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Introduction

Currently, web archiving initiatives, both private and public, are flourishing around the world. Among these, the activities of national cultural heritage preservation institutions in preserving the web memory are of paramount importance, particularly because of the considerable resource they constitute for the scientific community and for society at large.

Although web archiving promotes the fundamental right to seek and impart information, it raises many legal issues that must be addressed[2]. In addition to the delimitation of the legal missions and respective responsibilities of national cultural heritage preservation institutions, it is important to pay attention to the following aspects: the definition of the "national web", the consideration of various fundamental rights and freedoms such as freedom of expression, right to information, right to respect for private life and data protection, the respect for copyright and *sui generis* right on databases, the question of possible illegal or damaging online contents that could be collected as well as discussions on the probative value of web archives.

In this chapter, after a brief background highlighting the major societal challenges of web archiving in the public interest, we develop the links with data protection regime, both at the level of European Union law and Belgian law. The aim is thus to analyse the derogatory regime that the

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[2] From a legal point of view, web archiving raises many questions at the stage of selection, collection, preservation, archiving and access to web archives created. It is therefore important to consider all the interests involved, whether those of the authors of the content, the persons cited or involved in the content, the national cultural heritage preservation institutions that fulfil their legal missions, or the scientific community and all citizens who wish to access this important preserved heritage for research or information purposes.

General Data Protection Regulation (hereafter "GDPR") introduces[3] in the particular case of very long-term (or even unlimited) conservation of personal data, namely the processing for archiving purposes in the public interest[4]. Since the GDPR leaves room for manoeuvre to Member States on this point, we will also examine the specificities introduced by the Belgian legislator with regard to the purpose of archiving in the public interest.

I. Web archiving in the public interest: a major societal challenge

In the digital age, and more particularly thanks to the interactivity that characterises it[5], the web is full of contents likely to animate public

[3] The explicit introduction of a derogatory regime for personal data processing for archiving purposes in the public interest is a novelty of the GDPR. Nevertheless, under the former Directive 95/46/EC, processing operations for archiving purposes in the public interest were included by many Member States in the scope of the derogatory regime foreseen for historical research purposes. See O. VANRECK, « Impacts du Règlement général sur la protection des données dans le domaine de l'archivage », in *Le Règlement général sur la protection des données (RGPD/GDPR) – Analyse approfondie*, C. DE TERWANGNE et K. ROSIER (coord.), Bruxelles, Larcier, 2018, p. 840. In support of this consideration for Belgium, let us note Article 20 of the former Royal Decree of 13 February 2001, which stressed the importance of a particular derogation for historical research through archives. See Ancien Arrêté royal du 13 février 2001 portant exécution de la loi du 8 décembre 1992 relative à la protection de la vie privée à l'égard des traitements de données à caractère personnel, *M.B.*, 13 mars 2001, abrogé par la loi du 30 juillet 2018 relative à la protection des personnes physiques à l'égard des traitements de données à caractère personnel, *M.B.*, 5 septembre 2018.

[4] Regulation (EU) 2016/679 of the European Parliament and of the 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 (GDPR), *O.J.*, 4 May 2016, L 119/1, art. 89, §§ 1 and 3.

[5] With the advent of Web 2.0, the Internet user has moved from a passive role on static pages fed by experienced web managers to an extremely active role. Everyone can now easily post articles, photos, videos and comments on participatory websites, forums, blogs, social networks and video sharing platforms. Internet has thus become an important instrument for the exchange of ideas and the communication of information. As the European Court of Human Rights has repeatedly emphasised, it offers a vital tool for citizens' freedom of expression and right to seek and impart information. See ECHR (2nd sect.), case of *Ahmet Yildirim v. Turkey*, 18 December 2012, app. no 3111/10, § 54: "Internet has now become one of the principal means by which individuals exercise their right to freedom of expression and information, providing as it does essential tools for participation in activities and discussions concerning political issues and issues of general interest". See also ECHR (4th sect.), case of *Times Newspapers LTD (Nos. 1 and 2) v. The United Kingdom*, 10 March 2009, app. nos 3002/03 and 23676/03, § 27: "In the light of its accessibility and its capacity to store

debate or to feed the local, regional, national, European or global cultural heritage. Their preservation for the future generations, the scientific community and the society at large is essential, especially as online content is not necessarily replicated in the paper world.

From this perspective, web archiving activities carried out by national cultural heritage preservation institutions represent a major societal challenge. On the one hand, they make it possible to safeguard online cultural heritage by creating a considerable "digital memory". On the other hand, they undeniably facilitate the exercise of the right to seek and impart information protected by Article 10 of the European Convention on Human Rights[6] by providing researchers and citizens with access to a valuable tool bringing together a multitude of contents of general interest and materials representing cultural heritage[7]. These web archiving initiatives in the public interest are traditionally carried out by national cultural heritage preservation institutions, namely a country's national library and national archives. As far as national libraries are concerned, this competence is mostly vested in them on the basis of the mechanism established by the legislation on legal deposit, which is sometimes expressly extended to the web. On the side of the national archives, they play a role in the preservation and archiving of public sector websites on the basis of the legislation on archives. In Belgium, for example, both

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and communicate vast amounts of information, the Internet plays an important role in enhancing the public's access to news and facilitating the dissemination of information in general".

[6] European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted in Rome on the 4th November 1950, art. 10, § 1: "Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers […]".

