Article 89. Safeguards and derogations relating to processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes

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1. Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation. Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.
2. Where personal data are processed for scientific or historical research purposes or statistical purposes, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.
3. Where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18, 19, 20 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.
4. Where processing referred to in paragraphs 2 and 3 serves at the same time another purpose, the derogations shall apply only to processing for the purposes referred to in those paragraphs.

Relevant Recitals

(156) The processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes should be subject to appropriate safeguards for the rights and freedoms of the data subject pursuant to this Regulation. Those safeguards should ensure that technical and organisational measures are in place in order to ensure, in particular, the principle of data minimisation. The further processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is to be carried out when the controller has assessed the feasibility to fulfil those purposes by processing data which do not permit or no longer permit the identification of data subjects, provided that appropriate safeguards exist (such as, for instance, pseudonymisation of the data). Member States should provide for appropriate safeguards for the processing of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. Member States should be authorised to provide, under specific conditions and subject to appropriate safeguards for data subjects, specifications and derogations with regard to the information requirements and rights to rectification, to erasure, to be forgotten, to restriction of processing, to data portability, and to

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object when processing personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. The conditions and safeguards in question may entail specific procedures for data subjects to exercise those rights if this is appropriate in the light of the purposes sought by the specific processing along with technical and organisational measures aimed at minimising the processing of personal data in pursuance of the proportionality and necessity principles. The processing of personal data for scientific purposes should also comply with other relevant legislation such as on clinical trials.

(157) By coupling information from registries, researchers can obtain new knowledge of great value with regard to widespread medical conditions such as cardiovascular disease, cancer and depression. On the basis of registries, research results can be enhanced, as they draw on a larger population. Within social science, research on the basis of registries enables researchers to obtain essential knowledge about the long-term correlation of a number of social conditions such as unemployment and education with other life conditions. Research results obtained through registries provide solid, high-quality knowledge which can provide the basis for the formulation and implementation of knowledge-based policy, improve the quality of life for a number of people and improve the efficiency of social services. In order to facilitate scientific research, personal data can be processed for scientific research purposes, subject to appropriate conditions and safeguards set out in Union or Member State law.

(158) Where personal data are processed for archiving purposes, this Regulation should also apply to that processing, bearing in mind that this Regulation should not apply to deceased persons. Public authorities or public or private bodies that hold records of public interest should be services which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest. Member States should also be authorised to provide for the further processing of personal data for archiving purposes, for example with a view to providing specific information related to the political behaviour under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes.

(159) Where personal data are processed for scientific research purposes, this Regulation should also apply to that processing. For the purposes of this Regulation, the processing of personal data for scientific research purposes should be interpreted in a broad manner including for example technological development and demonstration, fundamental research, applied research and privately funded research. In addition, it should take into account the Union's objective under Article 179(1) TFEU of achieving a European Research Area. Scientific research purposes should also include studies conducted in the public interest in the area of public health. To meet the specificities of processing personal data for scientific research purposes, specific conditions should apply in particular as regards the publication or otherwise disclosure of personal data in the context of scientific research purposes. If the result of scientific research in particular in the health context gives reason for further measures in the interest of the data subject, the general rules of this Regulation should apply in view of those measures.

(160) Where personal data are processed for historical research purposes, this Regulation should also apply to that processing. This should also include historical research and research for genealogical purposes, bearing in mind that this Regulation should not apply to deceased persons.

(161) For the purpose of consenting to the participation in scientific research activities in clinical trials, the relevant provisions of Regulation (EU) No. 536/2014 of the European Parliament and of the Council should apply.

(162) Where personal data are processed for statistical purposes, this Regulation should apply to that processing. Union or Member State law should, within the limits of this Regulation, determine statistical content, control of access, specifications for the processing of personal data for statistical purposes and appropriate measures to safeguard the rights and freedoms of the data subject and for ensuring statistical confidentiality. Statistical purposes mean any operation of collection

and the processing of personal data necessary for statistical surveys or for the production of statistical results. Those statistical results may further be used for different purposes, including a scientific research purpose. The statistical purpose implies that the result of processing for statistical purposes is not personal data, but aggregate data, and that this result or the personal data are not used in support of measures or decisions regarding any particular natural person.

(163) The confidential information which the Union and national statistical authorities collect for the production of official European and official national statistics should be protected. European statistics should be developed, produced and disseminated in accordance with the statistical principles as set out in Article 338(2) TFEU, while national statistics should also comply with Member State law. Regulation (EC) No. 223/2009 of the European Parliament and of the Council provides further specifications on statistical confidentiality for European statistics.

