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BRE-JBZ

From: Kaai, Geran
Sent: vrijdag 3 april 2015 15:56
To: Verweij, Ellen
Subject: FW: Data protection - ENPA/EMMA updated position and suggestions for amendments
Attachments: Data Protection_Council text suggestions for amendments final.docx; Joint publishers and journalists' statement - EU draft Regulation on Dat....pdf; 20140509 letter on data protection NL.pdf
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From: BRE-JUS
Sent: vrijdag 9 mei 2014 17:02
To: Grave, Martijn-de; Ruiter, Mieneke-de; Dam, Caroline-ten; Alink, Marnix; Kaai, Geran; Sorel, Alexander; Luijsterburg, Sander; Zwart, Jan
Subject: FW: Data protection - ENPA/EMMA updated position and suggestions for amendments

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Van: BRE
Verzonden: vrijdag 9 mei 2014 17:02:22 (UTC+01:00) Brussels, Copenhagen, Madrid, Paris
Aan: BRE-JUS
Onderwerp: FW: Data protection - ENPA/EMMA updated position and suggestions for amendments

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From: [redacted] [mailto:[redacted]]
Sent: vrijdag 9 mei 2014 15:59
To: BRE
Cc: [redacted]
Subject: Data protection - ENPA/EMMA updated position and suggestions for amendments

Dear Mr. Kaai

In light of the ongoing discussions in the Council, and following the European Parliament's vote on the draft data Protection Regulation, EMMA, the European Magazine Media Association and ENPA, the European Newspaper Publishers' Association would like to update you on our main points of concern (see letter attached). Please also find attached some proposals for amendments which we believe would address these concerns. In particular:

1. **In order to maintain subscription readership and safeguard press distribution in Europe, both Article 6 §1 (f) and Article 20 must be amended.**

   If Article 6 §1 f (and the related Recital 38) together with Article 20 (and the related Article 58) are not amended accordingly, successful press distribution in Europe will no longer be possible. In order to address this problem, we would ask Member States to take the following into account:

   a) ***Article 6 § 1 (f) must maintain legal certainty and ability to attract new customers via third parties and through various communication channels***

b) ***The provisions on profiling must not be so broad in scope as to endanger legitimate commercial communications***

2. **<u>In order to preserve press freedom, the exemption for data processing for journalistic purposes (Article 80) must be amended</u>**

We believe that in order to preserve press freedom ideally the article 80 text should be **directly applicable and legally binding, as set out in reports adopted by two opinion-giving committees** (ITRE and JURI) in the European Parliament. However, should this not be possible, we would ask Member States to consider a **second option** would be to include in the text references to other forms of non-journalistic expression in a second paragraph, without affecting the main purpose of the exemption which is the journalistic processing of personal data. If these two options are not achievable in the Council, the **Commission's proposal should be considered as the minimum threshold**.

It would also be useful if you could inform us as regards what the time table will be for discussions ahead of the Justice Council meeting in June, and whether the aim is still to find a partial agreement on the text under the Greek Presidency.

We look forward to hearing from you.

Yours sincerely,

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European Federation of Journalists | EUROPEAN MAGAZINE MEDIA ASSOCIATION | ENPA EUROPEAN NEWSPAPER PUBLISHERS' ASSOCIATION | EPC European Publishers Council

EFJ, EMMA, ENPA and EPC statement on the need to preserve press freedom and journalism in the EU draft General Data Protection Regulation

Call by journalists and publishers across Europe to safeguard press freedom and journalism under Article 80

3 December 2013

EFJ, the European Federation of Journalists, ENPA, the European Newspaper Publishers' Association, EMMA, the European Magazine Media Association, and EPC, the European Publishers' Council, are extremely concerned that the approach taken by the European Parliament's LIBE Committee and taken in the latest Council text on Article 80 of the draft General Data Protection Regulation seriously undermines press freedom and journalism.

A directly binding exemption in the draft Regulation for journalistic data processing is essential to ensure that journalists and publishers can continue fulfilling their democratic mission as regards investigating, reporting, writing and publishing editorial content without any obstacle, and to guarantee that sources are adequately protected. It has to be ensured that with the change to a Regulation, the current level of protection will not be lowered in each Member State.