[7] Although the European Court of Human Rights has not yet had the opportunity to rule specifically on the protection under Article 10 of web archiving activities in the public interest carried out by national cultural heritage preservation institutions, the Court has already ruled on the maintenance of Internet archives (which can be seen as the subsequent phase of information preservation) by news media. In its view, such an initiative is protected by Article 10 and, in addition to being a valuable tool for education and historical research, the maintenance of Internet archives also contributes to the preservation and accessibility of news and information. See ECHR (4th sect.), case of *Times Newspapers LTD (Nos. 1 and 2) v. The United Kingdom*, 10 March 2009, app. nos 3002/03 and 23676/03, §§ 27 and 45; ECHR (4th sect.), case of *Wegrzynowski and Smolczewski v. Poland*, 16 July 2013, app. no 33846/07, § 59; ECHR (5th sect.), case of *M.L. and W.W. v. Germany*, 28 June 20148, app. nos 60798/10 and 65599/10, §§ 90 and 102.

institutions – the Royal Library of Belgium and the State Archives – are responsible for web archiving according to their respective legislation[8].

Although web archiving initiatives are closely related to freedom of expression and to the right to seek and impart information, they necessarily imply to take into account the interests and rights of others, including the right to data protection of natural persons involved in web archives.

II. Application of GDPR provisions to web archiving activities

Web archiving, whether it is carried upon private initiatives or by public institutions on the basis of a legal mandate, involves more often than not "the processing of personal data [...] by automated means", which obviously entails the application of the GDPR[9].

On the one hand, many "information relating to an identified or identifiable natural person"[10] can be found on websites that national cultural

[8] For the Royal Library of Belgium, the Royal Decree establishing the Royal Library of Belgium as a scientific establishment also lists, next to the mission of legal deposit regardless of the medium used, the mission of collecting and inventorying websites related to its missions. However, blogs and private websites are excluded. See Arrêté royal du 19 juin 1837 portant constitution en établissement scientifique de la Bibliothèque royale de Belgique, *M.B.*, 8 juillet 1837, tel que révisé par l'arrêté royal du 25 décembre 2016, *M.B.*, 16 janvier 2017, art. 3. For the State Archives in Belgium, the Royal Decree determining their missions indicates that they are responsible for "ensuring the proper conservation and management of archives, whatever the medium, produced and managed by public authorities, to collect, preserve and possibly destroy public archives" [free translation]. The use of the words "whatever the medium" implies that the State Archives in Belgium are also responsible for archiving the websites of Belgian public authorities. Next to the obligation to preserve public archives, the State Archives in Belgium also have the possibility (and not the obligation) to preserve private archives that may be of interest to the heritage of the federal state or the history of Belgium. It is undeniable that such archives may come from websites and personal blogs. Finally, the Royal Decree also requires the State Archives in Belgium to implement a "digital archive plan" which would include, among other things, the acquisition of archives created in digital form (e.g. websites). See Arrêté royal du 3 décembre 2009 déterminant les missions des Archives générales du Royaume et Archives de l'État dans les provinces, *M.B.*, 15 décembre 2009, art. 2, § 1, 4 and 7.

[9] Aforementioned Regulation (EU) 2016/679, art. 2, § 1.

[10] Aforementioned Regulation (EU) 2016/679, art. 4 (1). The GDPR applies to personal data relating to natural persons only, thus excluding legal persons. This means that information and data relating to companies, enterprises, public authorities or associations that could be collected in the context of web archiving are excluded from the scope of the GDPR. Furthermore, it only applies to personal data relating to living persons. The processing of personal data of deceased persons is therefore not subject to the provisions of the GDPR.

heritage preservation institutions wish to preserve permanently. Indeed, personal data may be found in web contents and signed posts, someone's cultural preferences (literary, cinematographic, musical or artistic tastes) that can be found online, opinions, comments and views expressed by natural persons on blogs and social media, names and surnames of natural persons, contacts details (postal address, email address, telephone number) both personal and professional of natural persons, bibliographical data, someone's photo, a natural person's biography, religious beliefs, sexual orientation, economic income or standard of living and many other information...

On the other hand, collecting and preserving a website containing personal data and providing access to web archives may imply further processing operations within the meaning of the GDPR[11]. In the context of web archiving activities, we are obviously dealing with personal data processing taking the form of long-term conservation, but also to other processing operations such as collection, consultation, use, communication, erasure and destruction of archives.

As a consequence, persons carrying out web archiving activities have the obligation to comply with data protection rules. Nevertheless, national cultural heritage preservation institutions carrying out such initiatives in the public interest will be able to benefit from a series of exemptions. Indeed, the GDPR sets up – while leaving room for manoeuvre to Member States on this point – a derogatory regime for personal data processing for archiving purposes in the public interest. The objective is thus to facilitate preservation activities in the public interest.

Nevertheless, it allows Member States to provide in their national law for "rules regarding the processing of personal data of deceased persons". See Regulation (EU) 2016/679 aforementioned, recitals 27 and 158. Caution is required: it is not because the European data protection legislation does not apply to information relating to deceased persons that national data protection legislation cannot apply.

[11] Aforementioned Regulation (EU) 2016/679, art. 4 (2): "'processing' means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction".

III. Scope and meaning of the derogatory regime for personal data processing for archiving purposes in the public interest

Before detailing the exemptions offered by the derogatory regime, it is important to define its scope in order to delimit its potential beneficiaries.

