



International Holocaust Remembrance Alliance

Briefing Paper on the Proposed General Data Protection Regulation

Inconsistencies between the Proposed General Data Protection Regulation (GDPR) and Adherence to the Stockholm Declaration of January 2000

Summary

- The proposed General Data Protection Regulation (GDPR), specifically GDPR article 83a-c, may impede EU member states from adhering to the Stockholm Declaration of 2000, which requires “the opening of archives in order to ensure that all documents bearing on the Holocaust are available to researchers.”
- Reports suggest that GDPR, or at least anticipation of GDPR, is already impeding researchers, lawyers, and scholars from accessing material across the EU. Such difficulties are greatest in Western Europe.
- IHRA should pursue two options: 1) Leveraging political support for an EU-wide declaration that will guarantee access to all Holocaust-related documents in public repositories and 2) An EU member state review of still classified or otherwise administratively restricted Holocaust-related documents.

Overview of GDPR

The General Data Protection Regulation (GDPR) emerged out of European Council (EC) discussions that focused on the utility of Directive 95/46/EC of the European Parliament and of the Council (24 October 1995). This directive, which hitherto directed EU member states on how best to ensure the protection of personal data through a regulatory framework that set limits on the collection and use of data at the national level, in the eyes of the EC, failed to meet the demands of the twenty-first century.

Forwarded first in 2012, the GDPR seeks to create an EU-wide regulation for the protection of personal data, particularly that data which is available through electronic communications. While IHRA supports the decision to pass GDPR in order to meet the requirements of protecting personal data (particularly electronic data) in an increasingly global and rapidly-changing landscape in a manner that is at once unified and in keeping with the fundamental rights assured to citizens of the EU, it is nevertheless concerned by the broad scope of the regulation, particularly as it affects data utilized by scholars, lawyers, and other researchers in archival repositories across the 28 states of the EU. Specifically, IHRA is concerned by GDPR Article 83, “Processing for historical, statistical and scientific research purposes,” which states

1. Within the limits of this Regulation, personal data may be processed for historical, statistical or scientific research purposes only if:
 - (a) these purposes cannot be otherwise fulfilled by processing data which does not permit or not any longer permit the identification of the data subject;
 - (b) data enabling the attribution of information to an identified or identifiable data subject is kept separately from the other information as long as these purposes can be fulfilled in this manner.
2. Bodies conducting historical, statistical or scientific research may publish or otherwise publicly disclose personal data only if:
 - (a) the data subject has given consent, subject to the conditions laid down in Article 7;
 - (b) the publication of personal data is necessary to present research findings or to facilitate research insofar as the interests or the fundamental rights or freedoms of the data subject do not override these interests; or
 - (c) the data subject has made the data public.¹

The lack of specificity contained in Article 83, which is the only article to focus exclusively on those archival materials that are essential to the pursuit of scholarship, to general research, to legal research, and to a broad range of purposes essential to the maintenance of healthy public discourse is of considerable concern. Specifically, the vagaries contained in Article 83 invite the possibility that access to documents on individuals, both public and private, is at risk of serious curtailment because this article

- does not set clear guidelines as to who can determine which data is and is not historically relevant;
- fails to indicate whether restrictions are to be applied retroactively, and
- insufficiently addresses how this regulation will affect already-existing archival collections at repositories across the EU;

The use of imprecise language in Article 83 could lead to a decline in scholarship, education, and public awareness of the Holocaust, effectively erasing public memory of this seminal event in world history and threaten public memory of other major human rights atrocities in Europe. In an environment of increasingly unhealthy nationalism in EU countries, such a development would be intolerable.

