Foster Transparency of Judicial Decisions and Enhancing the National Implementation of the ECHR (TJENI)

Roundtable on personal data protection in the publication of judicial decisions
Report

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TJENI presentation

The project "Foster Transparency of Judicial Decisions and Enhancing the National Implementation of the ECHR" (TJENI) is funded by Norway *Grants Funds for Regional Cooperation* – and is implemented by the *Innovative Solutions for Human Rights and Justice Unit* of the *Transversal Challenges and Multilateral Projects Division*, of the *Directorate General for Human Rights and Rule of Law (DG I)* of the Council of Europe.

This Roundtable gathered – in Brussels and online – more than 20 participants from several countries (project partners: Cyprus, Hungary, Lithuania, Poland, Romania, Slovenia and representatives of the authorities of other countries: France and Ireland), who had the opportunity to participate actively in the discussions and exchanges on the topics related to personal data protection in the publication of judicial decisions.

The roundtable was divided in four thematic sessions dedicated to: (I) Personal data processing by courts and their judicial capacity, (II) Right to be forgotten, rehabilitation and periods of data retention, (III) Safeguards and remedies in relation to personal data publication: international standards and national experience, and (IV) Practical aspects of publication of judicial decisions.

***Total** number of participants (in person and online) – 41*
***In person** participants – 20 (13 F, 7 M)*
***Online** participants – 21 (7 F, 14 M)*
***Gender** count (in person and online) – 20 F, 21 M*

Opening remarks

Giving the opening remarks, Mr. Tigran Karapetyan, Head of Division, Transversal Challenges and Multilateral Projects, Directorate General Human Rights and Rule of Law (DGI), Council of Europe, noted that the event was the third event organised under the TJENI Project. He emphasised the importance of personal data in openly published judicial acts as significant, considering the need for the publication in order to secure transparency of judiciary as well as legal research, on the one hand, and the effect on the rights of individuals on the other. Personal data contained in judicial decisions could refer to parties as well as witnesses, suspects, expert witnesses, judges, legal representatives and other participants of the court proceedings. There are a few security measures available, amongst which anonymisation or pseudonymisation. The exchange of experience at international level serves to equip the participants with the knowledge that may be applied in respective national systems.

Mr. Karapetyan informed about the achievements of the project so far. These included the need assessments for each of the beneficiaries and respective action plans. The shared space developed by the project team serves as a library of all materials produced throughout the Project. In addition, the project prepared a compilation of CoE standards and documents relevant to the publication of judicial decisions including the case law of the European Court of Human Rights pertaining to data protection in these matters. He also announced the efforts to connect the ECtHR database (HUDOC) with national systems to better use data, and other forthcoming activities. This event was supported by other units or bodies of the CoE, such as those dealing with issues of artificial intelligence or data protection.

Daniele Nardi, Legal Service Officer, European Data Protection Supervisor, emphasised the relevance of the event's topic considering the ongoing discussions at the level of the European Union. Considering the importance of cooperation with the CoE, the EDPS opened an office in Strasbourg. The European Data Protection Board has not dealt with the issue of the publication of judicial decisions; however, the exchange on this topic is necessary. According to Mr. Nardi, the topic of the conference had two avenues: the impact on personal data, rights of individuals, and the competence of the supervisory authorities vis-à-vis courts. Mr. Nardi referred to the X Z case of the European Court of Justice and its relevance for the topic, but also highlighted how difficult it is for the law students to differentiate and refer to this case because of its title.

Session 1 – International standards and case law on personal data protection

The session was opened by Elena Yurkina, Head of Unit, Innovative Solutions for Human Rights and Justice, DGI, Council of Europe who referred to a recently published survey results by the French Ministry of Justice on access to online judgement and the reuse of data. Several risks were identified in this survey: reidentification, intervention with private life, right to be forgotten and security. According to the gathered answers, 13 of 21 respondents had some regulation in place concerning the reuse of the published judicial data, 1 state responded to have established an agreement scheme in case of reuse of data. Regarding the existence of controlling authorities that would be competent for the reuse of data in judicial, two states responded that the matter had been considered. Ms. Yurkina noted that such a variety of answers proved different approaches. Therefore, discussion about standards is necessary.

Nevena Ruzic, CoE Expert, provided an overview of existing instruments in the area of personal data protection and challenges, especially in relation to judicial decisions

pronouncement, such as: possibility of disclosure of personal data not only of the parties, but other data subjects; broad definition of personal data; the right to access to information and its reuse (recognised as the constitutional right in many countries, also a subject matter of the Convention on Access to Official Documents (CETS No. 205) and to some extent protected under the European Convention), as well as some freedom of expression aspects.