The approach on Article 80 taken by the **European Parliament's Civil Liberties (LIBE) Committee in in its orientation vote on 21 October 2013 on the draft Data Protection Regulation is not acceptable**. The existing exemption as well as the Commission proposal have been significantly weakened in the "compromise" amendment adopted. All references to press and journalistic activities have been removed and the application of the exemption for journalistic data processing has been made optional at national level by using the wording "whenever this is necessary" and "to reconcile" data protection with freedom of expression.

A clear reference to "journalistic purposes" needs to be upheld as it is the only way to maintain proper protection of journalism (for example [redacted] data in [redacted] archives, protection of personal data of sources, digital transmission of personal data by publishing articles and maintaining online archives). The LIBE Committee compromise [redacted] ignores amendments which support a strong, clear and directly binding exemption for journalistic data processing previously adopted in Parliamentary [redacted] providing committees with broad support of MEPs from several parties. The LIBE amendment weakens rather than maintaining the current exemptions from data protection restrictions and from control by data protection authorities, and therefore poses a severe threat to press and media freedom in many parts of Europe.

Also in the Council, the **latest text discussed on Article 80 in the Data Protection Working Group (DAPIX) under the Irish Presidency poses a severe risk to press freedom and journalism**. The text only indicates that "Member States shall reconcile the right to the protection of personal data with the right to freedom of expression, including the processing of personal data for journalistic purposes". All references to the chapters to which

the exemption should apply have been removed. The Council's approach considerably weakens the original Commission's proposal and does not even consider or improve the existing legislation based on Article 9 of Directive 1995/46/EC.

The suggested wording in the **latest Council text removes any obligation for Member States to specifically foresee an exemption for data processing for journalistic purposes**, and therefore does not provide a guarantee that journalists would still be allowed to process personal data for fulfilling their democratic mission. It also gives a significant margin of interpretation on whether the exemption should even exist at national level and to what extent it should apply.

A directly binding exemption for journalistic data procession is urgently needed as all restrictions set out in the new regulation, including the control of editorial content by Data Protection Authorities, will be directly applicable. The compromise adopted in the LIBE Committee and the latest Council text instead leave the question of protection to national implementation and thereby open up the way for difficult discussions in Member States and opportunities for governments to curtail press and media freedom. In several countries it is even not clear whether the current level of protection for media freedom will be upheld.

Following this analysis, journalists and publishers in Europe, represented by ENPA, EMMA, EPC and EFJ would like to reiterate their **call towards governments and MEPs to support an appropriate approach for the respect of press freedom** and the need for journalists to process personal data without restrictions in order to achieve their democratic mission.

The **amendments to Article 80 adopted in the JURI and ITRE Committee opinions** and tabled (but sadly not adopted) by several MEPs from different political groups in LIBE Committee **provide, in our view, an appropriate response** for the exercise of professional journalism and the protection of press freedom.

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For the attention of Mr Kaai
Counsellor
Ministry of Justice
Permanent Representation of The Netherlands to the EU

Brussels, 9 May 2014

Dear Mr Kaai,

In light of the ongoing discussions in the Council, and following the European Parliament's vote on the draft data Protection Regulation, we would like to update you on our main points of concern. Please also find attached some proposals for amendments which we believe would address these concerns.

1. **<u>In order to maintain subscription readership and safeguard press distribution in Europe, both Article 6 §1 (f) and Article 20 must be amended by the Council.</u>**

If Article 6 §1 f (and the related Recital 38) together with Article 20 (and the related Article 58) are not amended accordingly, successful press distribution in Europe will no longer be possible.

a) Article 6 § 1 (f) must maintain legal certainty and ability to attract new customers via third parties and through various communication channels

Press publishers need to keep in touch with both current and potential subscribers to inform them about new offers or services that may be of interest to them. The use of third parties in getting new subscribers via direct marketing is essential to the future of the press and its readers. In some Member States **around 40% of new subscribers result from third parties' involvement**.

It is essential for the press to be able to deal with possible subscriber fluctuations. In this context, **Directive 95/46/EC (Article 7§f)** ensures that lawful data processing can be based on the **legitimate interests pursued by a controller or controllers or by a third party or parties to whom the data are disclosed**. This specific reference to third parties gives newspaper and magazine publishers the legal certainty to partner with third parties in order to reach potential new subscribers.

Consumers are made aware of the intended use of their personal information at the time of collection and can always object on the basis of the opt-out system (right to object) set out in Directive 95/46/EC. Furthermore, "Robinson lists" have been established in many EU Member States to allow the public to easily opt-out from receiving marketing communications.

