



Comments and proposals on the Chapter II of the General Data Protection Regulation

Ahead of the trialogue negotiations in September, EDRi, Access, Panoptykon Bits of Freedom, FIPR and Privacy International would like provide comments on selected key elements of the Chapter II on Principles.

When amendments are proposed **bold** (additions) and ~~strike-through~~ (deletions) reflect changes from the Commission proposal.

INTRODUCTION

The principles of data protection are the foundation on which the right to our personal data is built. If the principles are weak, then the entire structure will be weak and unreliable. Under the existing legislation, companies can process data using one of six justifications. The first five can be summarised in two words – necessity or consent. The sixth one is more unclear – the “legitimate interest” of the organisation processing the data. In other words, they can decide that their interest in processing your data is greater than any possible harm to you from this processing.

Currently, there are limitations on this – for example, the purposes that your information is used for must be clearly defined (so called “purpose limitation”). This means, for example, if you give your data to a supermarket for your loyalty card, they can use this information for relevant and related purposes. They cannot sell your data to a health insurance company that will profile you as potentially unhealthy, for example, based on your food-buying habits. The individual should know 1. to whom she/he gave their data, 2. that only the necessary data can be collected and 3. that the purpose of collection must be respected. This gives a degree of predictability and control to the individual. In short, data may only be processed when it is not excessive and is done for explicit and legitimate purposes.

Main issues in Chapter II on Principles:

- A general point: Exceptions should be kept separate from general principles and confined to the Articles where they apply.
- The exception for “archiving purposes” in Article 5 is too broad and could apply to all sorts of data storage.
- “Legitimate interest” as a basis for processing in Article 6.
- The entire paragraph in Article 6.4.
- Consideration to imbalances in contract and the associated “consent” in Article 7.
- The possibility for Member States to prohibit certain processing operations, even when the data subject has given his or her explicit consent, runs counter to the harmonisation intended by the Regulation in Article 9 and others.

Detailed analysis follows:

Article 5 - Principles relating to personal data processing

This is the all-important Article that lays down the principles for the processing of personal data that apply to all articles in the Regulation. However some of the Council and Parliament’s amendments add specific exceptions to the principles, see (1(b) and 1(e)). Exceptions should be kept separate from general principles and confined to the Articles to which they apply – in this case Article 83, which states them clearly. Additionally, one of the exceptions proposed by the Parliament and Council refers to ‘archiving purposes’. Archiving is a tool, not a purpose, and can cover a great number of purposes, potentially opening a loophole in the Regulation. This term was not used in the Directive 95/46/EC. A data controller can already archive data for legitimate purposes purpose (e.g. for tax purposes, defense against legal claims, etc).

Finally, regarding the Council proposal to replace ‘minimum necessary’ with ‘not excessive’, as per current Directive: although this is the language of the current (and outdated) legislation, all the evidence of the last years shows controllers collect far beyond what is necessary for the performance of any given task. The wording of the minimization principle calls for improved clarity.

Therefore, our suggestion for this Article will be close to the Commission proposal with small improvements proposed by the Parliament.

EDRi's proposal for Article 5

Personal data must be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data;
- (d) accurate and kept up to date; every reasonable step must be taken to ensure that personal data that

are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;

(e) kept in a form which permits **direct or indirect** identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; ~~personal data may be stored for longer periods insofar as the data will be processed solely for historical, statistical or scientific research purposes in accordance with the rules and conditions of Article 83 and if a periodic review is carried out to assess the necessity to continue the storage;~~

(ea) processed in a way that effectively allows the data subject to exercise his or her rights pursuant Article 10a to 21;

(eb) processed in a way that protects against unauthorised or unlawful processing and against accidental loss, destruction or damage, using appropriate technical or organisational measures;

(f) processed under the responsibility and liability of the controller, who shall ensure and demonstrate for each processing operation the compliance with the provisions of this Regulation.

Article 6 - Lawfulness of processing

The duality of the definitions of consent within the different parts of the Regulation create ambiguities which are specially dangerous when a controller needs to collect both sensitive and non-sensitive data at the same time. Using “explicit consent” and “unambiguous consent” in different articles should be avoided. Studies and reports such as the [Commission impact assessment](#) have indicated that this terminology failed to provide citizens with control over their personal information as companies often interpret ‘unambiguous’ as ‘presumed’). Therefore we suggest using “explicit consent” consistently throughout the text.