The notion of judicial capacity, as noted in the opening remarks, is essential for understanding both the application of data protection rules and the competence of supervisory authorities. Application of pseudonymisation leads to application of the rules of personal data. Furthermore, there is no common practice regarding the entity that is responsible for the publication of decisions, and in some countries, these are courts but in others it may be a ministry. Ms. Ruzic presented different models: making all information with personal data available and data recipients responsible for further use, removing some personal data, or applying full anonymisation. The last would be, in her opinion, detrimental to the court's reasoning in the decision.

Having in mind the application of data protection rules, Ms. Ruzic spoke about principles and rules to be applied, such as the principles of lawfulness, fairness and transparency, processing based on legal basis. Also, the need to respect data subjects' rights. Other obligations in the area of personal data protection entail necessity to have in place an agreement with data processors, as well as due diligence in choosing the right data processors, and performing data protection impact assessment. The requirement to have data protection officers is also applicable should the publication of decisions be regarded as an activity outside of the judicial capacity.

Silvia Martinez Canton, Seconded magistrate at the Court of Justice of the European Union from Spain, presented the CJEU case X and Z v Autoriteit Persoonsgegevens decided in March 2022. She first presented a case decided by a Spanish court during the Franco regime and a request submitted by descendants of a registrar whose name was published under the right to be forgotten as they wished not to be related notably to their relative's allegiance to Franco. The case X and Z v Autoriteit Persoonsgegevens referred to the access to judicial cases by journalists under the national regime. Following the inquiry of parties, the Dutch data protection authority referred the following question to the CJEU for the preliminary ruling: whether the authority is competent for the case (provision of some information about the case by national courts) and the application of Art 55(3) GDPR ["Supervisory authorities shall not be competent to supervise processing operations of courts acting in their judicial capacity"]. The Court took into account all arguments and decided that "the fact that a court makes temporarily available to journalists documents from court proceedings containing personal data in order to enable them better report on the course of those proceedings falls within the exercise, by that court, of its 'judicial capacity', within the meaning of that provision". The judgement has already impacted CJEU rulings in respective cases C-180/21 and C-268/21, both referring to the disclosure of personal data in judicial cases. Concluding her presentation Ms. Martinez Canton went back to the Spanish case concerning the right to be forgotten by the descendants of the court registrar during the Franco regime and explained that Spanish courts refused to grant the request with the reference to a need to be known as a part of societal history and heritage.

Boglarka Benko, Senior lawyer at the Registry of the ECtHR, presented the case law of the ECtHR and the principles on which the case law is based. Ms. Benko stressed the importance of differentiating the right to privacy from the right to data protection, as for the ECtHR data protection would be relevant if it concerned one's private life. While a rule may be in compliance with data protection regulation, it may represent a potential interference in the privacy. In such situation the ECtHR balances the right to privacy and public interests (for example in an access to some information, or in freedom of expression, or transparency of judiciary, or legal research). In addition, disclosure or publication of information / data may be

concerned not only the parties to the proceedings, but also other persons. The concept of reasonable expectation of privacy as established by the ECtHR is applied in the case law of the ECtHR. Also, in addition to the risks indicated in the mentioned report of the French Ministry of Justice the ECtHR's case law points the risks of secondary victimisation, particularly in cases pertaining to sexual harassment.

Presenting the case law, Ms. Benko listed other aspects taken into account by the ECtHR in such type of cases: availability to the authorities of less intrusive measures (i.e. whether alternative measures exist that have less impact on private life), individual approach in each case (did the domestic courts balance the competing interests), and availability of safeguards (are there safeguards allowing protect or remedy negative impact on the private life in case of publication).

Session 2 – Open justice and personal data in publication of judicial decisions

Laetitita Dimanche, Project Officer, Innovative Solutions for Human Rights and Justice, DGI, Council of Europe introduced the topics of the session.

Luis Neto Galvao, CoE expert, gave a presentation on EU standards and national experience. He reiterated that the right to be forgotten is commonly seen as established by the CJEU case Google v. Spain was more about the right to be delisted or erased. Although the right empowers the individual in their control over data, in practice it is difficult to implement, more so in the digital environment. Mr. Neto Galvao reiterated the questionable notion of anonymisation, particularly due to the broad definition of personal data. Adding different examples of anonymisation he noted a recent initiative of the CJEU to replace personal data regarding names of the parties with fictional names. There are several legal safeguards and procedures to protect the confidentiality of personal data in court proceedings, such as pseudonymisation, data protection impact assessment, data retention policies, as well as reduction or access control. Regarding the applicability of GPDR to courts acting in their judicial capacity and the competence of supervisory authorities he suggested addressing the authorities in case of doubt. Apart from procedure there are other tools to secure the right to be forgotten, such as different legal remedies under GDPR, not only to be exercised by data subjects affected, but also through organisations (e.g. noyb or Digital Rights Ireland).