Whereas the **European Parliament** rightly reintroduced a reference to "third parties" in the body of Article 6 § 1f), it detrimentally restricted the possibility for publishers to use a variety of different direct marketing techniques, by referring only to postal marketing (mailing) and omitting any reference to other types of marketing e.g. telephone marketing. At present, publishers in different European countries can use different marketing techniques, which allow them to adapt to national specificities (e.g., climatic and geographical conditions). It is essential that the Data Protection Regulation remains neutral as far as marketing techniques are concerned.

In the **Council**, some delegations have supported the reintroduction of third parties in Article 6 § 1f, but the European Commission seems to have stood by its initial proposal which refers to "the controller", rather than making a specific reference to "third parties". This approach is, in our view, not sufficiently clear about the legality of third parties' activities and does not provide the necessary legal certainty which a directly binding Regulation ought to guarantee.

What are the solutions?

The only solution providing unquestionable legal certainty is for **Article 6§1 f to directly reference third parties (see suggestion in the table attached)**, as is presently the case under Article 7§f of Directive 95/46/EC. This strikes a balance between controller's legitimate interests and the interests or fundamental rights and freedoms of the data subject. In the context of processing of personal data for direct marketing purposes Article 19 § 2 of the proposed Data Protection Regulation also guarantees the individual the right to information and the right to object.

This solution importantly allows press publishers to rely on third parties in order to find new subscribers and therefore renew their readership, instead of having to undertake untargeted mass marketing campaigns. This is important because in most cases press companies are SMEs and do not have sufficient internal economic resources to find new subscribers by themselves.

If data processing for direct marketing purposes is legitimate, then it should not be challenged by the provisions on profiling (Article 20 and Recital 58), which could have the effect of a prohibiting it totally. These provisions should therefore be amended as described below.

b) The provisions on profiling must not be so broad in scope as to endanger legitimate commercial communications

Publishers of newspapers and magazines face many challenges in the development of their online offerings. They invest heavily in innovative business models, especially in the field of advertising, to be able to finance the distribution of their content across all platforms. To adapt to the needs of readers, publishers must be able to better communicate with them.

It is therefore **crucial that direct marketing is not covered by the provisions on profiling (Article 20 and Recital 58)**, because it would simply amount to a prohibition of direct marketing (see attached table). It is equally crucial that processing of personal data for direct **marketing purposes is considered as carried out for a legitimate interest (in relation to Article 6 and the related Recital 38)**.

The definition of profiling laid down in the **Commission's proposal** is problematic as it is likely to cover not only direct marketing but also any form of legitimate business relationship between publishers and readers, including contractual relations and online advertising. We understand that discussions at **Council working group** level have addressed this risk and there is recognition that it would be inappropriate for there to be any reference to direct marketing under Article 20.

Article 20 of the Commission proposal sets out that **explicit consent** is required for any form of profiling. However, it is neither in the interests of readers nor of European press publishers that they have to create "log -in" systems whereby one tries to obtain readers' consent systematically. This strict provision would in fact burden European SMEs while benefiting the global internet players, which have the resources to e.g., develop a single log-in enabling them to easily get consumers' explicit consent covering a range of their services.

What are the solutions?

As regards profiling, this should be **restricted under Article 20 to measures producing individual negative legal effects on individuals or similarly severely affecting a specific data subject (see attached table).**

It is also important in relation to **Recital 58 to clarify that such individual negative legal effects - or comparable actual effects - do not cover** measures relating to commercial communication, like for example in the field of customer acquisition or customer relationship, including **direct marketing (see attached table).** Any wording that might suggest that direct

marketing could fall under "profiling" (e.g., such as the wording proposed during previous Council working group discussions, referenced in the table attached, should be avoided.

It is also equally important in relation to **Article 6 to have a positive notion that direct marketing is accepted as legitimate interest**. We therefore welcome the proposed inclusion by Member States of a reference to direct marketing in Recital 39 to ensure that the processing of personal data for **direct marketing can be done on the basis of the controller's legitimate interest**. While this addition is clearly positive, we **think it would be clearer if it was included in Recital 38 (see attached table),** which refers precisely to the controller's legitimate interest.

