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Processing of sensitive data and the "legitimate interest" legal basis for processing

1. Introduction

On 8 October, the European Data Protection Board (EDPB) issued guidelines on the processing of personal data on the basis of Article 6(1)(f) of the EU General Data Protection Regulation (GDPR).[1] This Note is a quick immediate response to the EDPB comments in that document relating to the processing of certain special categories of personal data that enjoy special protection under the GDPR, commonly referred to as "**sensitive data**". These are:

> personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, genetic data, biometric data [when used] for the purpose of uniquely identifying a natural person, data concerning health [and] data concerning a natural person's sex life or sexual orientation …
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> (See Article 9(1), discussed below)

Specifically, the EDPB appears to suggest that such data can be processed on the basis of the "legitimate interest" legal basis set out in Article 6(1)(f) of the GDPR, provided certain "**additional conditions**" for processing of sensitive data contained in Article 9(2) GDPR are met:

> In qualifying the nature of the data to be processed, the controller should pay special attention to, among other things … [t]he fact that special categories of personal data enjoy additional protection under Article 9 GDPR and, that the processing of special categories of personal data ("sensitive data") is only allowed under **specific additional conditions** set out in Article 9(2) GDPR.[2] In this regard, it should be kept in mind that a set of data that contains at least one sensitive data item is deemed sensitive data in its entirety, in particular if it is collected en bloc without it being possible to separate the data items from each other at the time of collection.[3] Further, it should be recalled that data are deemed sensitive if such data allow information falling within one of the categories referred to in Article 9(1) GDPR to be revealed.[4] It is irrelevant whether or not the information revealed by the processing operation in question is correct and whether the controller is acting with the aim of obtaining information that falls within one of the special categories referred to in that provision.[5] Hence, according to the jurisprudence of the CJEU, the relevant question is whether it is objectively possible to infer sensitive information from the data processed, irrespective of any intention of actually doing so.
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> (p.14, emphasis added)

Below, I explain why, in my opinion, this is not clear enough.

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[1] EDPB, Guidelines 1/2024 on processing of personal data based on Article 6(1)(f) GDPR, Version 1.0, adopted on 8 October 2024 (hereafter: "**the Guidelines**"), available at: https://www.edpb.europa.eu/system/files/2024-10/edpb_guidelines_202401_legitimateinterest_en.pdf#page26

[2] It should be reiterated that meeting the conditions laid down in Article 9(2) GDPR does not automatically fulfil the conditions of Article 6(1)(f) GDPR. **If this legal basis for processing is to be used, the controller must satisfy the requirements of both GDPR provisions when it processes special categories of personal data**. [original footnote, emphasis added]

[3] CJEU, judgment of 4 July 2023, Case C-252/21, *Meta v. Bundeskartellamt* (ECLI:EU:C:2023:537), para. 89. [original footnote]

[4] Ibid., para. 68. [original footnote]

[5] Ibid., para. 69. [original footnote]

2. The legal bases for processing non-sensitive and sensitive data under the GDPR

2.1 The rules

Article 6(1) of the GDPR stipulates, as a general rule, that personal data may only be processed if one of the following legal bases applies:

> (a) the data subject has given consent to the processing of his or her personal data for one or more specific purposes;
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> (b) processing is necessary for the performance of a contract to which the data subject is party or in order to take steps at the request of the data subject prior to entering into a contract;
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> (c) processing is necessary for compliance with a legal obligation to which the controller is subject;
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> (d) processing is necessary in order to protect the vital interests of the data subject or of another natural person;
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> (e) processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller;
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> (f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, 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.

The consent referred to in Article 6(1)(a) must meet the following conditions in order to be valid:

> [It must be consist of a] freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her.
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> (Article 4(11). See also Article 7 for further conditions for consent.)

Article 6(1) adds that:

> Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks.

And the third paragraph of Article 6 stipulates that:

> The basis for the processing referred to in point (c) and (e) of paragraph 1 shall be laid down by:
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> (a) Union law; or
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> (b) Member State law to which the controller is subject.

Furthermore:

> The purpose of the processing shall be determined in that legal basis [i.e., law] or, as regards the processing referred to in point (e) of paragraph 1, shall be necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller. … The Union or the Member State law [in question] shall meet an objective of public interest and be proportionate to the legitimate aim pursued.

The GDPR also contains a number of special rules – i.e., a prohibition subject to a number of specific exceptions – on the processing of sensitive data, set out in Article 9 as follows:

Article 9

Processing of special categories of personal data

1. Processing of personal data revealing racial or ethnic origin, political opinions, religious or philosophical beliefs, or trade union membership, and the processing of genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation shall be prohibited.

