripartite approach, which balances data protection against both competing free speech rights and the limited capabilities, which can reasonably be expected of private individuals on a more consistent and sounder basis. Firstly, interpretation of the personal exemption[11] should be widened to encompass those forms of individual publication which do not pose a serious *prima facie* risk of infringing privacy or other fundamental data protection rights. Second, a broad and non-discriminatory approach should be taken to the special expressive purposes derogation[12] so that it covers individuals disseminating a message to the collective public. Thirdly, individual publication which is both *prima facie* objectionable and predominantly aimed at self-expression and a general freedom to converse should, under the Regulation's new freedom of expression clause, (only) be made subject to data protection's core substantive and supervisory provisions. The practical challenges of implementing this vision should not be underestimated and will undoubtedly have to involve not only individuals themselves but also services such as social networking sites which facilitate (and often mould, structure and aggregate) their publication activities. However, only such a *via media* approach can ensure that Europe's twin commitments to upholding both data protection and freedom of expression in the digital age is effectively realised.

The rest of this article is structured into five parts. The next section outlines the key legislative, social, judicial and regulatory developments prior to the 2013 DPA survey. Section three, which forms the empirical heart of this piece, details the methodology and findings of this survey both as regards the

[2] Directive 95/46 extends not only to the 28 EU Member States but also to three associated states – Iceland, Liechtenstein and Norway – which together with the EU make up the European Economic Area (EEA). See EEA Joint Committee, *Decision 84/1999 amending Protocol 37 and Annex XI (Telecommunication Services) to the EEA Agreement*. The precise relationship between the legal duties of these three associated states and related legal provisions such as the protection of data protection within the EU treaties remains a matter of great complexity, the consideration of which is beyond the scope of this article.

[3] European Union, Fundamental Rights Agency, *Access to Data Protection Remedies in EU Member States* (2013) (http://fra.europa.eu/sites/default/files/fra-2014-access-data-protection-remedies_en.pdf), 9.

[4] Daniel J. Solove, *The Future of Reputation: Gossip, Rumor, and Privacy on the Internet* (Yale University Press) (2007) 19.

[5] Ibid., 29.

[6] Regulation 2016/679 of the European Parliament and of the European Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

[7] Directive 95/46, art. 3 (2).

[8] Directive 95/46, art. 9.

[9] Brendan V. Alsenoy,"The evolving role of the individual under EU data protection law", *CiTiP Working Paper 23/2015* (2015) https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2641680 16.

[10] The Urban Dictionary elucidates this British idiom as follows: "When people are arguing, this is commonly known as 'having a domestic', no matter the seriousness of the argument [*sic*]" (Urban Dictionary, *Having a Domestic* (http://www.urbandictionary.com/define.php?term=Having%20A%20Domestic)). In this case, given that fundamental issues concerning freedom of expression, privacy and personal integrity are at stake, the matter under dispute must be considered quite serious.

[11] Regulation 2016/679, art. 2 (2) (c).

[12] Ibid., art. 85 (2).

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