It is **inappropriate to require explicit consent for profiling in general** since it would be near impossible to do this in practice, especially on media websites where the risk of users' "click fatigue" is real. **We propose an amended version of Article 20 including changes to these particular points (see attached table)**.

Moreover, the **definition of profiling in Article 4 (see attached table)** is too broad. It is important to avoid that it impacts any form of legitimate business relationship between a publisher and its readers (direct marketing, pre and post contractual relationship, online advertising).

2. Concerns over approach to the exemption for data processing for journalistic purposes (Article 80) and the need to preserve press freedom

When it comes to press freedom, the exemption of data processing for journalistic purposes is of fundamental importance to allow journalists and publishers to carry out their vital democratic mission in providing information to the public. This very important task includes investigation, preparation and publication of editorial content. Against this background, European and national associations of publishers as well as European and national federations of journalists have publicly expressed their concerns in a petition relating to the wording of Article 80 agreed by the Parliament and under discussion in the Council. **See also the joint statement from journalists and publishers associations (attached)**

The European Parliament's text, adopted in March 2014, renders the Article 80 exemption meaningless given that the primary purpose of this exemption – in both the current Data Protection Directive (95/46/EC), as well as the Commission proposal - is the protection of journalistic activities. The Parliament's text, however, omits any specific reference to the press and journalists, in an attempt to cover other forms of expression online (including blogs , forums, etc.), and makes the exemption sound almost optional ("whenever this is necessary") rather than being binding.

At Council level, the proposed changes to the Article 80 text which have been under discussion would also result in a weakening of the guarantees set out in the original Commission proposal and as compared to the Directive 95/46/EC. In particular, the text no longer explicitly requires Member States to provide for an exemption but talks about merely "reconciling" freedom of expression with the right to data protection. This wording presents the risk of leaving too much flexibility for Member States when it comes to the implementation of Article 80. It would also create a risk of governments' misuse of this provision in Member States where protection of press freedom remains weak.

What are the solutions?

The best approach **(option 1 in the attached table) would, we believe, be to amend Article 80 so as to create a directly applicable and binding exemption** on processing of personal data for journalistic purposes, as proposed by the European Parliament's opinion-giving committees (ITRE and JURI). This would subsequently avoid a scenario whereby a Member State could

abuse the flexibility of Article 80. New forms of expression online are already covered in Recital 121 of the Commission's proposal.

The direct enforcement of the exemption is consistent with the principle of subsidiarity. Journalistic activities, although exempted from specific Articles of the Data Protection Regulation, would continue to be regulated by national laws applicable to the media, including those relating to privacy and other fundamental rights, which are guaranteed in each Member State.

A **second possibility (option 2 in the attached table) which would take into account new forms of expression online, without distorting the main purpose** of the journalistic exemption, would be to add a second paragraph to Article 80 covering blogs, forums, etc. We believe it is essential to keep an explicit reference to the press and journalistic activities, in light of the legislation and ethical rules governing the extensive responsibilities that professionals in the sector already have to comply with, as compared to others. It is important to uphold this distinction.

Should neither of the aforementioned approaches be sufficiently supported within the Council, then the original **Commission's text should be the basis for discussions as it builds on the 1995 Directive's provisions (option 3 in the attached table). Recital 121 in the Commission's proposal should be maintained** as it already takes account of new forms of expression online (blogs, forums, etc.) by opening the definition of journalistic activities accordingly **(see table attached).**

We hope that you will consider our comments in the context of the ongoing discussions on the draft regulation.

Yours sincerely,

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Article 6§1f)		
Council text of 16 December 2013	**Proposal for amendment**	**Comments**
(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a controller to which the data are disclosed except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This subparagraph shall not apply to processing carried out by public authorities in the exercise of their public duties	(f) processing is necessary for the purposes of the legitimate interests pursued by a controller ***or controllers or by a third party or parties to whom the data are disclosed***, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.	There is a need to include an explicit reference to third parties in order to ensure legal certainty, especially for SMEs (as it is already the case in Directive 95/46/EC).

