



Commission of the Bishops' Conferences  
of the European Union

## Evaluation and review of the General Data Protection Regulation

*A contribution  
by the  
Secretariat of COMECE  
(Commission of the Episcopates of the European Union)*

### 1. Introductory remarks

The **Catholic Church supports and values protection of personal data** and has specific and well-developed internal rules on the matter. The Church's understanding of the importance of protection of personal data and privacy is reflected in its internal provisions: for instance, according to Canon 220 of the Code of Canon Law "*No one is permitted to harm illegitimately the good reputation which a person possesses nor to injure the right of any person to protect his or her own privacy*". This principle is at the core of the work of COMECE on the data protection dossier.

The Church **appreciates the approach taken with the General Data Protection Regulation (GDPR)** to strengthen data protection and citizens' rights. It supports the attempt to reinforce fundamental rights in the EU and is committed to guarantee a high level of data protection in its structures.

With the help of its Secretariat, **COMECE assisted its member Bishops' Conferences** through the process launched with the General Data Protection Regulation and will continue to help them to address the specific challenges posed by the file to the Church in the EU Member States. Concerning the GDPR, **dialogue** was maintained by COMECE **with both the European Commission and the European Data Protection Board**, with the assistance of its Legal Affairs Commission.

Throughout this first phase, the Church at the national level has entertained close and **constructive relations with the respective Data Protection Authorities (DPAs)**. In general, **Member States** have expressed **satisfaction with the level of protection of personal data ensured by the Catholic Church**. Bishops' Conferences and Dioceses have been actively setting up internal training tools and initiatives on specific data protection issues.

The GDPR has undoubtedly contributed to **strengthening data protection culture and awareness** in the EU at all levels and areas of society. The option for a more invasive legislative tool, like a Regulation, created some difficulties. In this contest, the fact that the Regulation allowed national law to specify a number of aspects proved important.

In the context of the ongoing GDPR evaluation and review, we take the liberty of submitting some observations and elements, based on extensive internal reflections and on first evidence of the relevance of the GDPR with regard to Church activities in the Member States. **We would highlight the particular importance of remarks concerning Article 91 GDPR (pages 4-5).**

Taking into account the evident **impact** that the **Covid-19 crisis** is having **on protection of personal data and privacy**, we take this opportunity to underline - in the strongest possible terms - that any **temporary erosion of relevant standards**, linked with this exceptional situation, will have **to be eliminated at the earliest possible stage**; and that even **in the current phase, the highest possible protection of personal data and privacy** must be ensured.

## 2. The fundamental right to freedom of religion

**Recital 4 of the Regulation** highlights the provisions of the Charter of Fundamental Rights of the EU (CFR) in the light of which - in particular - the text should be interpreted and applied. Among them, the articles concerning the **fundamental right to freedom of religion** (Article 10 CFR) and **respect for cultural, religious and linguistic diversity** (Article 22 CFR).

This GDPR provision is **important in interpreting Article 91 GDPR** on "Existing data protection rules of churches and religious associations" (on which more at pages 4-5).

In accordance with Article 52.3 CFR, **Article 10 CFR covers the collective, as well as the institutional dimension of freedom of religion**, as outlined in the protective jurisprudence of the European Court of Human Rights. The right to autonomy/self-determination of Churches - which is guaranteed at the *Constitutional* level in some Member States - is an integral part of this fundamental right. For the Catholic Church this is, inter alia, about its **obligation to record sacraments, as well as defining and applying its internal data protection rules**.

## 3. Lawfulness of processing

A specific question with regard to legal basis' for processing concerns **consent as a possible legal basis for processing when a child is involved**: the GDPR provides limited indications at its Article 8, which are relevant only for information society services. The question of how to address the issue in areas that do not fall under the offer of information society services remains open to the national legislator. **Consent by the holder of parental responsibility over the child** should be referred to as a possible legal basis in such cases. This also affects the Church's approach and its mission in favour of children and youth, in particular catechesis.

## 4. Right to erasure

While Directive 95/46/EC already referred to a right to erasure at Article 12, point (b), the formulation adopted with the Regulation is decidedly **more developed and pervasive**.

The cases in which the data subject has the right to request erasure of personal data concerning him/her are quite **broadly worded** and therefore create grounds for a multiplication of requests.

Concerning the explicit and close link established by Article 17.1, point (c) GDPR between the exercise of the right to object (Article 21.1 GDPR) and the right to erasure, it is to be recalled that § 78 of the *Explanatory Report to the Protocol amending the Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data*, underlines that: **"The right to object operates in a distinct and separate manner from the right to obtain rectification or erasure"**.

In general, the clauses of **Article 17.3 GDPR seem insufficient** in the protection of the rights of data controllers.

Concerning the exception related to the exercise of the **fundamental right of freedom of expression and information** - Article 17.3, point (a) GDPR - the same approach could have been adopted for the **fundamental right to freedom of religion**, considering that both freedoms are identified by the jurisprudence of the European Court of Human Rights among the foundations of a democratic society.

The reference to "**archiving purposes**" - Article 17.3, point (d) GDPR - is somewhat restricted by its link with the "**public interest**" element, despite the useful integration provided by Recital 158.

**Preservation of Church sacramental records from erasure of historical facts and events** that have taken place within the Church community is **indispensable to the Church for carrying out its institutional mission** (e.g. celebrating sacraments such as baptisms, marriages etc.) and for protecting interests of relevant family members.