Mr. Neto Galvao presented the findings of a 2018 research pertaining to the supervision of compliance with data protection rules by courts acting in their judicial capacity according to which only Luxembourg provided specific, structurally independent body, while 17 legal systems had established a specific supervisory mechanism or initiated work in that regard, within the courts and outside. He also referred to the conclusions of the European Network of Councils of the Judiciary (ENCJ) on the implementation of GDPR in judiciary according to which data protection officers were appointed for courts with the mandate limited to data processing pertaining to administrative, management or internal organisation activities. Also, most Members States did not have specialised authority for the courts.[1]

Boglarka Benko, continued presenting standards in the case law of the ECtHR, notably regarding the interest of individuals, such as the right to be forgotten, and public interests

[1] The findings are found on the internet available in Portuguese, however, not other resources were found by the time of submission of this report. https://www.stj.pt/wp-content/uploads/2023/02/2fev2023_webinar_sw_apresentacao-webinar-protecao-de-dados-e-tribunais_stj_v4.pdf.

emphasising the focus on reputation rather than personal data. The right to be forgotten under the ECtHR case law needs to be observed through the notion of the expectation of privacy, and the same applies to court proceedings. Right to have an access to information may also be conflicting with the right to have personal data deleted. Access to courts' documents and decisions may depend on the existence of public interest that may change through time. When examining the cases the ECtHR considers the passage of time and related need for historical debate, need for rehabilitation, as well as loss of notoriety. The case law provides reasoning for both increase and decrease of public interest after a certain period has passed. As noted by Mr. Neto Galvao, GDPR is not applicable to the personal data of deceased persons.

Participants had discussions about the right to be forgotten in relation to court files and archives. Ms. Benko addressed the issue of digital archives and the question whether the modification would affect the very purpose of those archives. Ms. Ruzic commented that as a general rule, the exercise of the right to be forgotten should not be applied in such cases. In addition, Ms. Benko mentioned the cases referring to access to case files containing sensitive information.

Ms. Benko continued explaining different safeguards such as deletion, de-indexing, as well as anonymisation. In some cases, anonymisation may prove not only impossible but, as in the cases of anonymisation of a news item referring to a former president of Hungary, absurd. Mr. Nardi added that the difficulty of application of the rules stemmed from different understanding of public interest and the choice of person to be exposed to the public, as a public figure in politics or culture. Ms. Benko said that the time of the request to have personal data deleted is important. Mr. Karapetyan added another challenge regarding one's choice to opt out, i.e. for anonymisation, and later to opt in. The discussants agreed that the same degree of protection could not be allocated to each person equally. Mr. Nardi made distinction between original publication, e.g., the source, and further distribution. The (re)use of data should not be the responsibility of the source as a rule, however, as noted by Ms. Benko, there may be some exemptions. Requesting the purpose of (re)use of information would in many cases be contrary to the principle of access to information. In some cases, in Serbia, a judge can order the publication of a decision in the media, and this is often done integrally. As noted by Ms. Ruzic, further use of data would be under the responsibility of a new data controller. However, the data controller should be aware of the risks when making personal data available. Disclaimers that exist in some countries should not waive the responsibility of a public authority.

Marie Baker, judge of the Supreme Court and Supervisory Authority for data processing operations of courts when acting in their judicial capacity, Ireland, presented national experience in arrangement of safeguards in relation to publication of judicial decisions. According to Ms. Baker the distinction needed to be drawn between data protection under GDPR, and data privacy. She also explained the reasoning of having a decisions published in Ireland with all data. Open justice, a core principle elaborated by philosopher J. Bentham, is fundamental for the establishment and continuation of administration of justice. In addition, it permits the scrutiny of the justice. There are hearings that are heard in camera (matrimonial cases, childcare cases), or are restricted for reporting / publication. Criminal cases are not generally heard in camera, however, may be subject to reporting restrictions. Providing an example of disclosing data referring to HIV infected individuals that were part of a case, Ms. Baker stressed that it was decided that the publication of their names served to the principles of open justice. Minimisation of data is encouraged such as names of litigants' children, financial data, home address, etc. However, these questions are decided depending on certain circumstances in each individual case. She agreed that the right to be forgotten would not apply to archives.