Recital 38		
Council text of 16 December 2013	**Proposal for amendment**	**Comments**
(38) *The legitimate interests of a controller including of a controller to which the data may be disclosed may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding. This would need careful assessment including whether a data subject can expect at the time and in the context of the collection of the data that processing for this purpose may take place. In particular such assessment must take into account whether the data subject is a child, given that children deserve specific protection. The data subject should have the right to object to the processing, on grounds relating to their*	(38) *The legitimate interests of a controller including of a controller to which the data may be disclosed may provide a legal basis for processing, provided that the interests or the fundamental rights and freedoms of the data subject are not overriding. This would need careful assessment including whether a data subject can expect at the time and in the context of the collection of the data that processing for this purpose may take place. In particular such assessment must take into account whether the data subject is a child, given that children deserve specific protection.* ***The processing of personal data to the extent strictly necessary for the purposes of preventing and***	A reference to direct marketing as part of a legitimate interest is welcome. However, as a matter of consistency, it is important to ensure that all references relating to legitimate interests are set out under recital 38. We therefore propose that the paragraph currently found under recital 39 which clarifies that "*the processing of personal data for direct marketing purposes can be regarded as carried out for a*

particular situation and free of charge. To ensure transparency, the controller should be obliged to explicitly inform the data subject on the legitimate interests pursued and on the right to object, and also be obliged to document these legitimate interests. Given that it is for Union or national law to provide (…) the (…) basis for public authorities to process data, this legal ground should not apply for the processing by public authorities in the exercise of their public duties.	***monitoring fraud also constitutes a legitimate interest of the data controller concerned. A legitimate interest of a controller could include the processing of personal data for the purposes of anonymising or pseudonymising personal data. The processing of personal data for direct marketing purposes can be regarded as carried out for a legitimate interest.*** *The data subject should have the right to object to the processing, on grounds relating to their particular situation and free of charge. To ensure transparency, the controller should be obliged to explicitly inform the data subject on the legitimate interests pursued and on the right to object, and also be obliged to document these legitimate interests. Given that it is for Union or national law to provide (…) the (…) basis for public authorities to process data, this legal ground should not apply for the processing by public authorities in the exercise of their public duties.*	*legitimate interest*" should be moved to recital 38.

Article 20			
Council text of 16 December 2013[1]	**Proposal for amendment: Option 1**	**Proposal for amendment: Option 2**	**Comments**
1. Every data subject shall have the right not to be subject to a decision based solely on profiling which produces legal effects concerning him or her or severely affects him or her unless such processing: *(a) is carried out in the course of the entering into, or performance of, a contract between the data subject and a data controller and suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the rights of the data subject to obtain human intervention on the part of the controller, to express his or her point of view, and to contest the decision; or* *(b) is (…) authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate interests; or*	1. Every data subject shall have the right not to be subject to a decision based solely on profiling *which produces* ***individual negative*** *legal effects* concerning him or her ~~or severely affects him or her~~ unless such processing: a) is carried out in the course of the entering into, or performance of ***a contractual or other legal relationship to which*** ~~a contract between~~ the data subject ***is party or that is relevant for the data subject*** ~~and a data controller~~ ~~and~~ **or that there are** suitable measures to safeguard the data subject's legitimate interests ~~have been adduced~~, such as the rights of the data subject to obtain human intervention on the part of the controller, to express his or her point of view, and to contest the decision; or b) is (…) authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate interests, or	1. Every data subject shall have the right not to be subject to a decision based solely on profiling *which produces* ***individual negative*** *legal effects* concerning him or her or ***similarly*** severely affects him or her unless such processing: a) is carried out in the course of the entering into, or performance of ***a contractual or other legal relationship to which*** ~~a contract between~~ the data subject ***is party or that is relevant for the data subject*** ~~and a data controller~~ ~~and~~ **or that there are** suitable measures to safeguard the data subject's legitimate interests ~~have been adduced~~, such as the rights of the data subject to obtain human intervention on the part of the controller, to express his or her point of view, and to contest the decision; or b)is (…) authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate	Option 1: aims at limiting the profiling definition and deleting "severely affects "in Art. 20 Option 2: aims at limiting the profiling definition and clarification that "severe effects" on the data subject must be similar to "legal effects".

