

Implementation and transposition of Articles 85 and 78 GDPR and Article 53 LED: Overview of discussions with the members of the GDPR/LED expert group

This note summarizes the comments of 26 Member States and 1 EEA country, namely AT, BE, BG, CZ, DE¹, DK, EE, EL, ES, FI, FR, HU, HR, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SI, SK and NO, on Articles 78 and 85 GDPR and Article 53 LED, as well as the comments of CH² on Article 53 LED. Member States which have not provided their input and therefore are not covered in this note are CY as well as SI for the GDPR as the adoption of the national implementing law in SI is still pending. The note does not intend to provide an exhaustive account of the implementation of the mentioned provisions at national level but it aims to give an *overview of different approaches* adopted, based on the feedback received.

Article 85 GDPR

- 1. Exemptions or derogations** for processing for journalistic purposes or the purpose of academic or literary expression in order to reconcile the right to the protection of personal data with the right to freedom of expression and information on the basis of Article 85(1) and (2) GDPR:
 - Member States have adopted various ways to make use of the flexibility provided by Article 85 GDPR. An overview is presented in the annexed table.
- 2. Specific criteria in the national law to reconcile** the right to the protection of personal data with the right to freedom of expression and information:
 - 8 Member States (AT³, BE, CZ, DK, EL, FI, FR, MT) indicated that there are **specific criteria** in the national law which **refer generally to the balancing of**

¹ In DE, the provisions for private and public service TV and radio broadcasters and the online press are laid down in State Treaties which apply in all 16 of the German Länder. Rhineland-Palatinate chairs the Broadcasting Commission which is responsible for these State Treaties and it therefore answered on behalf of all 16 Länder. Some Länder follow the same approach also in their printed press laws, whereas some others have a slightly different approach. As regards Article 78 GDPR and Article 53 LED, the Code of Administrative Court Procedure applies in the Länder and at the federal level.

² Given that the GDPR does not apply to CH, its comments concern only the LED (as a part of the Schengen acquis). In this respect, the replies reflect the situation at the federal level. In the cases where the cantons are responsible for transposing the LED, the proceedings are largely governed by cantonal law and the supervision is the responsibility of the cantonal data protection authorities.

³ In AT the balancing is limited to the processing for the purposes of academic, artistic or literary expression. There are no specific criteria for balancing with regard to the personal data processing by the media for journalistic purposes.

the right to the protection of personal data with the right to freedom of expression and information when necessary.

- 11 Member States and 1 EEA country (BE, CZ, DE⁴, EE, EL, ES, HU, IT, LU, LV, PT + NO) indicated that there are **specific criteria** in the law which require balancing the two rights and **assessing individual circumstances of each case** on the basis of these criteria.
- 13 Member States (AT, BE, DE, DK, FI, HR, IE, LT, NL, PL, RO, SE, SK) indicated that there are **no specific criteria** for balancing or a requirement to assess individual cases as the **balancing is already done by the legislator**.

3. The way of doing the balancing between the right to freedom of expression and the right to the protection of personal data **in practice**:

- 16 Member States (AT, BE, CZ, DE, DK, EL, FI, FR, IE, LT, LU, MT, NL, PL, SE, SK) indicated that the balancing is **already done in the national law(s)** by exempting the application of certain GDPR Chapters or provisions.
- 18 Member States and 1 EEA country (AT, BE, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IT, LU, LV, MT, NL, PT + NO) indicated that the balancing is (also) done on a **case-by-case basis by the controller** based on the criteria in the national law and taking into account relevant European and national case law.
- 4 Member States (BG, ES, LU, RO) indicated that there is (also) **another way of doing the balancing** and clarified this as follows:
 - o BG: Due to the decision of the Constitutional Court (8/2019) the criteria for balancing listed in the GDPR implementing act are no longer applicable. Therefore, the balancing must be done on a case-by-case basis.
 - o ES: The balancing is done by ordinary courts, the contentious-administrative division of the national high court *Audiencia Nacional* (for rulings of the DPA) and ultimately by the Constitutional Court.
 - o LU: Access to information by the data subject must be exercised via the intermediary of the CNPD in the presence of the president of the Press Council or their representative, or when the president of the Press Council has been duly summoned.
 - o RO: In order to verify the balance, all criteria established in the ECHR case law have to be taken into account. The DPA aims to ensure this balance.