Closely Related Provisions

Article 4 (Definitions) (see too recital 26); Article 5 (Principles relating to processing of personal data); Article 6 (Lawfulness of processing) (see too recital 50); Article 9 (Processing of special categories of personal data) (see too recitals 52–53)

Related Provisions in LED [Directive (EU) 2016/680]

Article 4 (Principles relating to processing of personal data) (see too recital 26); Article 9 (Specific processing conditions)

Relevant Case Law

CJEU

Case C-524/06, *Heinz Huber v Bundesrepublik Deutschland*, judgment of 16 December 2008 (grand Chamber) (ECLI:EU:C:2008:724).

Case C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, judgment of 13 May 2014 (Grand Chamber) (ECLI:EU:C:2014:317).

Opinion of Advocate General Jääskinen in C-131/12, *Google Spain SL and Google Inc. v Agencia Española de Protección de Datos (AEPD) and Mario Costeja González*, delivered on 25 June 2013 (ECLI:EU:C:2013:424).

ECtHR

Times Newspapers Ltd v United Kingdom (nos. 1 and 2), Appl. Nos. 3002/03 and 23676/03, judgment of 10 March 2009.

A. Rationale and Policy Underpinnings

As is the case with the other provisions of Chapter IX, Article 89 GDPR enumerates specific processing situations in regard to which the EU legislator has deemed it necessary to allow the processing of personal data, subject to appropriate safeguards. The fundamental reason for providing what is in practice a broad margin for Member States to accommodate archiving purposes in the public interest, or processing carried out for scientific, historical research or statistical purposes, is the recognition of the important

role they each play in society,[1] and the fact that they cannot be accomplished without the processing of personal data. In practice, this means that the fundamental question from a data protection standpoint is often not whether processing may take place, but rather which safeguards should be imposed and adhered to when it does.

B. Legal Background

1. EU legislation

The DPD recognised the fundamental interests enumerated in Article 89 with regards to data processing for historical, statistical or scientific purposes.[2] While the DPD did not contain a provision directly equivalent to Article 89, Member States could under Article 8(4) of the DPD, subject to the provision of suitable safeguards, lay down exemptions from the prohibition on the processing of special categories of personal data for reasons of substantial public interest.[3] In practice this allowed for national legislation with a scope similar to that now mandated under Article 89.

Recital 29 of the DPD stated that the further processing of personal data for historical, statistical or scientific purposes was not generally to be considered incompatible with the purposes for which the data had previously been collected, provided that Member States furnished suitable safeguards. It also contained the only mention in the DPD of safeguards that could be imposed on processing of personal data for historical, statistical or scientific purposes, which were supposed to 'rule out the use of the data in support of measures or decisions regarding any particular individual'.[4] The DPD also recognised in other provisions derogations that could be used for research purposes.[5]

Finally, the WP29 recognised processing for historical, scientific, statistical or research purposes as interests that could be invoked to provide a legal basis for data processing under Article 7(f) of the DPD.[6]

2. International instruments

Article 9(3) of Convention 108 provides that 'Restrictions on the exercise of the rights specified in Article 8, paragraphs b, c and d, may be provided by law with respect to automated personal data files used for statistics or for scientific research purposes when there is obviously no risk of an infringement of the privacy of the data subjects'. The Modernised Convention 108 provides in Article 5(4)(b) that 'further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes is, subject to appropriate safeguards, compatible with those purposes'. In addition, the Modernised Convention allows restrictions on the exercise of the provisions concerning the transparency of processing (Article 8(3)) and on rights of the data subject (Article 9(2)). Finally, Article 11 of the Modernised Convention states that 'Restrictions

[1] E.g. research is a key objective of the EU as set out in Art. 179 Treaty on the Functioning of the European Union ('TFEU').

[2] See rec. 29 and 40, and Art. 6(1)(b) and (e) DPD.

[3] See further Pormeister 2017.

[4] DPD recital 29.

[5] E.g. in Art. 6(1)(e) GDPR (allowing the Member States to provide for longer storage of personal data) and Art. 11(2) GDPR (allowing derogations from the obligation to provide information to the data subject). See also Pormeister 2017, p. 142.

[6] WP29 2014B, p. 28.

on the exercise of the provisions specified in Articles 8 and 9 may be provided for by law with respect to data processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes when there is no recognisable risk of infringement of the rights and fundamental freedoms of data subjects'.