[1] We understand that these provisions have been evolving during the course of recent discussions in the Council

(c) is based on the data subject's explicit consent (…). *2. (…)* *3. Profiling shall not (…) be based on special categories of personal data referred to in Article 9(1), unless Article 9(2) applies and suitable measures to safeguard the data subject's legitimate interests are in place.* *4. (…)* *5. (…)*	c) is based on the data subject's ~~explicit~~ consent (…) 2. (…) 3. Profiling ***which produces individual negative legal effects*** shall not (…) be based on special categories of personal data referred to in Article 9(1), unless Article 9(2) applies and suitable measures to safeguard the data subject's legitimate interests are in place. 4. (…) 5. (…)	interests, or c) is based on the data subject's ~~explicit~~ consent (…) 2. (…) 3. Profiling ***which produces individual negative legal effects*** shall not (…) be based on special categories of personal data referred to in Article 9(1), unless Article 9(2) applies and suitable measures to safeguard the data subject's legitimate interests are in place. 4. (…) 5. (…)	

Recital 58			
Council text of 16 December 2013[2]	**Proposal for amendment: Option 1**	**Proposal for amendment: Option 2**	**Comments**
(58). Every data subject should have the right not to be subject to a decision which is based on profiling (…). However, such profiling should be allowed when expressly authorised by Union or Member State law, including for fraud monitoring	(58) Every data subject should have the right not to be subject to a decision which is based on profiling ***which produces individual negative legal effects concerning the data subject***	(58) Every data subject should have the right not to be subject to a decision which is based on profiling ***which produces individual negative legal effects concerning the data subject or similarly severely affects a***	It is essential to delete the last sentence to Recital 58 on direct marketing which can result in banning this existing and legitimate practice. Furthermore, direct marketing is already

[2] We understand that these provisions have been evolving during the course of recent discussions in the Council

and prevention purposes and to ensure the security and reliability of a service provided by the controller, or carried out in the course of entering or performance of a contract between the data subject and a controller, or when the data subject has given his consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention (…). Profiling for direct marketing purposes or based on special categories of personal data should only be allowed under specific conditions.	(…). However, such profiling should be allowed when expressly authorised by Union or Member State law, including for fraud monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller, or carried out in the course of entering or performance of a contract ~~between the data subject and a controller,~~ ***to which the data subject is party or that is relevant for the data subject, especially if the data subject is not a contract partner but may benefit from the performance of the contract***, or when the data subject has given his consent. ~~In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention (…). Profiling for direct marketing purposes or based on special categories of personal data should only be allowed under specific conditions.~~ ***(58a) Profiling based solely on the processing of pseudonymous data does not produce individual negative legal effects concerning the data subject. Also measures based on profiling which consist solely of the***	***specific data subject*** (…). However, such profiling should be allowed when expressly authorised by Union or Member State law, including for fraud monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller, or carried out in the course of entering or performance of a contract ~~between the data subject and a controller,~~ ***to which the data subject is party or that is relevant for the data subject, especially if the data subject is not a contract partner but may benefit from the performance of the contract***, or when the data subject has given his consent. ***Actual effects should be comparable in their intensity to legal effects to fall under this provision. This is, for example, not the case for measures relating to commercial communication, like for example in the field of customer acquisition or customer relationship, including direct marketing.*** ~~In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention (…). Profiling for direct marketing purposes or based on special categories of personal data should only be allowed under specific conditions.~~ ***(58a)Profiling based solely on the processing of pseudonymous data***	covered by Article 19 and Article 6§1f). It is also necessary to ensure that profiling is limited to decision which produces individual negative legal effects or similarly severely affects the data subjects, in order to avoid that other legitimate commercial practices which are indispensable for usual customer relationships do not fall under the concept of profiling.

	processing of pseudonymous data do not produce individual negative legal effects concerning the data subject.	***does not produce individual negative legal or similarly severe effects concerning the data subject. Also measures based on profiling which consist solely of the processing of pseudonymous data do not produce individual negative legal effects concerning the data subject.***	

Article 4		
Council text of 16 December 2013[3]	**Proposal for amendment**	**Comments**
(12a) 'profiling' means any form of automated processing of personal data intended to create or use a personal profile by evaluating personal aspects relating to a natural person, in particular the analysis and prediction of aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements	(12a) 'profiling' means ~~any form~~ ***producing decisions based solely on*** ~~of~~ automated processing of personal data ~~intended to~~ create**ing** or use**ing** a personal profile by evaluating personal aspects relating to a natural person, in particular the analysis and prediction of aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements;	The definition of profiling needs to be narrowed down in order to ensure that other legitimate commercial relationships with customers are not negatively affected.