The provisions of the GDPR do not define the notion of "archiving purpose in the public interest". However, recital 158 states that "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"[12]. Although this recital is not binding and does not constitute a real definition, it does shed some light on the scope of the notion of "archiving purpose in the public interest" by setting out five cumulative conditions to be met in order to fall within the scope of the derogatory regime[13].

First, the data controller for archiving purposes in the public interest must be a public authority, a public body or a private body.

Second, the processing operations carried out must pursue a conservation purpose of archives in the public interest. The GDPR at no point defines the terms "archives" or "records". In its guidelines on the implementation of the General Data Protection Regulation in the archive sector, the European Archives Group suggests to define "archive" as "the whole of the documents created and received by a person, family, or organisation, public or private, in the conduct of their affairs, and selected for permanent preservation"[14]. This definition, which focuses only on archives that are selected for permanent preservation, seems to be particularly

[12] Aforementioned Regulation (EU) 2016/679, recital 158.

[13] On this point, see O. Vanreck, *op. cit.* (see note 3), pp. 851 to 852.

[14] European Archives Group, *Guidance on data protection for archive services: EAG guidelines on the implementation of the General Data Protection Regulation in the archive sector*, October 2018, available at https://ec.europa.eu/info/files/guidance-data-protection-archive-services_en, p. 33. In the Belgian context, an interesting definition can also be found in the legislation on archives, which adopts a very broad understanding of this concept. See Arrêté royal du 18 août 2010 portant exécution des articles 1er, 5 et 6*bis* de la loi du 24 juin 1955 relative aux archives, *M.B.*, 23 septembre 2010, art. 1er, al. 2 and Arrêté royal du 18 août 2010 portant exécution des articles 5 et 6 de la loi du 24 juin 1955 relative aux archives, *M.B.*, 23 septembre 2010, art. 1er, al. 2 : « tous les documents qui, quels que soient leur date, leur forme matérielle, leur stade d'élaboration ou leur support, sont destinés, par leur nature, à être conservés par une autorité publique ou par une personne privée, une société ou une association de droit privé, dans la mesure où ces documents ont été reçus ou

relevant in the context of the objectives pursued by the European legislator with the derogatory regime for personal data processing for archiving purposes in the public interest. Moreover, this definition is likely to cover online materials, such as web pages, blog posts, videos and other forms of web content that may constitute a web archive.

Third, the activity of archives' conservation in the public interest must be legally required by European Union or national law. It can therefore be seen that the data controller of archiving processing in the public interest must be subject to a legal obligation to hold archives in the public interest. In our view, national cultural heritage preservation institutions such as national libraries, national archives and museums undoubtedly fulfil this condition. As quite rightly pointed out by the European Archives Group, "it is not the nature of archives, but the mission of the institution that holds them that determines whether the exemption can be applied"[15]. Next to data controllers who have an explicit legal obligation to hold archives in the public interest, some perform a cultural mission of archives preservation without relying on a legal obligation and therefore do not comply with this condition and cannot benefit from the GDPR derogatory regime for archiving purposes in the public interest[16]. They may nevertheless benefit from another derogatory regime, very similar to the one for archiving purposes in the public interest[17]: the derogatory regime for historical research purposes[18].

Fourth, according to the wording of the recital, the legal obligation of the data controller to hold archives in the public interest must cover the following processing operations: acquisition, preservation, appraisal, arrangement, description, communication, promotion, dissemination, and accessibility. The use of the conjunction "and" implies the cumulative

produits dans l'exercice de ses activités, de ses fonctions ou pour maintenir ses droits et obligations ». However, the scope of the Belgian legal definition is not only reduced to archives selected for permanent preservation.

[15] European Archives Group, *op. cit.* (see note 14), p. 10.

[16] *Ibid.*, p. 10.

[17] The only two exemptions from the regime for archiving purpose in the public interest which do not apply to historical research purpose are those to the right of data portability and to the notification obligation regarding rectification or erasure of personal data or restriction of processing. For a detailed analysis of the exemptions included in the derogatory regime for archiving purpose in the public interest, we refer the reader to part 4 of this chapter.

[18] European Archives Group, *op. cit.* (see note 14), p. 10. See aforementioned Regulation (EU) 2016/679, art. 89, §§ 1 and 2 and recital 160. As O. Vanreck points out, however, it can be difficult in practice to distinguish between archiving purposes in the public interest and historical research purposes. See O. Vanreck, *op. cit.* (see note 3), p. 852.

nature of such a list of processing operations[19]. This would mean that the legal obligation to hold archives in the public interest would have to list all such actions. In our view, it is not appropriate that the data controller subject to a legal obligation to hold archives in the public interest should have to carry out all these data processing operations on the archives in order to benefit from the exemptions. It is undeniable that the archiving purposes in the public interest pursued by data controllers on the basis of a legal obligation outweighs the actual performance of all these processing operations on the archives. We are therefore convinced that national cultural heritage preservation institutions that carry out web archiving activities in the public interest on the basis of a legal mission or a legal obligation should be able to benefit from the derogatory regime set up by the GDPR. It should indeed be recalled that the objective pursued by the European legislator is to facilitate preservation activities carried out in the public interest and that such web archiving initiatives are undoubtedly in line with the philosophy pursued.

Finally, the conservation's legal obligation concerns archives "of enduring value for general public interest". This general public interest is consistent with the public interest idea behind the archiving purposes. Such a purpose is aimed at archives which have a certain cultural, heritage or historical value for society.