Ms. Baker, being a person responsible of applications concerning personal data contained in decisions, shared her experience noting that, though in some cases there were opposing views, by default the ruling judges would comply with her suggestion to remove data, even in cases of judges of higher courts. The removal may be a result of an individual request such as the case of a witness in a high-profile case whose name and address were made available, and she suggested deletion of home address (as unnecessary for the case data disclosure) and later needed to track this data and introduce the respective amendments in lower courts judgements. Regarding some allegations of deficiency in her independence being a judge herself, other considered options are appointment of a data protection person outside the judiciary. Mr. Neto Galvao expressed his doubts whether the system provided independence as well as impartiality due to the small community. Ms. Baker noted that the lack of “teeth”, fines as well as other instruments might affect the effectiveness, however, so far that had not been an obstacle. The model of having general supervisory authority would not be appropriate, neither would the inclusion of academia.

Ms. Yurkina commented about a potential challenge for setting of a proper data protection safeguard mechanism in form of possible uncertainty in person or body in charge of remove of personal data from decisions, when many actors are involved. In Ireland, the publication of decisions is done by court service under the instruction of a ruling judge and never by the ministry as it would be against the concept of separation of powers. Mr. Karapetyan raised the issue of older decisions and the removal of data, as well as situations in which the removal of data was sought after a judge had left the office. Ms. Baker answered that the judgements were being published since maximum 30 years ago, while older judgements were kept in repositories in legal libraries. Regarding other cases, she noted she could be the one deciding about removing data, if necessary.

Taking into account different legal systems, Ms. Yurkina, noted the importance of precedents in common law legal systems, wondering whether substitution of full names with initials make referencing to cases impossible, and the legal research and studies difficult. According to Ms. Baker, that would be regarded neither necessary nor desirable, which would be applicable to any common law country. The practice of the CJEU to substitute names with initials is, for cases coming from Ireland, futile, as the full names are available in the domestic case law.

Representatives of Cyprus noted the commonalities with the Irish system. Ms. Eleftheria Araliou shared reservations vis-à-vis the anonymisation of the names of the parties in the decisions prior its publication as it goes against their legal tradition in common law system. .

The vivid discussion left no time for planned session 3 on data protection impact assessment and the role of data protection officers.

Concluding remarks

Concluding the event, Ms. Yurkina said that every time one would think of having soma questions answered, new questions appear. Whatever is the approach of the national authorities, human rights and the respective standards set shall always be in the focus. Digitisation should be done mindful of human rights. Ms. Yurkina reminded the participants of an existing HELP course available on the CoE platform, notably the one on data protection, as well as the pertinent documents prepared by different committees and bodies of the CoE.

Agenda

09.15 – 09.30	**Registration of participants**
09.30 – 09.50	**Opening remarks** • Daniele Nardi, Legal Service Officer, European Data Protection Supervisor • Tigran Karapetyan, Head of Division, Transversal Challenges and Multilateral Projects, Directorate General Human Rights and Rule of Law (DGI), Council of Europe
	International standards and case law on personal data protection
09.50 – 11.10	**Moderator:** Elena Yurkina, Head of Unit, Innovative Solutions for Human Rights and Justice, DGI, Council of Europe **I. Personal data processing by courts and their judicial capacity** • Overview of the existing instruments and regulation, Nevena Ruzic, CoE expert (20 min) • Case law of the CJEU: (*CJEU case of 24 March 2022, X and Z v Autoriteit Persoonsgegevens),* Silvia Martinez Canton, Seconded magistrate at the Court of Justice of the European Union from Spain (20 min) • Case law of the ECtHR, Boglarka Benko, Senior lawyer at the Registry of the ECtHR (20 min) **Discussion (20 min)**
11.10 - 11.30	***Coffee break***
	Open justice and personal data in publication of judicial decisions
11.30 – 13.10	**Moderator:** Laetitita Dimanche, Project Officer, Innovative Solutions for Human Rights and Justice, DGI, Council of Europe **II. Personal data protection in publication of judicial decision: safeguards and remedies (international standards and national experience)** • EU standards and national experience, Luis Neto Galvao, CoE expert (30 min) • Standards in the case law of the European Court, Boglarka Benko, Senior lawyer at the Registry of the ECtHR (30 min) • Selected national experience in safeguards arrangement, Marie Baker, judge of the Supreme Court, Ireland (20 min) **Discussion (20 min)**
13.10 – 13.50	**Moderator:** Biljana Nikolic, Senior Project Officer, Innovative Solutions for Human Rights and Justice, DGI, Council of Europe **III. Discussion on practical aspects of publication of judicial decisions** • Data protection impact assessment (DPIA) and Data Processing Agreement (DPA) • Data protection officers: roles and responsibilities – project beneficiaries
13.50– 14.00	**Concluding remarks** • Elena Yurkina, Head of Unit, Innovative Solutions for Human Rights and Justice, DGI, Council of Europe
14.00 – 15.30	***Lunch***