[3] We understand these provisions have been evolving during the course of recent discussions in the Council

Article 80			
Council text of 16 December 2013	**Proposal for amendment Option 1 (amending EC proposal[4])**	**Proposal for amendment Option 2 (amending EC proposal)**	**Comments**
1. *Member State law shall (…) reconcile the right to the protection of personal data pursuant to this Regulation with the right to freedom of expression, including the processing of personal data for journalistic purposes and the purposes of artistic or literary expression.* 2. (…)	***Chapter II*** *(*General principles*),* Chapter ***III*** *(*Rights of the data subject *),* Chapter ***IV*** *(*Controller and processor*),* Chapter ***V*** *(*Transfer of personal data to third countries and international organisations*),* Chapter ***VI*** *(*Independent supervisory authorities*),* Chapter ***VII (Co-operation and consistency) as well as Articles 73, 74, 76 and 79 of*** Chapter ***VIII (Remedies, liability and sanctions) shall not apply to*** the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression.	***Chapter II*** *(*General principles*),* Chapter ***III*** *(*Rights of the data subject *),* Chapter ***IV*** *(*Controller and processor*),* Chapter ***V*** *(*Transfer of personal data to third countries and international organisations*),* Chapter ***VI*** *(*Independent supervisory authorities*),* Chapter ***VII (Co-operation and consistency) as well as Articles 73, 74, 76 and 79 of*** Chapter ***VIII (Remedies, liability and sanctions) shall not apply to*** the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression. ***2. Section 1 shall apply accordingly to processing of personal data carried out solely for purposes of non-***	The exemption needs to be directly applicable and legally binding since the draft text is a regulation and not a directive. Option 1 would ensure the best legal certainty and was adopted in two opinion-giving committees (ITRE and JURI) in the European Parliament Option 2 includes other forms of non-journalistic expression in a second paragraph without affecting the main purpose of the exemption which is the journalistic processing of personal data. If these two options are not achievable in the Council, the Commission's proposal should be

[4] Commission's proposed Article 80 : *Member States shall provide for exemptions or derogations from the provisions on the general principles in Chapter II, the rights of the data subject in Chapter III, on controller and processor in Chapter IV, on the transfer of personal data to third countries and international organisations in Chapter V, the independent supervisory authorities in Chapter VI and on co-operation and consistency in Chapter VII for the processing of personal data carried out solely for journalistic purposes or the purpose of artistic or literary expression in order to reconcile the right to the protection of personal data with the rules governing freedom of expression.*

		journalistic expression of opinions or allegations of facts.	considered as the minimum threshold.

Recital 121		
Council text of 16 December 2013	**Proposal for amendment (Retain original Commission's proposal)**	**Comments**
121. *Member States law should reconcile the rules governing freedom of expression, including journalistic, artistic and or literary expression with the right to the protection of personal data pursuant to this Regulation, in particular as regards the general principles, the rights of the data subject, controller and processor obligations, the transfer of data to third countries or international organisations, the independent supervisory authorities and co-operation and consistency. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly. (…)*	The processing of personal data solely for journalistic purposes, or for the purposes of artistic or literary expression should qualify for exemption from the requirements of certain provisions of this Regulation in order to reconcile the right to the protection of personal data with the right to freedom of expression, and notably the right to receive and impart information, as guaranteed in particular by Article 11 of the Charter of Fundamental Rights of the European Union. This should apply in particular to processing of personal data in the audiovisual field and in news archives and press libraries. Therefore, Member States should adopt legislative measures, which should lay down exemptions and derogations which are necessary for the purpose of balancing these fundamental rights. Such exemptions and derogations should be adopted by the Member States on general principles, on the rights of the data subject, on controller and processor, on the transfer of data to third countries or international organisations, on the independent supervisory authorities and on co-operation and consistency. This should not, however, lead Member States to lay down exemptions from the other provisions of this Regulation. In order to take account of the importance of the right to freedom of expression in every democratic society, it is necessary to interpret notions relating to that freedom, such as journalism, broadly. Therefore, Member States should classify activities as "journalistic" for the purpose of the exemptions and derogations to be laid down under this Regulation if the object of these activities is the disclosure to the public of information, opinions or ideas, irrespective of the medium which is used to transmit them. They should not be limited to media undertakings and may be undertaken for profit-making or for non-profit making purposes.	The Commission's proposal in recital 121 sufficiently addresses non-journalistic form of expression.