Data controllers meeting these five conditions, like national cultural heritage preservation institutions that archive the web in the public interest, will benefit from exemptions from certain key processing principles, from certain obligations imposed on them and from certain rights conferred on data subjects. Therefore, even if they obviously have to comply with the GDPR, all these easings will facilitate the fulfilment of their public interest mission. However, it should be stressed that these exemptions apply only to data processing operations relating to archives held in the public interest. Data controllers may therefore not invoke this derogatory regime for other data processing operations that they carry out (e.g. those on personal data of staff or users)[20].

[19] O. Vanreck, *op. cit.* (see note 3), p. 852.
[20] European Archives Group, *op. cit.* (see note 14), p. 11.

IV. Exemptions for archiving purposes in the public interest

The GDPR introduces the possibility for data controllers to benefit from a favourable regime when processing personal data for archiving purposes in the public interest.

In order to grasp the exemptions covered by this regime, it is necessary to read the GDPR in its entirety. Indeed, some exemptions are directly included in the provisions laying down the processing key principles, the obligations of the data controller and the data subjects' rights to information and erasure. On the other hand, regarding exemptions to other rights of data subjects, we have to pay attention to Article 89, paragraph 3, of the GDPR. This provision mentions that "where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes"[21].

Moreover, before analysing these exemptions, it is important to know that some of them are directly provided for by the GDPR while others are simply allowed by the text of the Regulation but must be put in place by the European or national legislator.

A. A necessary pre-condition: the establishment of appropriate safeguards

National cultural heritage preservation institutions engaged in web archiving wishing to benefit from the exemptions provided for under the derogatory regime for archiving purposes in the public interest, whether contained directly in the GDPR or in Union or national law, must provide appropriate safeguards for the respect of the rights and freedoms of data subjects. This is indeed a precondition for the application of all the exemptions.

In this respect, Article 89, paragraph 1, of the GDPR states that "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

[21] Aforementioned Regulation (EU) 2016/679, art. 89, § 3.

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"[22] (emphasis added).

As part of the technical and organisational measures to be implemented to ensure these appropriate safeguards, the GDPR mentions pseudonymisation and anonymisation measures[23]. In our view, when they are applied according to the minimisation principle, pseudonymisation and anonymisation must not intervene at the stage of the permanent preservation[24]. Otherwise, it will totally undermine the objectives pursued by the archiving purpose in the public interest. We therefore agree with O. Vanreck when she emphasises that the aim of archiving activities, which is to preserve an unaltered version of materials of heritage, cultural or historical value, is difficult to reconcile (or even totally irreconcilable) with pseudonymisation and anonymisation measures[25]. This mention of pseudonymisation and anonymisation measures within Article 89, paragraph 1, of the GDPR does not, however, necessarily indicate a lack of knowledge of the specific sector of archiving by the European legislator. On the one hand, the same appropriate safeguards also apply to scientific or historical research purposes and to statistical purposes for which it is clear that such measures may be necessary in accordance with the minimisation principle. On the other hand, the wording of Article 89, paragraph 1, of the GDPR makes it very clear that pseudonymisation and anonymisation apply only if the intended purpose can be fulfilled despite

[22] Aforementioned Regulation (EU) 2016/679, art. 89, § 1. Emphasis added.

[23] Anonymous data are data that cannot and will never again be linked to an identified or identifiable natural person. Pseudonymised (or coded) data are data that can, by means of a code, key or additional information, relate to an identified or identifiable natural person. In contrast to anonymous data, pseudonymised data fall within the scope of the GDPR since they constitute "personal data". Indeed, the GDPR defines the pseudonymisation as "the processing of personal data in such a manner that the personal data can no longer be attributed to a specific data subject without the use of additional information, provided that such additional information is kept separately and is subject to technical and organisational measures to ensure that the personal data are not attributed to an identified or identifiable natural person". See aforementioned Regulation (EU) 2016/679, art. 4 (5) and recital 26.

[24] Such pseudonymisation or anonymisation measures may of course, however, be applied in the name of the minimisation principle for the later stages of access or making the archives available for the scientific community or citizens in general.

[25] O. Vanreck, *op. cit.* (see note 3), p. 859.

the application of such measures, which is obviously not the case of the archiving purpose in the public interest.

Finally, it is not because pseudonymisation and anonymisation do not apply for the archiving purpose in the public interest that no other technical or organisational measures need to be implemented by national cultural heritage preservation institutions performing web archiving activities. The general requirement of Article 89, paragraph 1, of the GDPR to provide for appropriate safeguards for the rights and freedoms of data subjects remains, of course, applicable.

B. Exemptions directly provided by the GDPR

In their web archiving activities, national cultural heritage preservation institutions will be able to benefit from four exemptions directly provided for in the text of the GDPR. These exemptions concern respectively the purpose limitation principle, the storage limitation principle, the right to information where personal data have not been obtained from the data subject and the right to erasure of identified or identifiable natural persons in web archives.