Article 6(1)(f), allowing processing of data for the purposes of the **controller's legitimate interest** as drafted by the three institutions, can in practice offer controllers a way to avoid many processing restrictions altogether, since current experience suggests that few data subjects will be able or willing to test reliance on this criterion in court. Moreover, the broadness of the term “legitimate interest” creates legal uncertainty, both for data subjects and business. Furthermore this uncertainty will most probably lead to divergences in practice between different Member States and therefore a failure to achieve the goal of harmonisation. In the interest of legal certainty, it should at least be specified that direct marketing is not a legitimate interest in the scope of this Article, which would also remove inconsistencies with the revised ePrivacy Directive. Furthermore, the reference to third parties in this Article is also worrying, since it broadens the scope of who can access and process this data, potentially affecting the principle of purpose limitation. Lastly, we ask for the reference to Article 6(f) needs to be kept in Article 19.1.

If a data controller wishes to use “legitimate interest” as a basis for processing, this must be separately and explicitly flagged to the data subject and the data processor should publish its grounds for believing that its interests override those of the data subject. Our proposed amendment introduces obligations on controllers to this effect.

As it should also be noted in recital 38 that paragraph 1 point (f) should not apply to the processing carried out by public authorities. In the Commission proposal, it was unclear whether the last sentence of paragraph 1, point (f) referred only to the sentence before (i.e. the balancing test), or to the whole point. Our proposed amendment clarifies this. For other controllers, this ground for lawfulness should only be used as a “last resort”, with it being preferable to have processing based on one or several of the other grounds.

Additionally, we suggest deleting point 2 of this Article as it is redundant with the content of Article 83.

Finally, the exception foreseen in **paragraph 4** undermines the principle of purpose limitation, one of the key concepts of data protection. For this reason, this paragraph **must be deleted**. See also the [EDPS first Opinion](#) on the data protection reform package, [as well as its latest recommendation](#), and the [Opinion of the Article 29 Working Party](#) .

EDRI's proposal for Article 6

1. Processing of personal data shall be lawful only if and to the extent that at least one of the following applies:

(a) the data subject has given **explicit** consent to the processing of their personal data for **for all the purposes for which the data are to be processed**;

(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;

(c) processing is necessary for compliance with a legal obligation to which the controller is subject;

(d) processing is **manifestly** necessary in order to protect the vital interests of the data subject **or of another person**;

(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;

(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. **This legal ground can never be relied on for processing that affects the fundamental rights and freedoms of any data subject. This legal ground shall not apply to processing carried out by public authorities in the performance of their tasks. This legal ground shall also not apply to processing that can be based on one or several of the other grounds in this paragraph.**

2. Processing of personal data which is necessary for archiving purposes in the public interest, or for historical, statistical or scientific purposes shall be lawful ~~subject also to~~ **provided** the conditions and safeguards referred to in Article 83 **are fully complied with**.

3. The basis for the processing referred to in points (c) and (e) of paragraph 1 must be established in accordance with:

(a) Union law, or

(b) national law of the Member State to which the controller is subject.

The law of the Member State must ~~meet~~ **pursue an legitimate** objective of public interest **in a democratic society** or must be necessary to protect the rights and freedoms of others, respect the

essence of the right to the protection of personal data and be proportionate to the legitimate aim pursued.

3a. In the case referred to in point (f) of paragraph 1, the controller shall inform the data subject about this the processing and the legitimate interest or interests pursued, explicitly and separately. The controller shall also publish the reasons for believing that its interests override the interests or fundamental rights and freedoms of the data subject.

~~4. Where the purpose of further processing is not compatible with the one for which the personal data have been collected, the processing must have a legal basis at least in one of the grounds referred to in points (a) to (e) of paragraph 1. This shall in particular apply to any change of terms and general conditions of a contract.~~

5. deleted

Article 7 - Conditions for consent

The EDPS suggestion for Article 7.4 improves the Article by setting criteria to ensure that consent is freely given by the data subject. These criteria cover not only the possible imbalance between the controller and the data subject, but also a situation where the execution or provision of a contract is made conditional to the data subject's consent for the processing of data that is not necessary for the performance of such contract .

EDRI's proposal for Article 7

We suggest following the EP version with the following modification as suggested by the EDPS :

4. When assessing whether consent is freely given, it must be considered, among others:
(a) whether there is a significant imbalance between the data subject and the controller, and
(b) in cases of processing under Article 6(1)(b), whether the execution of a contract or the provision of a service is made conditional on the consent to the processing of data that is not necessary for these purposes.