3. National developments

National laws governing data processing for archiving or research purposes are present in many Member States, many of which deal with medical research.[7] A notable example from the realm of scientific research is the research authorisation regime in Denmark, where the national DPA—in addition to an authorisation provided to the individual researcher by the National Committee on Health Research Ethics—authorises and sets conditions for, inter alia, the publication of personal data collected in the course of research projects.[8] It has been stated that considerable variation exists between the Member States with regard to data protection requirements for medical research under the DPD,[9] and that this lack of harmonisation will likely continue under the GDPR.[10]

4. Case law

The *Huber*[11] judgment of the CJEU concerned an Austrian national resident in Germany who requested the deletion of personal data relating to him in the German Central Register of Foreign Nationals ('AZR'), which was used for statistical purposes and by security and police services and judicial authorities for the prosecution and investigation of criminal activities. The Court held that only the processing of anonymous information was required in order for the statistical objectives of the database to be attained, so that it could not be said that the processing of personal data in this case was 'necessary'.[12]

In his Opinion in *Google Spain*,[13] Advocate General Jääskinen cited with approval the decision of the European Court of Human Rights ('ECtHR') in *Times Newspapers Ltd v United Kingdom (nos. 1 and 2)*, where the ECtHR had stated that newspaper archives 'constitute an important source for education and historical research, particularly as they are readily accessible to the public and are generally free'.[14] However, the Court disagreed with the Advocate General's conclusion that there was no so-called 'right to be forgotten' with regard to links to search results derived from online newspaper archives,[15] and found that such a right did exist in this case.[16]

C. Analysis

1. Introduction

The interaction between data protection law, archiving in the public interest and research has been complex and controversial.[17] The strengthening in the GDPR of rules

[7] See e.g. Beyeveld et al. 2004; Timmers et al. 2018.
[8] See section 10 Danish Data Protection Act 2000.
[9] Timmers et al. 2018, p. 7.
[10] Ibid., p. 19.
[11] Case C-524/06, *Huber*.
[12] Ibid., para. 65.
[13] Case C-131/12, *Google Spain* (Opinion AG).
[14] ECtHR, *Times Newspapers Ltd v UK*, para. 27. See Case C-131/12, *Google Spain* (Opinion AG), para. 123.
[15] *Google Spain* (Opinion AG), para. 137.
[16] See Case C-131/12, *Google Spain*, para. 99.
[17] For a discussion of the issues in the context of research, see Forgó 2015; Pormeister 2017; Rumbold 2017; and Timmers et al. 2018.

in areas such as consent could be seen as potentially harmful to archiving and research, while the creation in Article 89 of a more detailed framework for reconciling the needs of data protection and research than was the case under the DPD could be viewed as helpful. It should be noted that many of the specific issues concerning the tension between archiving and research on the one hand and data protection on the other hand are also mirrored in other provisions of the GDPR.[18]

During the negotiations of the GDPR, the issue of whether to require the explicit consent of the data subject for processing of personal data for scientific research purposes was debated extensively. The WP29 took the position that the further processing of health data for historical, statistical and scientific research purposes should only be permitted after having obtained the explicit consent of the data subjects or if certain narrow exceptions apply,[19] but this position has not been reflected in the GDPR.

Article 89 is addressed both to parties that conduct archiving and research (with regard to their practices in these areas), and to the EU and Member State legislators (with regard to the enactment of derogations). Article 89 encompasses the processing of both personal data under Article 6 and special categories of personal data under Article 9. Article 89 does not by itself provide a legal basis for data processing. Under the GDPR, potential legal bases for archiving and research covered by Article 89 could include, among others, the legitimate interests of the data controller as set forth in Article 6(1)(f).[20] Article 5(1)(b) also provides that further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes will not be considered to be incompatible with the initial purpose, provided that Article 89(1) is complied with.

With regard to special categories of personal data, Article 9(2)(j) allows for the processing hereof:

> when processing is necessary for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes in accordance with Article 89(1) based on Union or Member State law which shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject.[21]

The sensitive nature of personal data covered by Article 9 is reflected by the requirement in Article 9(2)(j) whereby the Union or Member State law allowing for the processing of such data, in addition to meeting the general criteria stated in Article 89(1), 'shall be proportionate to the aim pursued, respect the essence of the right to data protection and provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject'. Throughout Article 89, the 'public interest' must be based on Union or Member State law;[22] i.e. the public interest of a third country does not suffice.