First, Article 5, paragraph 1, b) of the GDPR allows for an exemption from the purpose limitation principle. This is the principle according to which, on the one hand, personal data must be collected "for specified, explicit and legitimate purposes" and, on the other hand, further processing operations must respect the purposes of origin. The exemption addresses the second facet of the purpose limitation principle. Indeed, further processing for archiving purposes in the public interest is not considered incompatible with the initial purposes for which personal data were collected, provided that appropriate safeguards for rights and freedoms of data subjects have been put in place[26]. This means that, where personal data initially collected for a specific purpose are further processed for archiving purposes in the public interest, such further processing shall automatically comply with the initial purposes for which the personal data were collected[27]. National cultural heritage preservation institutions that are archiving the web in the public interest may therefore benefit from a presumption of compatibility with the objectives pursued by the initial data collection.

[26] Aforementioned Regulation (EU) 2016/679, art. 5, § 1, b).

[27] Aforementioned Regulation (EU) 2016/679, recital 50: "Further processing for archiving purposes in the public interest […] should be considered to be compatible lawful processing operations".

Second, Article 5, paragraph 1, e) of the GDPR foresees an exemption from the storage limitation principle. This principle 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 personal data are processed"[28]. Nevertheless, for personal data contained in web archives established in the public interest and processed solely for this purpose, conservation may be of longer periods if the national cultural heritage preservation institutions have put in place appropriate safeguards for the rights and freedoms of data subjects[29]. In the context of the activities carried out by these institutions, one could even envisage an unlimited period of conservation[30].

Third, Article 14 of the GDPR establishes an exemption from the right to information of data subjects in case of indirect acquisition of data. In principle, where personal data have not been directly obtained from the data subject, the data controller must provide him/her with a range of information[31]. National cultural heritage preservation institutions that are engaged in web archiving in the public interest are allowed not to apply this right to information when this information would be impossible to obtain or would require a disproportionate effort to obtain, or when it would be likely to render impossible or seriously impair the fulfilment of the archiving purpose in the public interest[32]. According to recital 62 of the GDPR, in order to determine whether the provision of this information would prove impossible or would require a disproportionate effort, we have to consider "the number of data subjects, the age of the data and any appropriate safeguards adopted"[33]. The benefit of this exemption is of course still subject to the implementation of appropriate safeguards for the rights and freedoms of data subjects. In this respect, the GDPR cites in particular "making the information publicly available"[34].

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[28] Aforementioned Regulation (EU) 2016/679, art. 5, § 1, e).

[29] Aforementioned Regulation (EU) 2016/679, art. 5, § 1, e).

[30] In the same vein, see C. DE TERWANGNE, « Les principes relatifs au traitement des données à caractère personnel et à sa licéité », in *Le Règlement général sur la protection des données (RGPD/GDPR) – Analyse approfondie*, C. DE TERWANGNE et K. ROSIER (coord.), Bruxelles, Larcier, 2018, p. 114.

[31] Aforementioned Regulation (EU) 2016/679, art. 14, §§ 1-4.

[32] Aforementioned Regulation (EU) 2016/679, art. 14, § 5, b) and recitals 62 and 156. The GDPR states that it is particularly the case "for processing for archiving purposes in the public interest".

[33] Aforementioned Regulation (EU) 2016/679, recital 62.

[34] Aforementioned Regulation (EU) 2016/679, art. 14, § 5, b).

Finally, national cultural heritage preservation institutions may benefit from an exemption from the right to erasure[35] in their web archiving activities in the public interest, as long as they put in place appropriate safeguards for the rights and freedoms of data subjects. Indeed, Article 17, paragraph 3, d) of the GDPR states that this so-called "right to be forgotten" does not apply when personal data processing operations are necessary for archiving purposes in the public interest and if the implementation of this right is likely to render impossible or seriously impair the fulfilment of the archiving purpose in the public interest[36]. As regards web archiving, a second exemption to the right to erasure may apply outside the derogatory regime for archiving purposes in the public interest. This is the exemption provided for the processing of personal data that is necessary for the exercise of freedom of expression and of the right to information[37]. We can therefore argue, for example, that web archives relating to contents of general interest or presenting a heritage, cultural or historical value help to guarantee the right of citizens to receive and impart information[38]. A balance of interests should then be carried out on a case-by-case basis to determine the overriding interest between, on the one hand, the rights to data protection and privacy of data subjects and, on the other hand, the right to information and freedom of expression of all citizens[39].

[35] Article 17 of the GDPR confers in principle to data subjects a right to erasure in a wide range of cases: the personal data are no longer necessary for the initial purposes, the data subject has withdrawn his or her consent and there is no other legal ground for the processing, the data subject exercises his or her right to object, the personal data have been unlawfully processed, the erasure of personal data is imposed by a legal obligation as well as personal data relating to a child collected in the context of the provision of information society services. See aforementioned Regulation (EU) 2016/679, art. 17, § 1.

[36] Aforementioned Regulation (EU) 2016/679, art. 17, § 3, d) and recitals 65 and 156.

[37] Aforementioned Regulation (EU) 2016/679, art. 17, § 3, a).

[38] On this point, we refer the reader to part 1 of this paper.