⁴ In DE the balancing is limited to the right of access and the right to rectification (as laid down in State Media Treaty).

4. The body or bodies that are in charge of monitoring and/or supervising the reconciliation of the right to protection of personal data with the right to freedom of expression and information:

- 22 Member States and 1 EEA country (AT, BG, CZ, DE⁵, DK, EE, ES, FI, FR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SE, SK + NO) indicated that such body is the **national data protection authority (DPA)**.
- 9 Member States (DE, EE, EL, FI, HU, LU, NL, PT, SK) indicated that such body is also the **media or press council or a similar body**, some of which are voluntary self-regulatory bodies and others established on the basis of national media or press law. In most cases such bodies do not have binding decision-making powers or exercise legal authority in data protection issues (e.g. EE, FI, NL). However, EL indicated that monitoring the content of broadcasting and imposing administrative sanctions in this field belongs to the *exclusive* competence of the National Council for Radio and Television (NCRTV), which is an independent public authority based on the Constitution.
- 20 Member States (AT, BE, BG, CZ, EE, EL, ES, FI, FR, HR, HU, IE, IT, LU, LV, NL, PL, PT, RO, SE) indicated that such role is also given to a **general court** (civil, penal and/or administrative). CZ and ES also mentioned the role of the Constitutional Court in this context.
- 1 Member State (RO) indicated that a supervisory role is also given to the national **Ombudsman**.

5. The powers given to the body responsible for monitoring/supervising the reconciliation of the right to protection of personal data with the right to freedom of expression and information:

- 16 Member States and 1 EEA country (DE, DK, EE, EL, ES, HU, IE, IT, LU, LV, MT, NL, PL, PT, RO, SK + NO) indicated that their DPAs have been attributed **full powers under Article 58 GDPR** as far as the GDPR rules are not exempted or derogated from. In some Member States such powers are excluded for instance in the field of media or broadcasting (e.g. EL, PT).
- 8 Member States (AT, BG, CZ, DE, FI, FR, LT, SE) indicated that their DPAs have been attributed **partial powers under Article 58 GDPR** in a sense that certain specific restrictions apply:
 - o AT: The DPA and the courts have to respect editorial confidentiality of the media as set out in the Media Act (Mediengesetz).
 - o BG: The DPA does not have the right, when applying its powers under Art. 58 GDPR, to request information on the journalistic source.

⁵ Such DPAs can also be specialized DPAs, like in DE (Rhineland-Palatinate) where there are separate DPAs for the processing of personal data for journalistic purposes by private TV or radio broadcasters and for the processing of personal data for journalistic purposes by public service broadcasters.

- CZ: Powers under Art. 58(1)(a)(b)(e)(f) and under Art. 58(2)(d)(f)(g) are excluded or restricted as far as strictly necessary for journalistic purpose.
 - DE: In Rhineland-Palatinate the Broadcasting Commissioners for Data protection, as competent authorities for the public service broadcasters, have full powers under Art. 58 GDPR except for imposing fines under Art. 83 GDPR.
 - FI: The powers under Art. 58(2)(f) do not apply. Otherwise Art. 58 applies unless the Article to which a certain provision of Art. 58 relates to is not applicable.
 - FR: In an investigation carried out by CNIL, the secrecy can be invoked when it is aimed at protecting a journalistic source.
 - LT: Powers under Art. 58(1)(b) and (c), 58(2)(e),(g),(h),(j) and 58(3)(a), (c) and (e)–(j) are not applicable.
 - SE: The DPA's powers can be limited on the basis of the Freedom of Press Act and the Fundamental Law on Freedom of Expression (e.g. to protect the confidentiality of sources and to prevent the censorship).
- 2 Member States (CZ, HR) indicated that **other types of powers** have been given to the competent bodies. Such powers belong to general courts and respective powers apply. In several Member States also media or press councils have powers to enforce voluntary self-regulation, which are in many cases relevant as regards the protection of personal data.