[18] See in particular Art. 5 (principles relating to the processing of personal data); Art. 9 (processing of special categories of personal data); Art. 14 (information to be provided where personal data have not been obtained from the data subject); Art. 17 (right to erasure); and Art. 21 (right to object) GDPR.

[19] WP29 2015.

[20] Ibid, p. 28, finding that the legitimate interests of the controller 'will often' be a 'well-considered use' of Art. 7(f) DPD (which corresponds to Art. 6(1)(f) GDPR) with regard to data processing for historical or other kinds of scientific research.

[21] See the commentary on Art. 9 in this volume.

[22] See Art. 6(3) and the commentary on Art. 6 in this volume.

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Articles 89(2)–(3) provide for derogations from the exercise of certain rights, in order to provide 'specific conditions' for their exercise.[23] However, even when the derogations apply, the protections of Article 89(1) are still applicable. In addition, other relevant legislation will continue to apply even when the derogations are used.[24]

Certain conditions apply to the derogations contained in Article 89(2)–(3). First of all, the conditions of Article 89(1) still apply notwithstanding any derogations. Thus, appropriate safeguards must be in place to protect the rights and freedoms of data subjects even when derogations apply. Secondly, use of the rights from which derogations are given must be 'likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes'.[25] Thus, Member States should tailor the scope of the derogations narrowly so that they will apply only when exercise of the rights in question would make the relevant data processing impossible or seriously impair it. Finally, the derogations only apply to the purposes mentioned in the respective paragraphs.[26] This means, for example, that when a company conducts scientific research then such data processing may fall under a derogation, but its subsequent use of the research results for commercial purposes would not; in practice, it may not always be easy to differentiate between the original research purposes of data processing and any subsequent purposes. It should be noted that the phrase 'in the public interest' in Article 89 modifies only 'processing for archiving purposes'; thus, data processing for scientific or historical research purposes or statistical purposes is covered by the Article even if they are not 'in the public interest'.

2. Safeguards and purposes of processing

Article 89 GDPR regulates three distinct and separate purposes: archiving in the public interest, scientific or historical research purposes and statistical purposes. The provision mandates that appropriate safeguards for the rights and freedoms of the data subject must be observed when processing personal data for all of the listed purposes (paragraph (1)). Further, it provides in paragraphs (2) and (3) for derogations from the rights referred to in the enumerated provisions. Paragraph (4) makes clear that the derogations provided for in paragraphs (2) and (3) only apply to the purposes described in those paragraphs and not to any other purpose.

Common to all three purposes is that the formal definition of the individual purpose is largely left to the discretion of the Member States. Similarly, the extent to which the pursuit of one of these purposes can be a task delegated wholly or partly to private entities is left to Member States to set out. This means that in practice, the detailed requirements for the types of data processing described in Article 89 are likely to be determined largely under Member State law.

Under Article 89(1) GDPR, safeguards must be used whenever personal data are processed for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes. In particular, the provision requires the use of technical and organisational measures to achieve data minimisation, which is defined in Article 5(1)(c)

[23] Rec. 156 GDPR.

[24] Ibid. See also rec. 161, stating that 'For the purpose of consenting to the participation in scientific research activities in clinical trials, the relevant provisions of Regulation (EU) No. 536/2014 of the European Parliament and of the Council should apply'.

[25] This formulation is used in both Art. 89(2) and (3) GDPR.

[26] See ibid., Art. 89(4).

GDPR as personal data being processed in a way that is 'adequate, relevant and limited to what is necessary in relation to the purposes for which they are processed'. Recital 156 mentions anonymisation in this regard, and the reference in Article 89(1) to 'further processing which does not permit or no longer permits the identification of data subjects' could be interpreted as including anonymisation. In addition, Article 89(1) specifically mentions pseudonymisation. Thus, anonymisation and pseudonymisation are favoured as safeguards under Article 89, though the list of safeguards mentioned in the article is non-exhaustive. The generality and limited scope of the safeguards in Article 89(1) have been criticised,[27] and it remains to be seen how much protection they will provide in practice.