[39] From the point of view of the European Convention on Human Rights, the case law of the European Court of Human Rights made it possible, in 2012, to draw up an evaluation grid which serves as a "guide" for resolving conflicts between Articles 8 (right to respect for private life and data protection) and 10 (freedom of expression) of the Convention. The relevant criteria for the balancing exercise are: the contribution to a debate of general interest, the notoriety of the person concerned and the subject of the report/diffusion, the prior conduct of the person concerned, the content, the form and the consequences of the publication/diffusion, the circumstances in which the information (e.g. photos) was collected, the method used to obtain the information and its veracity and the seriousness of the penalties imposed. In these two leading rulings (*Von Hannover* and *Axel Springer*), the Court also states that "in cases such as the present one, which require the right to respect for private life to be balanced against the right to freedom of expression, the Court considers that the outcome of the application should not, in theory, vary according to whether it has been lodged with the Court under Article 8 of the Convention by the person who was the subject of the article,

C. Exemptions provided by Union or national law

Next to the exemptions directly provided for in the GDPR, national cultural heritage preservation institutions may also benefit, in their web archiving activities in the public interest, from an exemption from the prohibition principle to process special categories of personal data and exemptions from data subjects' rights if they are implemented by European Union or national law. The GDPR also enables the European or national legislator to authorise the processing of personal data relating to criminal convictions and offences.

First, Article 9, paragraph 2, of the GDPR allows the national or European legislator to provide for a derogation from the prohibition to process special categories of personal data[40] where such processing is necessary for archiving purposes in the public interest[41]. To this end, the national or European legislator granting such exemption must ensure that suitable and specific measures are provided to safeguard the rights and interests of data subjects[42].

Second, Article 10 of the GDPR specifies that the processing of personal data relating to criminal convictions and offences is permitted if it is provided for by Union or Member State law laying down appropriate safeguards for data subjects' rights and freedoms[43]. The Belgian legislator has seized this opportunity. Indeed, Article 10 of the Belgian law of 30 July 2018 authorizes the processing of personal data relating to criminal convictions and offences for archiving purposes[44]. National cultural heritage preservation institutions wishing to process this type of data for web archiving purposes in the public

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or under Article 10 by the publisher. Indeed, as a matter of principle these rights deserve equal respect. Accordingly, the margin of appreciation should in theory be the same in both cases". See ECHR (grand chamber), case of *Von Hannover v. Germany (No. 2)*, 7 February 2012, app. nos 40660/08 and 60641/08, §§ 106, 108-113; ECHR (grand chamber), case of *Axel Springer AG v. Germany*, 7 February 2012, app. no 39954/08, §§ 87, 89-95.

[40] Within the meaning of the GDPR, special categories of personal data which in principle deserve a higher level of protection are genetic data, biometric data, health data, those concerning a natural person's sex life or sexual orientation and those revealing racial or ethnic origin, political opinions, religious o philosophical beliefs or trade union membership. See aforementioned Regulation (EU) 2016/679, art. 9, § 1 and recital 53.

[41] Aforementioned Regulation (EU) 2016/679, art. 9, § 2, j). See also recital 52: "Derogating from the prohibition on processing special categories of personal data should also be allowed when provided for in Union or Member State law and subject to suitable safeguards, so as to protect personal data and other fundamental rights, where it is in the public interest to do so […] Such a derogation may be made […] for archiving purposes in the public interest […]".

[42] Aforementioned Regulation (EU) 2016/679, art. 9, § 2, j) and recital 53.

[43] Aforementioned Regulation (EU) 2016/679, art. 10.

[44] Belgian Law of 30 July 2018 on the protection of individuals with regard to the processing of personal data, *M.B.*, 5 September 2018, art. 10.

interest will have to comply with a twofold condition. On the one hand, they will have to establish a list of the categories of persons having access to such personal data with a description of their function in relation to this data processing. On the other hand, they will have to ensure that these persons are bound by an obligation of confidentiality[45].

Third and finally, next to the possibility to derogate from the right to erasure directly provided for by the GDPR, national cultural heritage preservation institutions carrying out web archiving activities in the public interest will also be able to benefit from exemptions from the other data subjects' rights if these have been established by Union or Member State law[46]. Indeed, for personal data processing for archiving purposes in the public interest, Article 89, paragraph 3, of the GDPR allows the national or European legislator to introduce exemptions to the data subjects' rights of access, to rectification, to restriction of processing, to data portability and to object as well as exemptions to the obligations of the data controller to notify the recipients of personal data of any rectification, erasure or restriction of the processing[47]. National or European law may allow such exemptions where they are necessary to achieve the archiving purpose in the public interest and where the exercise of those rights is likely to render impossible or seriously impair the achievement of this specific purpose. They will also have to put in place appropriate safeguards for data subjects' rights and freedoms[48]. These exemptions were introduced by the Belgian legislator in the law of 30 July 2018[49].

V. Appropriate safeguards and specificities of the Belgian law

The Belgian legislator has made use of the room for manoeuvre conferred by the GDPR in the matter of archiving in the public interest. Consequently, the Belgian law of 30 July 2018 determines, in its Articles 186 to 206, the appropriate guarantees for the rights and freedoms of the data subjects as well as the specificities to respect in order to benefit from the derogatory regime for archiving purposes in the public interest[50].

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[45] Aforementioned Belgian law of 30 July 2018, art. 10.

[46] Aforementioned Regulation (EU) 2016/679, art. 89, § 3.

[47] Aforementioned Regulation (EU) 2016/679, art. 89, § 3 and recital 156.

[48] Aforementioned Regulation (EU) 2016/679, art. 89, § 3 and recital 156.

[49] Aforementioned Belgian law of 30 July 2018, art. 186. For an analysis of the appropriate safeguards for data subjects' rights and freedoms and of the different specificities put in place by the Belgian legislator, we refer the reader to part 5 of this paper.

[50] Aforementioned Belgian law of 30 July 2018, art. 186 to 206.