Article 78 GDPR and Article 53 LED⁶

1. **Challenging the decision of the data protection authority (DPA) in the court**, as referred to in Article 78(1) GDPR and Article 53(1) LED:
 - 22 Member States, 1 EEA country (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, IT, LT, LU, PL, PT, SE, SI, SK + NO) and CH indicated that this could be done **once the DPA has taken its decision in the case**.
 - 6 Member States (CZ, LV, MT, NL, RO, SK) indicated that the decision of the DPA can be contested in the court once the data protection authority has taken its decision and the complainant has **exhausted the required intermediary (administrative) remedies**, such as an internal appeal within the authority or a complaint to a higher administrative authority. ES indicated that as the first step an administrative appeal or an appeal for reversal *may* be lodged within the authority itself.

⁶ For SI and CH the text describes only the situation under Article 53 LED.

2. The type of decisions the court can make in the cases falling under Article 78(1) GDPR and Article 53(1) LED:

- 22 Member States, 1 EEA country (AT, BE, BG, CZ, DE, DK, EE, EL, ES, FI, FR, HR, HU, IE, LT, LV, NL, PL, PT, RO, SI, SK + NO) and CH indicated that the court can **either uphold or annul the decision** of the DPA (and refer it back to the authority for material decision).
- 18 Member States (AT, CZ, DE, DK, ES, FI, HR, HU, IE, IT, LT, LU, LV, MT, NL, PT, SE, SI) and CH indicated that the court can also give a **material decision** in the case. In some countries, such as CH, it is the court which decides on the merits of the case and the case is referred back to the DPA only exceptionally, if its expertise is needed.
- 6 Member States (AT, DE⁷, DK, HR, IT, NL) and CH indicated that the court can also make **other types of decisions**, such as order the controller to refrain from or to take a specific action in order to fulfil its obligation under law or to protect the rights of the data subject concerned, impose damages or order compensation (IT, NL).

3. Availability of a judicial remedy in the cases of inaction falling under **Article 78(2) GDPR and Article 53(2) LED**:

- 23 Member States, 1 EEA country (AT, BG, CZ, DE, DK, EE, EL, ES, FR, HR, HU, IE, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK + NO) and CH indicated that a **judicial remedy** is available (after the time limit of 3 months). In CZ and SI, the time limit for the DPA's decision is shorter than 3 months.
- Of these, 20 Member States, 1 EEA country (AT, BG, CZ, DE (for some Länder), DK, EE, EL, ES, FR, HU, IT, LT, LU, LV, MT, NL, PL, PT, RO, SI + NO) and CH clarified that there is a specific provision on such judicial remedy either in their national law implementing GDPR (AT, DE, DK, FR, MT, PT, RO) or transposing LED (DE, DK, ES, LU, PL, SI + NO), and/or in their administrative procedural law (BG, CZ, EE, EL, FR, HU, LT, LU, LV, SI + CH) or in other national law (IT). DE, NL, PL and NO explained that access to a judicial remedy is based directly on Article 78(2) GDPR (in conjunction of relevant administrative laws).
- 2 Member States (FI, SE) indicated that there is **another type of legal remedies** than courts available to the data subject in the cases falling under Article 78(2) GDPR and Article 53(2) LED, namely the Chancellor of Justice and the Parliamentary Ombudsman. They oversee the legality of actions taken by public authorities, including the DPAs, and can for instance issue a reprimand or initiate disciplinary or criminal proceedings in serious cases. Data subjects can also

⁷ The German case-law has different views on this issue. As regards Article 78 GDPR the question of to what effect a court can decide on the case according to Article 78(1) GDPR has been referred to the Court of Justice (request for a preliminary ruling by the Verwaltungsgericht Wiesbaden, Case C-552/21, 7 September 2021).

claim damages or compensation in the court in case the delay has caused damage.