The phrase at the end of Article 89(1), that 'those purposes *shall* be fulfilled in that manner' (emphasis added), may seem to require anonymisation or pseudonymisation, though this will to a large degree depend on which purposes are being pursued. In some areas, such as in medical research, they are widely used. But in others, a requirement to anonymise or pseudonymise personal data that have been deemed worthy of preservation (e.g. that are processed for archiving purposes) may make little sense, as removing the nexus between people and events would negate the purpose of the processing. The fact that anonymisation and pseudonymisation should only be used when this would not defeat the purpose of the processing is emphasised by the statement in Article 89(1) 'Where those purposes can be fulfilled by further processing … '

3. Archiving in the public interest

Article 89(3) GDPR permits derogations for 'archiving in the public interest'. Services covered by this definition include ones 'which, pursuant to Union or Member State law, have a legal obligation to acquire, preserve, appraise, arrange, describe, communicate, promote, disseminate and provide access to records of enduring value for general public interest'.[28] Thus, not every archive will fall under the scope of Article 89, but only those that have a legal obligation to maintain records as described above. This means that archives such as personal or family archives or company records will generally not be covered by Article 89, unless they somehow fulfil the criteria of being kept in the 'public interest'. The requirement that archiving must take place 'in the public interest' should be regarded as satisfied as long as any individual archiving activity is set out—even broadly—in Member State law. Thus, the GDPR does not limit the extent to which Member States can delimit what materials are of sufficient historical interest to warrant subjecting them to achieving rules.

Under Article 89(3) GDPR, where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15 (right of access by the data subject), 16 (right to rectification), 18 (right to restriction of processing), 19 (notification obligation regarding rectification or erasure of personal data or restriction of processing), 20 (right to data portability) and 21 (right to object) GDPR. However, such derogations are still subject to the conditions and safeguards referred to in Article 89(1).

The GPDR provides in the recitals that it should not apply to deceased persons,[29] even though many of the archives to which Article 89 applies will necessarily contain

[27] See Pormeister 2017, p. 139. [28] Rec. 158 GDPR. [29] See ibid., rec. 27, 158 and 160.

the personal data of such persons. However, Member States are authorised to provide for rules regarding the processing of personal data of the deceased,[30] and they are also authorised to provide for the further processing of personal data in archives that include 'specific information related to the political behaviour under former totalitarian state regimes, genocide, crimes against humanity, in particular the Holocaust, or war crimes',[31] which would seem to consist mainly of persons who are deceased. Thus, the processing of the personal data of the deceased is a matter left to national law and to European human rights law. With regard to archiving under the GDPR, the best view seems to be that, while archives containing only the personal data of deceased persons are not subject to the GDPR, archives are not removed from the rules of Article 89 (and the GDPR in general) solely because they contain some data of deceased persons. Moreover, Member State law may also be relevant in such cases.

The GDPR does not require that archiving be carried out in a particular manner. Thus, it may be centralised with one or more state-owned or private bodies, may make use of private sector entities and may encompass flexible arrangements whereby relevant materials are archived locally with the entity which originally produced them, as long as such a practice is governed by relevant legislation and subject to appropriate safeguards as required in Article 89.

4. Scientific or historical research purposes

Recital 159 states that 'the processing of personal data for scientific research purposes should be interpreted in a broad manner including for example technological development and demonstration, fundamental research, applied research and privately funded research'.

Further, the Regulation provides a broad enumeration of the types of scientific research that can be carried out under Article 89, including as examples medical research into cardiovascular disease, cancer and depression, and registry-based research whereby information from registries is coupled to enable researchers to obtain essential knowledge about the long-term correlation of a number of social conditions such as unemployment and education with other life conditions.[32] The term also includes studies conducted in the public interest in the area of public health.[33]

The exact meaning of historical research is not set out. The term does, however, include both historical research and research for genealogical purposes.[34] As discussed above with regard to archiving in the public interest, the GDPR does not apply to deceased persons in the context of scientific or historical research purposes as well.[35] However, scientific and historical research is not removed from the rules of Article 89 (and the GDPR in general) just because it results in the processing of some data of deceased persons. Member State law may also be relevant in such cases.

It is clear that the legislator has intended to ensure a broad mandate for Member States to allow scientific research purposes to be pursued at least to the extent possible under the DPD. Many types of scientific research are covered, including those in the 'hard sciences', social sciences etc. Parties involved in scientific research, particularly in the health context, should be prepared to implement further protections if they are in the interest of

[30] See ibid., rec. 27. [31] Ibid., rec. 158. [32] Ibid., rec. 157. [33] Ibid., rec. 159.
[34] Ibid., rec. 160. [35] Ibid.

the data subject, and to apply the general rules of the GDPR with regard to such further protections.[36] Regarding the question on how the result of scientific research may be disseminated to the public via publication, and thus ensure the public value of the research is realised, Member States are required to ensure specific conditions apply 'in particular as regards the publication or otherwise disclosure of personal data in the context of scientific research purposes'.[37]

Under Article 89(2), where personal data are processed for scientific or historical research purposes, Union or Member State law may provide for derogations from the rights referred to in Articles 15 (right of access by the data subject), 16 (right to rectification), 18 (right to restriction of processing) and 21 (right to object) GDPR. However, such derogations are still subject to the conditions and safeguards referred to in Article 89(1).