A. Appropriate safeguards for data subjects' rights and freedoms

First of all, the Belgian law recalls that the derogations to the rights of data subjects referred to in Article 89, paragraph 3, of the GDPR may only be implemented where allowing data subjects to exercise those rights would be likely to make it impossible or seriously impair the processing of personal data for archiving purposes in the public interest and where those derogations are genuinely necessary to achieve such a purpose[51].

Subsequently, the Belgian law determines the various conditions to be met to apply the derogatory regime for archiving purposes in the public interest. Before going into detail, it should be noted that Article 187 of the Belgian law states that these conditions do not have to be met if the data controller complies with a code of conduct approved in accordance with Article 40 of the GDPR[52].

Without prejudice to the application of such an exception, in order to benefit from the derogatory regime, national cultural heritage preservation institutions engaged in web archiving activities in the public interest will have to comply with four obligations. First, if the processing of personal data for archiving purposes in the public interest is likely to create a high risk for the rights and freedoms of natural persons[53], national cultural heritage preservation institutions will have to appoint a data protection officer[54]. Second, prior to any data collection, national cultural heritage preservation institutions will have to include specific mentions in the records of processing activities: on the one hand, the justification of the public interest nature of the web archives kept and, on the

[51] Aforementioned Belgian law of 30 July 2018, art. 186, al. 2.

[52] Aforementioned Belgian law of 30 July 2018, art. 187. For more information on codes of conduct in the sense of the GDPR, we refer the reader to the contribution of Y. Poullet. See Y. Poullet, « Les modes alternatifs de régulation : codes de conduite, certifications et ADR dans le RGPD », in *Le Règlement général sur la protection des données (RGPD/GDPR) – Analyse approfondie*, C. de Terwangne et K. Rosier (coord.), Bruxelles, Larcier, 2018, pp. 337 to 367.

[53] This high risk for the rights and freedoms of natural persons is understood here in the sense of Article 35 of the GDPR. Paragraph 1 of that provision states that "Where a type of processing in particular using new technologies, and 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, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data. A single assessment may address a set of similar processing operations that present similar high risks". See aforementioned Regulation (EU) 2016/679, art. 35, § 1.

[54] Aforementioned Belgian law of 30 July 2018, art. 190. On data protection officers, we refer the reader to K. Rosier, « Délégué à la protection des données : une fonction multifacette », in *Le Règlement général sur la protection des données (RGPD/GDPR) – Analyse approfondie*, C. de Terwangne et K. Rosier (coord.), Bruxelles, Larcier, 2018, pp. 559 to 592.

other hand, the reasons why the exercise of data subjects' rights might make it impossible or seriously impair the fulfilment of the purpose of archiving in the public interest[55]. Third, in case the personal data are collected directly from the data subject (which will remain a very marginal hypothesis in the context of web archiving activities in the public interest), national cultural heritage preservation institutions will have to provide additional information to the data subject. Indeed, they will have to inform the data subject whether or not his or her personal data will be anonymised and why the exercise of his or her rights would make it impossible or seriously impair the fulfilment of the public interest purpose of archiving[56]. This information shall be annexed to the records of processing activities[57]. Finally, if national cultural heritage preservation institutions have not collected personal data directly from the data subjects, they should in principle conclude an agreement with the data controller of the initial processing operation[58]. This agreement should be annexed to the records of processing activities and ought to contain both the contact details of the initial and subsequent data controllers and the grounds on which the exercise of his or her rights would make it impossible or seriously impair the fulfilment of the archiving purpose in the public interest[59]. Three exceptions to this obligation to conclude an agreement with the initial data controller are nevertheless provided for by the Belgian law: if the processing is carried out on the basis of personal data that have been made public, if a legal text mandates the data controller to process personal data for archiving purposes in the public interest or also if a legal text prohibits the re-use of personal data for other purposes[60]. Clearly, in the context of web archiving activities in the public interest carried out by national cultural heritage preservation institutions, the first two exceptions are intended to apply. Nevertheless, even if they can avail themselves of these exceptions, they must still inform the initial data controller of such data collection[61].

[55] Aforementioned Belgian law of 30 July 2018, art. 192.
[56] Aforementioned Belgian law of 30 July 2018, art. 193.
[57] Aforementioned Belgian law of 30 July 2018, art. 196.
[58] Aforementioned Belgian law of 30 July 2018, art. 194, al. 1er.
[59] Aforementioned Belgian law of 30 July 2018, art. 195 and 196.
[60] Aforementioned Belgian law of 30 July 2018, art. 194, al. 2.
[61] Aforementioned Belgian law of 30 July 2018, art. 194, al. 3.

B. Specificities for the dissemination and the communication of personal data processed for archiving purposes in the public interest

The Belgian legislator has also foreseen appropriate safeguards for data subjects' rights and freedoms in the event of dissemination or communication of personal data processed for archiving purposes in the public interest[62]. Whereas the Belgian legislator understands "dissemination" as the publication of personal data without the possibility of identifying the third parties who will be able to consult them, "communication" refers to personal data communicated to identified third parties[63]. National cultural heritage preservation will therefore have to be attentive to these specificities when making web archives accessible to the scientific community and citizens in general[64].

