

Issues of personal data processing: Religious gatherings and Covid-19. The Kansas case

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Religious gatherings, including but not limited to, weddings, funerals, memorial services, and wakes, of ten (10) persons inside or ten (10) percent of building occupancy (whichever number is greater) and fifty (50) people outside may resume, provided social distancing is maintained. In the interest of public health and to avoid a Covid-19 outbreak in the community, event organizers should consider maintaining a record of attendees where appropriate. Attendees are not required, however, to provide their names or contact information at any religious gathering. In the event of a Covid-19 outbreak connected to a religious gathering, the organizers may contact those potentially exposed and, request that they (the organizers) confidentially, provide their names and other relevant information voluntarily provided at the gathering to the Department of Public Health. Any information collected under this subsection by the organizers of the gathering or the Department of Public Health shall remain confidential to the extent allowed by law and be utilized only for public health purposes or to address public health concerns.

The above regulation forms part of the measures taken by Kansas City (Missouri, US) to reduce the possibility of exposure to Covid-19, and in our view is a great way to address the issue of personal data processing when it comes to the collective aspect of religious freedom. This article briefly examines the concept of the “controller” under the GDPR, using the Kansas City regulation as an example that could also apply to European regions.¹

Firstly, it is essential to highlight the exact wording of the regulation when it comes to the “list issue”. Specifically, the provision stipulates that:

“.....of ten (10) persons inside or ten (10) percent of building occupancy (whichever number is greater) and fifty (50) people outside may resume, provided social distancing is maintained. In the interest of public health and to avoid a Covid-19 outbreak in the community, event organizers should consider maintaining a record of attendees, where appropriate. Attendees are not required however to provide their names or contact information at any religious gathering...”

Clearly, the wording does not indicate an “obligatory” instruction, since the addition of the phrases “should consider” and “not required” render it voluntary. Both the Church and the attendees are given an option. The Church may or may not hold a list of the people attending the relevant ceremonies and the decision shall be the result of the balancing between the choice to protect the general right of public health (in case of a potential epidemic incident)

¹ The relevant measures are available online. We note that we refer to the Kansas City case, without prejudice to other similar practices.

and the right to protect the core of Church, its independence and autonomy against the State, and the attendees' right to privacy and religious freedom. Under ordinary circumstances, it would be easy for the Church to protect the privacy of its congregation. Nevertheless, during the pandemic, the risk of an incident endangers an indefinite number of attendees in each ceremony, whereas creating a document full of sensitive religious data ready to be processed by the Church or by the State, may deter many from attending ceremonies. This is a major nuisance for a Church. Whatever the choice of each Church might be, in this case, or in any case that could follow the example of this regulation, the final choice is given to the attendee who is "not required" to provide their information in case the Church holds a list. The question, however that arises here is, whether this is a real option or not. What would a person of faith do, if someone asked her information in order to prevent a potential spread of a pandemic? Protect the general public? Or protect their religious beliefs from exposure? Although, as already mentioned, the wording at hand seems to provide options both to the Church and to the attendees, when the state authority places a person before such ethical dilemmas, one might consider that the freedom to choose is inherently limited since the person only gets to choose from what is provided to her as an option.

The Covid-19 crisis has had a strong knock-on-effect on Europe too. It is obvious that governments with a view to flattening the curve of infections responded with drastic measures, which inevitably begged the question: should the protection of public health trump the protection of personal data? In the context of EU law, the European Data Protection Board stated that:

"when processing of personal data is necessary for managing the Covid-19 pandemic, data protection is indispensable to build trust, create the conditions for social acceptability of any solution, and thereby guarantee the effectiveness of these measures."

Besides, the right to the protection of personal data is not an absolute right. Maintaining a record of attendees, albeit voluntary, has to be compliant with the key principles of Article 5 of GDPR. How long is the data being stored? What is the legal ground for collection? Is there consent? Is consent valid for a disclosure to third parties in case of Covid-19 outbreak or is there any other specific provision? These questions indicate the necessary framework of transparency. A deeper insight to this approach, should evaluate all the technical and organizational measures as well as the assessed impact on adults' and children's rights. On the contrary, it is believed that data can save lives. Does this order imply an actual shift from a reasonable expectation of privacy to an indirect disclosure of religious beliefs? Listing someone in a religious record of presence does not declare essentially that he or she is a member of this community as anyone can be an attendee; even a non-religious person. Nonetheless, data controlling religious communities may have to process information of high risk, not just names and contact data. In an escalating Covid-19 crisis, health and religious data may be potentially under unlawful processing in the absence of specific and transparent

procedures. This is why governments have to ensure that religious people will not be in the threshold of reasonable expectation of privacy and stigmatization.

Regarding the issue of personal data processing and religious beliefs, one has to deal with the concepts of “community”, “member of a community”, and the nature of religious beliefs itself. First of all, the Kansas City regulation for religious gatherings defines the “event organizer” as controller of the processing of personal data. However, due to the fact that the main goal of this article is to use this regulation as a paradigm to analyse the issue of personal data and Churches in Europe, one should take into account the role and the legal and canonical position of the community within the data processing procedure. More analytically, one’s religious beliefs constitutes data that is considered sensitive under the GDPR. In case of need to maintain a record of members of a religious group or in general a record which contains religious beliefs of citizens of a secular state, the processing should be very specific and proportional due to the protection of the freedom of and from religion. Therefore, when such processing is performed in the context of a religious denomination, the controller of the processing of personal data is naturally the denomination itself. The claim above is based on the fact that a religious community is protected within a region as a whole. Freedom of worship is closely connected with freedom of conscience. Consequently, it is impossible for a state to guarantee religious freedom while ignoring its collective aspect. Important to the definition of controller in such cases is judgment of the Court of Justice of the European Union (CJEU) in *Jehovan todistajat*,² which analyses the main characteristics of a religious group as a controller according to the GDPR:

*“If the data processing at issue in the main proceedings falls within the scope of Directive 95/46, the referring court notes that the question then arises as to whether the Jehovah’s Witnesses Community must be regarded as a controller of that processing within the meaning of Article 2(d) thereof. The case-law of the Court deriving from the judgment of 13 May 2014, Google Spain and Google (C-131/12, EU:C:2014:317), broadly defines the concept of ‘controller’ within the meaning of those provisions. Furthermore, it is clear from Opinion 1/2010 of 16 February 2010 on the concepts of ‘controller’ and ‘processor’ produced by the Working Group set up pursuant to Article 29 of Directive 95/46, that, in particular, the ‘effective control’ and the conception that the data subject has of the controller must be taken into account”.*³

The Court further noted that:

“In the present case, the Data Protection Board, in the decision at issue in the main proceedings, found that the Jehovah’s Witnesses Community is a controller, jointly with its members who engage in preaching, of the processing of personal data carried out by the latter in the context of door-to-door

² Case C-25/17, ECLI:EU:C:2018:551.

³ *Ibid*, para. 21.

preaching. In so far as only the responsibility of that community is challenged, the responsibility of the members who engage in preaching does not appear to be called into question".⁴

Hence, a religious community is a group, and each time the group itself or its members process personal data related to its scope, the controller is first and foremost the religious community.

In conclusion, issues of personal data processing regarding Churches and other religious groups highlight the concept of religious self-organization under secular law. For example, one of the questions that arise is the dependence of the legal basis of consent on the legal form of a religious community or entity. Accordingly, in cases of extraordinary measures, the proportional treatment of the fundamental rights of health, religion and privacy becomes an escalating issue of paramount importance for the State, the Church and the individuals.

⁴ *Ibid*, para. 64.