2. Paragraph 1 shall not apply if one of the following applies:

(a) the data subject has given explicit consent to the processing of those personal data for one or more specified purposes, except where Union or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject;

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller or of the data subject in the field of employment and social security and social protection law in so far as it is authorised by Union or Member State law or a collective agreement pursuant to Member State law providing for appropriate safeguards for the fundamental rights and the interests of the data subject;

(c) processing is necessary to protect the vital interests of the data subject or of another natural person where the data subject is physically or legally incapable of giving consent;

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a foundation, association or any other not-for-profit body with a political, philosophical, religious or trade union aim and on condition that the processing relates solely to the members or to former members of the body or to persons who have regular contact with it in connection with its purposes and that the personal data are not disclosed outside that body without the consent of the data subjects;

(e) processing relates to personal data which are manifestly made public by the data subject;

(f) processing is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity;

(g) processing is necessary for reasons of substantial public interest, on the basis of 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;

(h) processing is necessary for the purposes of preventive or occupational medicine, for the assessment of the working capacity of the employee, medical diagnosis, the provision of health or social care or treatment or the management of health or

social care systems and services on the basis of Union or Member State law or pursuant to contract with a health professional and subject to the conditions and safeguards referred to in paragraph 3;

(i) processing is necessary for reasons of public interest in the area of public health, such as protecting against serious cross-border threats to health or ensuring high standards of quality and safety of health care and of medicinal products or medical devices, on the basis of Union or Member State law which provides for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy;

(j) 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.

2.2 The relationship between Articles 6 and 9

The basic legal rule is that a special rule overrides a more general rule (*lex specialis derogat lex generalis*). Therefore, the special rules in Article 9 (the prohibition with specific exceptions) override the rules on legal bases in Article 6. Or if in certain regards Article 9 sets out stricter requirements than Article 6, the stricter requirements should be adhered to.

In most respects, the special rules in Article 9 can indeed be seen as imposing **additional conditions** on processing of personal data on the legal bases set out in Article 6 when sensitive data are processed, either in general or in specific contexts. Thus:

2.3 Article 9(2)(a) adds to the Article 6(1)(a) conditions for valid ***consent*** ("*freely given, specific, informed and unambiguous*"), the additional condition that the consent for processing of sensitive data must also be "*explicit*" (and allows the Member States to forbid processing of sensitive data even with such consent in certain context such as, e.g., employment relationships);*

*Note: Processing that is "*necessary for the performance of a **contract** to which the data subject is party*" or "*in order to take steps at the request of the data subject prior to entering into a contract*" (i.e., credit checks) (Article 6(1)(b)) is of course also based on consent (a contract being defined, at least in Continental European legal systems, as a matching of [expressed] wills) and will effectively always be "explicit". In any case, the requirement of necessity will of course have to apply particularly strictly in relation to the use of sensitive data in such contexts.

- Article 9(2)(g) relates to contexts covered by Article 6(1)(c) and (e) (i.e., "*processing [that] is necessary for compliance with a **legal obligation** to which the controller is subject*" and "*processing [that] is necessary for the performance of a **task carried out in the public interest** or in the **exercise of official authority** vested in the controller*") and adds to the requirement set out in Article 6(3) that such processing must be based on a Union or Member State law that "*meet[s] an objective of public interest and [is] proportionate to the legitimate aim pursued*", the additional condition that processing of sensitive data in such cases must be "*necessary for reasons of substantial public interest*" and that the law

in question must "*provid[e] for appropriate safeguards for the fundamental rights and the interests of the data subject*";

- Article 9(2)(b) also relates to contexts covered by Article 6(1)(c) and (e) (here more specifically: ***employment and social security and social protection law***), but again also adds to the requirement that the processing must be covered by a Union or Member State *law that "meet[s] an objective of public interest and [is] proportionate to the legitimate aim pursued*", the additional condition that if sensitive data are processed the law in question must *"provid[e] for appropriate safeguards for the fundamental rights and the interests of the data subject*";
- Article 9(2)(h) also relates to contexts covered by Article 6(1)(c) and (e) (here more specifically: ***health and social care***), but Article 9(3) again also adds to the requirement that the processing must be covered by a Union or Member State *law that "meet[s] an objective of public interest and [is] proportionate to the legitimate aim pursued*", the additional condition that if sensitive data are processed this must be done "*by or under the responsibility of a professional subject to the obligation of professional secrecy under Union or Member State law or rules established by national competent bodies or by another person also subject to an obligation of secrecy under Union or Member State law or rules established by national competent bodies*";
- Article 9(2)(i) also relates to contexts covered by Article 6(1)(c) and (e) (here more specifically: ***threats to health and medical safety***) and adds the additional condition that the relevant law must "*provide[ ] for suitable and specific measures to safeguard the rights and freedoms of the data subject, in particular professional secrecy*"; and
- Article 9(2)(c) adds to the legal basis in Article 6(1)(d) covering "*processing [that] is necessary in order to protect the vital interests of the data subject or of another natural person*", the additional condition "*where the data subject is physically or legally incapable of giving consent*".