On the one hand, regarding the dissemination of web archives containing personal data processed for archiving purposes in the public interest to non-identified third parties, the rules vary according to whether the data are pseudonymised or not. National cultural heritage preservation institutions may disseminate pseudonymised data, with the exception of the special categories of personal data listed in Article 9 of the GDPR[65]. Regarding personal data that have not been pseudonymised, their dissemination is in principle prohibited. Nevertheless, Belgian law provides for four exceptions to this prohibition: obtaining the consent of the data subject, the fact that the data subject has himself or herself made his or her personal data public, the fact that the personal data are closely related to the public or historical character of the data subject or again the fact that the personal data have a close connection with the public or

[62] It is nevertheless possible that a legal text (Union law, specific law, ordinance or decree) may provide for stricter conditions than those provided for by the Belgian law of 30 July 2018 for the dissemination and communication of personal data processed for archiving purposes in the public interest. See aforementioned Belgian law of 30 July 2018, art. 205, 206 et 207.

[63] See aforementioned Belgian law of 30 July 2018, art. 188.

[64] In Belgium, the Royal Library of Belgium and the State Archives in Belgium have a legal obligation to make their collections accessible to the public. See Arrêté royal du 19 juin 1837 portant constitution en établissement scientifique de la Bibliothèque royale de Belgique, *M.B.*, 8 juillet 1837, tel que révisé par l'arrêté royal du 25 décembre 2016, *M.B.*, 16 janvier 2017, art. 3 ; Arrêté royal du 3 décembre 2009 déterminant les missions des Archives générales du Royaume et Archives de l'État dans les provinces, *M.B.*, 15 décembre 2009, art. 6 and 7.

[65] Aforementioned Belgian law of 30 July 2018, art. 206. These special categories of personal data include genetic and biometric data, data concerning health, sex life or sexual orientation and data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs or trade union membership.

historical nature of facts in which the data subject has been involved[66]. In the context of their web archiving activities in the public interest, national cultural heritage preservation institutions will undoubtedly be able to invoke the latter two exceptions. Although the first two exceptions could also apply, certain weaknesses need to be considered. With regard to the exception relating to obtaining the consent of the data subject, it should be stressed that web archiving activities are likely to cover a huge number of websites. It therefore seems, for operational reasons, very complicated for national cultural heritage preservation institutions to rely on this exception which would require to manage numerous contacts with data subjects. As regards the exception relating to the fact that the data subject himself/herself has made his/her data public, it should not be overlooked that on the web many personal data are published by third parties.

On the other hand, regarding the communication of web archives containing non-pseudonymised personal data processed for archiving purposes in the public interest, national cultural heritage preservation institutions must ensure, in three specific situations, that persons receiving such data may not reproduce them other than by handwriting[67]. This obligation applies if web archives contain special categories of personal data or personal data relating to criminal convictions and offences, if the possible agreement with the initial data controller prohibits this, or also if the reproduction of personal data in a way other than by handwriting would be detrimental to the security of the data subject[68]. However, the Belgian legislator has provided for the same four exceptions as those laid down for the dissemination of non-pseudonymised personal data, which could thus enable national cultural heritage preservation institutions to communicate web archives containing non-pseudonymised personal data without having to ensure that they cannot be reproduced other than by handwriting[69].

Conclusion

As we have pointed out, web archiving initiatives have a particular resonance with regard to the citizens' right to information. By safeguarding the cultural heritage available online, national cultural heritage

[66] Aforementioned Belgian law of 30 July 2018, art. 205.
[67] Aforementioned Belgian law of 30 July 2018, art. 207.
[68] Aforementioned Belgian law of 30 July 2018, art. 207.
[69] Aforementioned Belgian law of 30 July 2018, art. 208.

preservation institutions tend to create a "digital memory". In doing so, they offer a considerable tool to enable everyone to exercise their right to seek and impart information protected by Article 10 of the European Convention on Human Rights.

With a view to facilitating heritage preservation activities, the European legislator has, within the GDPR, set up a derogatory regime for data processing for archiving purposes in the public interest. National cultural heritage preservation institutions may therefore, when archiving the web in the public interest, benefit from a series of exemptions from certain key processing principles, from certain obligations imposed on them and from certain rights conferred on data subjects.

Even if we obviously welcome such a consideration of archiving activities in the public interest, two pitfalls remain in the derogatory regime established by the GDPR.

On the one hand, despite the clarifications provided by recital 158, there is no legal definition of “archiving purposes in the public interest”. This deficiency, which is largely regrettable, leaves room for vagueness as to the scope of the potential beneficiaries of the derogatory regime.

On the other hand, the European legislator has missed the opportunity to adopt a harmonised approach for data processing for archiving purposes in the public interest. Indeed, while some exemptions are directly applicable under the GDPR[70], others have to be implemented by national or European Union law[71]. The Member States therefore still have a considerable margin of manoeuvre regarding data processing for archiving purposes in the public interest. This therefore creates the risk of differentiated regimes across the European Union. Such a risk is undoubtedly unfortunate, especially for web archiving activities in view of their “borderless” character. From one Member State to another, national cultural heritage preservation institutions may not be able to benefit from the same exemptions to facilitate their legal mission of preservation in the public interest…

[70] It is the case for the purpose limitation principle, the storage limitation principle, the obligation of information in case of indirect acquisition of data and the right to erasure.

[71] It is the case for the prohibition to process special categories of personal data, the right of access, the right to rectification, the right to restriction of processing, the right to data portability, the right to object and the obligations of notification in case of rectification, erasure or restriction of the processing.