4. The type of decisions the court can make in the cases falling under Article 78(2) GDPR and Article 53(2) LED:

- 22 Member States, 1 EEA country (AT, BG, CZ, DE, DK, EE, EL, ES, FR, HR, HU, IE, LT, LU, LV, MT, NL, PL, PT, RO, SI, SK + NO) and CH indicated that the **court can refer the case back to the data protection authority** and order the data protection authority to examine the case and make a decision on it.
- 12 Member States (AT, CZ, DK, HR, IE, IT, LU, NL, PL, PT, SI, SK) and CH indicated that the **court can make also other decisions**, such as set a time limit for the DPA to make a decision (CZ, HR, LU, NL, PL, SK). For instance in NL, the time limit (notice of default) is accompanied by a penalty payment for each day that the DPA continues to be in default.⁸ In some Member States, the court can also order the controller to refrain from certain action or to take certain action to fulfil its obligation under law or to protect the rights of the data subject concerned (AT, DK, HR, PL, PT, SK), give also a material decision in the case (HR, PL, SI) or order compensation for the damage caused by the infringement (IE). In some Member States (such as IT) and in CH the court has full jurisdiction and it will not refer the case back to the DPA or it will do so only in exceptional cases where the DPA's expertise is needed.

⁸ Such penalty payment is applicable in all situations where the DPA does not decide on time on an application for a decision, including decisions taken under Article 78(1) GDPR.

Annex: The scope of derogations or exemptions under Article 85(1) and (2) GDPR adopted at the national level⁹

	General exemption or requirement to reconcile ¹⁰	Chapter II (Principles)	Chapter III (Rights)	Chapter IV (Controller/Processor)	Chapter V (Transfers)	Chapter VI (DPA) ¹¹	Chapter VII (Cooperation)	Chapter IX (Specific situations)
AT	-	Entire Ch II except Art 5	Entire Ch III	Entire Ch IV	Entire Ch V except Art 28, 29, 32	Entire Ch VI	Entire Ch VII	Entire Ch IX
BE	-	Art 7-10, 11(2)	Art 13-16, 18-20, 21(1)	Art 30(4), 31, 33, 36	Entire Ch V	Art 58	-	-
BG	-	Art 6, 9, 10	Art 12-21	Art 30, 34	-	Art 58(1)	-	Entire Ch IX
CY	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
CZ	-	Entire Ch II	Entire Ch III except Art 23	Entire Ch IV	Entire Ch V	Art 58(1)(a), (b), (e), (f); Art 58(2)(d)(f)(g)	Entire Ch VII	Entire Ch IX
DE	-	Entire Ch II except Art 5(1)(f), 5(2)	Entire Ch III except Art 24	Entire Ch IV except Art 32	Entire Ch V	Entire Ch VI	Entire Ch VII	Entire Ch IX
DK	-	Entire Ch II	Entire Ch III	Entire Ch IV except Art 28, 32	Entire Ch V	Entire Ch VI	Entire Ch VII	Entire Ch IX
EE	-	-	-	-	-	-	-	-
EL	-	Entire Ch II except Art 5	Entire Ch III	Entire Ch IV except Art 28, 29 and 32	Entire Ch V	-	Entire Ch VII	Entire Ch IX
ES	General exemption/requirement to reconcile	-	-	-	-	-	-	-
FI	-	Art 5(1)-(2), 6, 7, 9, 10, 11(2)	Entire Ch III except Art 23	Art 24-27, 30, 31, 34(1)-(3), 35, 36, 39, 40, 42	Entire Ch V	Art 56, 57, 58	Art 60, 61, 62, 63, 64, 65, 66, 67, 70	-
FR	-	Art 5(1)(e), 9, 10 GDPR	Art 12-16 and 18	-	Entire Ch V	Art 58(1)(a)	-	-
HR	-	-	-	-	-	-	-	-
HU	General exemption/requirement to reconcile	-	-	-	-	-	-	-
IE	-	Entire Ch II except Art 5(1)(f)	Entire Ch III	Entire Ch IV	Entire Ch V	Entire Ch VI	Entire Ch VII	-