Article 9(2)(d), that allows for processing of sensitive data by political, philosophical, religious or trade union bodies, is a specific concession to such bodies, that would be hampered in their activities without an exception from the prohibition of processing of sensitive data in Article 9(1) because not all processing, in particular by churches etc., can be based on consent or contract (viz., e.g., baptism records). But of course, the data will still have to be relevant to those activities and limited to the minimum necessary, etc.

Article 9(2)(j) sets out additional conditions in relation to processing sensitive data for archiving and research purposes in that it makes clear that such processing must comply with the "compatability" principle set out in Article 5(1)(e) and the special rules on archiving and research in Article 89, and in addition must not only be based on a law that is "proportionate to the aim pursued", but that must also "respect the essence of the right to data protection" and again "provide for suitable and specific measures to safeguard the fundamental rights and the interests of the data subject".

3. Conclusion

I have two issues with the Guidelines.

First of all, as noted at 2.1, above, the final sentence of Article 6(1) stipulates clearly and unequivocally that the "legitimate interest" legal basis "*shall not apply to processing carried out by public authorities in the performance of their tasks*". In that regard, the Guidelines say the following:[6]

> **Processing by public authorities**
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> Article 6(1), second indent, of the GDPR states that the legal basis under Article 6(1)(f) shall not apply to processing carried out by public authorities in the performance of their tasks. Recital 47 of the GDPR clarifies the reason: "it is for the legislator to provide by law for the legal basis for public authorities to process personal data". Such provision indeed relates to the fact that, as a general rule, processing undertaken by public authorities falls under the scope of their tasks and missions provided for by EU or Member State law.
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> Nevertheless, these provisions do not prevent from relying, in exceptional and limited cases, on Article 6(1)(f) GDPR when the processing is not linked to or does not relate to the performance of their specific tasks or the exercise of their prerogatives as public authorities, but concerns, where permitted by the national legal system, other activities that are lawfully carried out. Relying on Article 6(1)(f) GDPR in such exceptional cases should be documented internally. In no circumstances, public authorities may rely on Article 6(1)(f) for processing activities falling within the scope of the performance of their tasks.

The second paragraph appears to be, or at least gets close to being, *contra legem*. What are the "*exceptional and limited cases … when the processing is not linked to or does not relate to the performance of their specific tasks or the exercise of their prerogatives as public authorities, but concerns, where permitted by the national legal system, other activities that are lawfully carried out [by such authorities]*"? If they are "permitted by the national legal system", does that not mean that they are "in the performance of [the authorities'] tasks"?

At the very very least, the EDPB should provide clear examples of such "exceptional cases"

Secondly, as concerns the relationship between Article 6 and 9, my analysis at 2, above, shows that:

- Article 9(2), paras. (a), (b), (c), (g) and (h), between them, do indeed impose "additional conditions" on the legal bases of consent (Article 6(1)(a)), compliance with a legal obligation (Article 6(1)(c)), vital interest (Article 6(1)(d)) and public interest tasks/official authority (Article 6(1)(e)), and on the rules relating to archiving and research;
- Article 9 does not as such affect the legal basis of processing that is necessary for a contract or pre-contractual measure (Article 6(1)(b)), because the consent for such processing is always already "explicit" (although the necessity of the use of sensitive data in such context should be strictly assessed); and

[6] Guidelines, section IV.2, paras. 98 – 99.

- Article 9(2)(d) in effect creates a separate legal basis for the processing of sensitive data on their members and "regular contacts" by political, philosophical, religious or trade union bodies.

This leaves two Article 9 exemptions: the ones in Article 9(2), paras. (e): "*processing [that] relates to [sensitive] personal data which are manifestly made public by the data subject*", and (f): "*processing [of sensitive data] [that] is necessary for the establishment, exercise or defence of legal claims or whenever courts are acting in their judicial capacity*".

In relation to the first (processing of sensitive data that were "manifestly" made public by the data subject), this would mean that a controller may process such sensitive personal data if the controller or a third party has a legitimate interest in this being done, and this is not outweighed by the rights or interests of the data subject (Article 6(1)(f)); and the data subject has a right to object to the processing (Article 21).

As concerns the second context (processing of sensitive data where this is necessary in relation to legal claims etc.), it could have sufficed to apply the "necessity" requirement strictly in such contexts (cf. my comments on Article 6(1)(b), above).

It can be argued that these are two contexts that in relation to non-sensitive data are covered by Article 6(1)(f), "legitimate interest". But if that is so, they constitute the only two contexts in which sensitive data can be based on that legal basis.

If one were to insist on framing this in terms of "additional conditions", one would have to say that **the "legitimate interest" legal basis for processing of personal data can only be relied on when the data include sensitive data in these two contexts: that the sensitive datum or data had been "manifestly" made public by the data subject, or that the sensitive datum or data are (strictly) necessary in a legal claims context.**

In my opinion, this too should be spelled out in the second version of the Guidelines.

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Cambridge (UK), 11 October 2024