As recalled above, the **fundamental right to freedom of religion** has a personal but also an **institutional aspect**. Bearing this in mind, as the recording of a sacrament (e.g. baptism) in a Church record also represents an important aspect of the function of an ecclesial body, erasure of the relevant records could lead to the violation of the fundamental right in question.

## 5. Right to object

The impact of the **reversal of the burden of proof** introduced with Article 21.1 GDPR should be carefully assessed, particularly considering that the **broad and open formulation** of the provision can cause an increase in litigation.

The previous references to the need to **balance the right to protection of personal data with the the right to freedom of religion**, in particular in its institutional dimension, are also relevant for the right to object.

## 6. Right of access

In some Member States, Church structures manifested problems in coping with requests of access, especially considering that Article 15 GDPR **does not seem to establish any limitations or exceptions** to this right.

It is also to be noted that Article 15.3 GDPR provides for the obligation for the data controller to **provide automatically a copy of personal data undergoing processing** - as opposed to providing a copy upon the data subject's request. This may create undue **bureaucratic burdens for smaller-size actors**, including Church-related ones.

## 7. Data Protection Officers (DPOs)

The novelty concerning the GDPR provisions on the appointment of **DPOs** has been **well-received within Church structures** as a useful tool.

Although normally Church bodies and mechanisms do not fall within the requirement of "processing on a large scale" of special categories of data pursuant to Article 9 GDPR, **in many countries the Church proceeded to the appointment DPOs**, at different levels in accordance with the national legal situation and status. This as a concrete sign of the **integration of the principle of accountability in the specific Church approach to protection of personal data**. Joint DPOs have been appointed where needed.

## 8. Historical (research) purposes and archiving purposes

Article 89 GDPR (and other provisions in the Regulation) refer to "**historical research purposes**", using a **more limited expression if compared to** the more general reference to "historical purposes" contained in **Directive 95/46/EC**. This renders the protection offered in this regard decidedly less viable. The **rationale** for this limitation is **doubtful**, including in the context of the processes launched with the timely *European Year of Cultural Heritage 2018*.

The new reference to "**archiving purposes**" has proved **useful**, although, as underlined above, the impact of the provision has been somewhat limited by the required connection with "public interest".

In providing 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*" Recital 158 GDPR - in line with Recital 27 - ensures at least **partial protection for some private archives**. However, to ensure better safeguards in this regard, private archives (as it is the case, inter alia, for ecclesiastical archives in many Member States) should be, in our view, considered as of **public interest regardless of whether a legal obligation to keep the records is foreseen or not**.

Furthermore, bearing in mind the universal dimension of the Catholic Church, any **negative impact** deriving from **different levels of protection granted to Church archives** in the Member States **should be avoided**.

## 9. Obligations of secrecy

GDPR provisions on professional or other equivalent obligations of secrecy are **quite limited** (cf. in particular Article 90 GDPR). It is important to ensure that sound legal clauses are in place for this area, inter alia to **ensure that the Church may comply with the obligations to which it is bound by Canon law**, such as those concerning confessional and pastoral secrecy.

## 10. Article 91 GDPR (Existing data protection rules of churches and religious associations)

The inclusion of **Article 91** in the General Data Protection Regulation was **greatly appreciated** and is crucial for the Church in the Member States.

The **misconception according to which Article 91 GDPR concerns/applies to only one specific national legal system** should be countered. The need for the clause in question was made even more evident by the option taken in favour of a Regulation, rather than a Directive.

In accordance with the principle of hierarchy of norms, the **interpretation and application of Article 91 GDPR** has to be **in line with**:

1. The **fundamental right to freedom of religion - including its institutional dimension** - as defined by the jurisprudence of the European Court of Human Rights (Recital 4 GDPR);
2. **Article 17.1 of the Treaty on the Functioning of the EU (TFEU)** on respect and non-prejudice for the status under national law of Churches and religious associations or communities in the Member States.

The **GDPR preparatory works further assist the interpreter**: the Explanatory memorandum to the original Commission proposal states at page 16 (with reference to the original numbering of the provision): "*Article 85 allows in the light of Article 17 of the Treaty on the Functioning of the European Union for the continuous application of existing comprehensive data protection rules of churches if brought in line with this Regulation*". On the basis of Article 17.1 TFEU, **the European Union is bound to respect the diversity of Church-State relations** within the Union and to rigorously avoid interfering with those national models and the legal provisions in which they are formed and firmly established.

With regard to the (closely linked) **Recital 165 GDPR**, it is to be noted that while this provision explicitly mentions **Article 17 TFEU**, it presents a relevant difference from the latter: the Recital refers exclusively to existing "constitutional law", whereas Article 17.1 TFEU concerns more broadly "national law". In the light of this **discrepancy**, the **EU primary law formulation shall prevail** in supporting the interpreter, covering both relevant constitutional and ordinary law at the national level.

Concerning concrete legal expressions used in Article 91 GDPR, the undefined reference to "**comprehensive**" **rules** did raise some doubts, but the implementation of the provision was generally carried out smoothly. It should be underlined that Article 91 GDPR speaks of "**rules**" (not of "law" or "legislation"): this expression even more clearly **excludes the need for one single** previously existing **text compiling all relevant internal norms**.

One final remark concerns the scope of **Article 91 GDPR**, which is **limited to those Churches** and religious associations or communities **which already had "comprehensive rules relating to the protection of natural persons with regard to processing" at the time of entry into force** of the Regulation (24 May 2016). In our view, it is arbitrary to tie the existence of comprehensive rules on data protection to a specific date, if comprehensive rules on data protection, that guarantee a level of data protection comparable to the one guaranteed with the GDPR, are provided for.

*COMECE Secretariat  
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