⁹ The restrictions to the application of the GDPR presented in the table may apply under certain circumstances or to certain extent only (e.g. only for journalistic, artistic or literary purposes or only for academic purposes), or may be subject to a case-by-case reconciling or balancing. This table thereby only indicates *the largest possible scope* of exemptions or derogations, not the grounds on or conditions under which they apply, which vary from one Member State to another.

¹⁰ The existence of a general exemption or a requirement to reconcile is mentioned only for those Member States where the possibility or requirement of balancing the right to the protection of personal data with the right to freedom of expression exists but which have not indicated more specific derogations or exemptions. For those Member States that have indicated that *both* a general exemption or derogation or a requirement to reconcile *and* more specific ones (covering entire GDPR Chapters and/or certain provisions of the GDPR) exist, only the specific exemptions or derogations are shown in the table.

¹¹ In some Member States the scope of exemptions was described to cover also Chapter VI (DPA) or some provisions under it. Despite this, it was sometimes indicated that the DPA is in charge of monitoring and supervising compliance with Article 85 and in many cases the DPA was also explained to have full powers under Article 58 in those areas where the GDPR applies (i.e. in the areas not exempted on the basis of Article 85). For some other Member States, no specific exemptions or derogations concerning Chapter VI were indicated but it was nonetheless stated that DPAs are not competent for instance in the area of broadcasting or more generally in issues covered by Article 85.

	General exemption or requirement to reconcile ¹⁰	Chapter II (Principles)	Chapter III (Rights)	Chapter IV (Controller/Processor)	Chapter V (Transfers)	Chapter VI (DPA) ¹¹	Chapter VII (Cooperation)	Chapter IX (Specific situations)
IT	-	Art 9, 10	-	-	Entire Ch V	-	-	-
LT	-	Art 8	Entire Ch III	Art 25, 30, 33-39, 41-43	Entire Ch V	Art 57 (1) (j-l), (n-t); Art 58(1)(b), (c); 58(2)(e), (g), (h), (j), 58(3)(a), (c), (e)-(j)	-	Art 88-91
LU	-	Art 9(1), 10	Art 13, 14,15	-	Entire Ch V	-	-	-
LV	General exemption/requirement to reconcile	(except Art 5)	-	-	-	-	-	-
MT	-	Entire Ch II	Entire Ch III	Entire Ch IV	-	-	Entire Ch VII	-
NL	-	Art 7(3), 9, 10, 11(2)	Entire Ch III	Entire Ch IV except Art 24, 25, 28, 29, 32	Entire Ch V	Entire Ch VI	Entire Ch VII	-
NO	-	Entire Ch II	Entire Ch III	Art 25, 27, 30, 31, 33(1), 33(3)-(5), 34-39	Entire Ch V	-	Entire Ch VII	Entire Ch IX
PL	-	Entire Ch II except Art 10	Entire Ch III except Art 12, 17 and 23	Art 27, 28(2)-(10), 30	-	-	-	-
PT	General exemption/requirement to reconcile	-	-	-	-	-	-	-
RO	-	Entire Ch II	Entire Ch III	Entire Ch IV	Entire V	Entire Ch IV	Entire Ch VII	Entire Ch IX
SE	-	Entire Ch II	Entire Ch III	Entire Ch IV except Art 31-34	Entire Ch V	-	-	-
SI¹²	N/A	N/A	N/A	N/A	N/A	N/A	N/A	N/A
SK	-	Art 6(1)(a)	-	-	-	-	-	-

¹² According to the information available to the Commission, the adoption of the national law implementing the GDPR in SI is still pending.