State of the Present-Day Problem

The 31 national governments who have joined the International Holocaust Remembrance Alliance (IHRA) have promised to uphold the tenets of the Declaration of the Stockholm Forum on the Holocaust (2000). The forum that led to this declaration included the heads of state of 23 countries and senior governmental representatives of 46 nations. The declaration that followed the Stockholm Forum obligates members in the IHRA to engage in work that will ensure the permanence of Holocaust commemoration, education, and research. Necessary to this is a commitment to “take all

¹ European Commission, “Proposal for a regulation of the European Parliament and of the Council on the Protection of Individuals with Regard to the Processing of Personal Data and on the Free Movement of Such Data (General Data Protection Regulation)”. COM(2012) 11 final, 2012/0011 (COD) {SEC(2012) 72 final} {SEC(2012) 73 final}. Brussels, 25.1.2012, as at http://ec.europa.eu/justice/data-protection/document/review2012/com_2012_11_en.pdf, last accessed 15 September 2014.

necessary steps to facilitate the opening of archives in order to ensure that all documents bearing on the Holocaust are available to researchers.”

The aspirations and intent of this clause remain incomplete owing to innumerable privacy laws across the 28 member states of the European Union. The recently proposed GDPR, a regulation that will likely receive the overwhelming approval by members of the European Parliament (as shown by a vote on the matter of data privacy in March 2014), poses a significant risk to IHRA member state’s obligation to make available access to the documentary, photographic, filmic, and material record of the Holocaust.²

While the European Commission’s Impact Assessment of January 2012 acknowledges that archival institutions will find it difficult to fulfill the obligations found in GDPR, particularly since a few respondents to this study expressed concern that the regulation “may diminish academic freedom and result in loss of important forms of knowledge production.”³ Yet, the EC makes no provisions to allow for ease of work or for managing the fact that imposing the “right to be forgotten” is antithetical to the role played by archives in ensuring availability of information for general research, legislative research, or scholarship.⁴ The report suggests a policy option whereby the EC or EU should establish “detailed and harmonised rules for specific sectors and circumstances,” including for “scientific research.”⁵ None of these acknowledgments or concerns appears in the EC executive summary of the Impact Assessment.⁶ Moreover, there has not been a public consultation on the regulation since 28 January 2011.⁷ Nevertheless, as noted in a separate discussion between the Chair of the IHRA Steering Committee on Archival Access and a team of European data privacy attorneys, there is no hope to bring about an amendment to GDPR Article 83 to address the lack of adequate consideration granted to the matter of archival access.

The scale of challenges to access in the EU remained largely unknown and anecdotal through 2014. To investigate these problems, the IHRA launched a multi-language, international survey. This survey, which was active between 4 June 2013 and 4 April 2014, received promotion in scholarly, genealogical, and other research circles in the English-, French-, German-, and Russian-speaking worlds. The survey yielded 547 responses. Of these, 261 indicated a serious challenge to individual

² See European Commission Memo/14/186, “Progress on EU data protection reform now irreversible following European Parliament Vote,” 12 March 2014, as at http://europa.eu/rapid/press-release_MEMO-14-186_en.htm, last accessed 18 September 2014.

³ European Commission, “Commission Staff Working Paper. Impact Assessment Accompanying the Document Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data,” 25 January 2012, as at http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_72_en.pdf, 72 and 77.

⁴*Ibid*, 72

⁵*Ibid*, 58

⁶ See European Commission, “Commission Staff Working Paper. Executive Summary of the Impact Assessment Accompanying the document Regulation of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) and Directive of the European Parliament and of the Council on the protection of individuals with regard to the processing of personal data by competent authorities for the purposes of prevention, investigation, detection, or prosecution of criminal offences or the execution of criminal penalties, and the free movement of such data,” 25 January 2012, as at http://ec.europa.eu/justice/data-protection/document/review2012/sec_2012_73_en.pdf

⁷ See http://ec.europa.eu/justice/data-protection/review/actions/index_en.htm

researchers as she/he attempted to access archival materials relevant to study of the Holocaust. The challenges encountered were of the following general types:

- Legal Obstacles, e.g., “Access ... denied because of an alleged necessity to protect data.”
- Archive was closed, e.g., “Refused entry to the building”
- Prohibitive costs for reproduction and use, e.g., “[E]xorbitant costs for photocopies.”
- Insufficient cataloging/reference assistance, e.g., “There is only one single thematic inventory of the whole archive. The archivist was helpful and friendly but that cannot compensate for the fact that there is no catalog of their holdings.”
- Inadequate facilities for research and access, e.g., “Very small and noisy reading room, I could hear clerks playing computer games.”
- Poor physical condition of material, e.g., “‘Trophy’ materials not well handled or preserved; at risk of degradation or destruction”

Based on this data, the IHRA followed their survey with an intensive consultation with archival experts in June 2014. Held at IHRA headquarters in Berlin, this consultation included 14 participants (2 of whom were members of the IHRA Steering Committee on Archival Access), representing major archival-holding institutions, organizations that collect and make available archival collections pertinent to Holocaust study, and major scholars in the field of Holocaust Studies. The participants’ range of expertise covered a broad geographical area – from North America to Western Europe, and from Eastern Europe to North Africa and the Middle East.

After several days of detailed discussion and spirited debate, the consultations’ participants concluded unanimously that the scale of challenges is significantly greater than that indicated by the IHRA survey. Furthermore, trends of increasingly restricted access to Holocaust-related materials indicate that the greatest and most onerous restrictions occur in Western European EU countries. Those Eastern European EU member states had traditionally been more willing to grant access to such material, thanks in part to the legacy of openness to study of the past that accompanied the fall of European communism. Since joining EU and other supranational institutions, however, many of these nations have begun to restrict access to Holocaust-era collections, including those, which had once been declassified by the post-communist state. Over the course of the past few years, and in conjunction with the rise of populist and far-right nationalist movements across the whole of the EU, the trend toward restricted access has grown.

While some states in the EU have proactively pursued means to make easier the task of identifying and using Holocaust-related Holocaust materials, the participants in this consultation concluded that developments are such that they not only prevent researchers from undertaking a thorough review of the history and contemporary significance of the Holocaust in Europe, but they have also bred a so-called “culture of fear.” This “culture of fear” is such that individual researchers are not only frustrated in their pursuit of research in the past, but are cowed into silence on the scale, scope, and significance of the problem. This situation is made all the worse by the fact of declined state support for the maintenance and staffing of archival institutions in EU member states, by the high costs often assessed on researchers and archival sharing institutions for the copying and use of materials, and by policies that occasionally restrict further access based on citizenship, profession, and the use of Holocaust-era materials for commercial purposes (e.g., the copyright restrictions placed on some Holocaust-era films and photographs).

Proposed Solutions

Overcoming the challenges to access and the likely development of increasingly onerous impositions on researchers who hope to access the documentary history of the Holocaust will require broad international cooperation and a reaffirmation of the commitments outlined in the Stockholm Declaration of 2000. Based on internal discussions and the advice and insight of a number of experts both within and outside the IHRA, the IHRA Steering Committee on Archival Access suggests that IHRA pursue multiple projects to address obstacles to access. These projects are:

- An IHRA-supported survey and review of still classified or otherwise administratively restricted Holocaust-related documents across member states of IHRA. Such a project requires the administrative support and oversight of individual governments, and should involve a final report that includes the names, locations, and types of collections held in government repositories. Such a project could begin immediately, with an end date in spring 2016.
- An effort by IHRA as an organization and by governmental representatives in IHRA delegations to compel an EU-level regulation that will guarantee access to all Holocaust-related material in order to make rules of access consistent with the language and intent of the Stockholm Declaration of 2000.
- An effort by IHRA to seek a declaration by the Council of Europe calling for open access to Holocaust-related material, as held by government-supported repositories.
- The amendment of IHRA funding policies in order to allow for modest support for projects that will lead to improved identification of and access to Holocaust-related materials.