The GDPR as a whole, and Article 89 in particular, do not distinguish between scientific research pursuing public interests and that pursuing private or purely commercial research.[38] As long as the requirements of the GDPR and applicable Member State law are met, purely private or commercial interests can be pursued through the processing of personal data for scientific research purposes. Any other relevant legislation (such as legislation on clinical trials in the case of medical or scientific research) will also continue to apply.[39] Furthermore, if the result of scientific research gives reason for further measures in order to protect the interests of data subjects, then the general rules of the GDPR will apply to such further measures.[40]

Although consent is not dealt with in Article 89, it should be noted that the use of consent as a processing basis for the purpose of scientific research should be allowed even though it often is not possible to fully identify the purpose of personal data processing at the time when consent is given.[41]

5. Statistical purposes

Recital 162 defines 'statistical purposes' as 'any operation of collection and the processing of personal data necessary for statistical surveys or for the production of statistical results'. The non-personal nature of aggregate or statistical data means that it is not to be used 'in support of measures or decisions regarding any particular natural person'.[42] Union or Member State law must also enact a number of protections for data used for statistical purposes, within the limit of the GDPR. In particular, they should 'determine statistical content, control of access, specifications for the processing of personal data for statistical purposes and appropriate measures to safeguard the rights and freedoms of the data subject and for ensuring statistical confidentiality'.[43] There are also special rules covering information which the EU institutions and national statistical authorities collect for the production of official European and national statistics;[44] in particular, Article 338(2) TFEU applies to the development, production and dissemination of European statistics,[45] and national statistics must comply with Member State law. Regulation EC No. 223/2009 also applies with regard to statistical confidentiality for European statistics.[46]

Under Article 89(2), where personal data are processed for statistical purposes, Union or Member State law may provide for derogations from the rights referred to in Articles

[36] Ibid., rec. 159. [37] Ibid.
[38] See also the example of 'privately funded research' listed ibid., rec. 159. [39] Ibid., rec. 156.
[40] Ibid., rec. 159. [41] See ibid., Art. 6(1)(a) and rec. 33. [42] Ibid. [43] Ibid.
[44] See ibid., rec.163. [45] Ibid. [46] Ibid. See further Regulation 223/2009.

15 (right of access by the data subject), 16 (right to rectification), 18 (right to restriction of processing) and 21 (right to object) GDPR. However, such derogations are still subject to the conditions and safeguards referred to in Article 89(1).

The material scope of the GDPR extends only to personal data,[47] and recital 162 states that the processing of personal data for statistical purposes results in aggregate data (i.e. non-personal data).[48] A literal reading of this recital would suggest that the aggregated datasets produced for statistical purposes are always non-personal data. This literal reading is, however, likely to be precluded by the broad definition of 'personal data' in GDPR Article 4(1)[49] and by the high level of protection conferred by the GDPR (see recitals 9–10). Such an interpretation would also be at odds with the high threshold for anonymisation that the GDPR sets, and with the WP29's finding (under the DPD) that aggregate statistical data may remain personal data if aggregation and anonymisation are not done effectively.[50]

A better reading of recital 162 is that it is only intended to make clear that data processed for statistical purposes remain personal data (subject to the GDPR) until they are anonymised through aggregation (i.e. until the 'result' of the statistical processing operation is achieved). This is in line with the WP29's view on the scope of application of the DPD, as the WP29 considered the process of data anonymisation as an instance of 'further processing' that requires a legal basis.[51]

6. Enforcement

Infringements of Article 89 are subject to the higher level of administrative fines under Article 83(5)(c), i.e. up to € 20 million or 4 per cent of the total worldwide turnover of the preceding financial year, whichever is higher.

Select Bibliography

EU legislation

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National legislation

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[47] See ibid., Art. 2(1). [48] Ibid., rec. 162.
[49] See the commentary on Art. 4(1) in this volume. [50] See WP29 2013, pp. 12–18.
[51] See WP29 2014A, p. 7.

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