Article 8 – Processing of personal data of a child

The increased protection of children should not be restricted to information society service; it should rather be extended to all services offered directly to them.

As both the Parliament and Council have brought improvements to the original proposal from the Commission, the EDPS' gather good elements from the three texts. We therefore recommend following the [EDPS proposal](#).

Article 9 - Processing of special categories of personal data

The possibility for Member States to prohibit certain processing operations, even when the data subject has given his or her explicit consent, runs counter to the harmonisation intended by the Regulation.

In those limited cases where the Regulation allows exceptions to be created by Union or Member State law, it should be specified that these exceptions must comply with fundamental rights and provide adequate safeguards for the data subject's interests.

Our proposal for this Article combines good elements proposed by the three institutions and the EDPS.

The related Article 9a created by the Council regarding the processing of personal data was unnecessarily removed from Article 9. For sake of clarity, we recommend keeping this provision into Article 9.

Finally, of particular concern is that the Council proposal on point 2 (i) would allow further processing of health data, including genetic data on a massive scale; indefinite retention of health data including genetic data such as whole genomes without data subject's knowledge or consent. Those could also be subsequently shared with third parties, including companies such as, for example, search engines, without people's knowledge or consent, usually with names stripped off (pseudo-anonymised) but in a way which allows results to be reconnected to individuals later on, or combined with other data sets (e.g. social care, education). To prevent those serious risks, we recommend maintaining the text proposed by the Commission and Parliament on this specific point.

EDRi's proposal for Article 9

1. The processing of personal data, revealing race or ethnic origin, political opinions, ~~religious~~ or **philosophical** beliefs, trade-union membership, and the processing of genetic data or **biometric data** or data concerning health or sex life or criminal convictions, **criminal offences**, related security measures as well as any other factors included in Art. 21 of the Charter of Fundamental Rights that can lead to discrimination, 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, subject to the conditions laid down in Articles 7 and 8, except where Union law or Member State law provide that the prohibition referred to in paragraph 1 may not be lifted by the data subject; or

(b) processing is necessary for the purposes of carrying out the obligations and exercising specific rights of the controller in the field of employment law in so far as it is authorised by Union law or Member State law providing for adequate safeguards **for the fundamental rights and the interests of the data subject**; or

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

(d) processing is carried out in the course of its legitimate activities with appropriate safeguards by a

foundation, association or any other non-profit-seeking 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 data are not disclosed outside that body without the consent of the data subjects; or

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

(f) processing is necessary for the establishment, exercise or defence of legal claims; or

(g) processing is necessary for the performance of a task carried out **for reasons of substantial** ~~in the~~ public interest, on the basis of Union law, or Member State law which shall provide for suitable measures to safeguard the data subject's **fundamental rights and** legitimate interests; or

(h) processing of data concerning health is necessary for health purposes and subject to the conditions and safeguards referred to in Article 81; or

(i) processing is necessary for historical, statistical or scientific research purposes subject to the conditions and safeguards referred to in Article 83; or

(j) processing of data relating to criminal convictions, **criminal offences**, or related security measures is carried out ~~either~~ under the control of official authority ~~or~~ when the processing is necessary for compliance with a legal or regulatory obligation to which a controller is subject, or for the performance of a task carried out for important public interest reasons, and in so far as authorised by Union law or Member State law providing for adequate safeguards **for the fundamental rights of the data subject**. A complete register of criminal convictions shall be kept only under the control of official authority.

3. The **European Data Protection Board** ~~Commission~~ shall be empowered to adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria, conditions and appropriate safeguards **entrusted within six months of the coming into force of this Regulation, issue guidelines, recommendations and best practices** for the processing of the special categories of personal data referred to in paragraph 1 and the exemptions laid down in paragraph 2, **in accordance with Article 66**.

Article 10 – Processing not allowing identification

This Article follows from the principle of data minimisation. The original proposal from the Commission could be further strengthened. Our proposal for this Article is based on the Commission and Parliament version and includes further improvement brought to the text by the EDPS.

We fundamentally reject the text proposed by the Council under Article 10. The proposal aims at limiting the exercise of data subject's rights pursuant Article 15 to 18 when his or her personal data have been pseudonymised, as the controller is prohibited from engaging in the "additional processing"

necessary to identify the data subject. This was a clear intention from the Council as, until June 13, Article 10.1 had a final sentence "This in particular applies to the processing of pseudonymised data". The wording "in particular", indicates that pseudonymised data are included in any case. While pseudonymisation techniques can be useful for the protection of data subjects' personal data, the Council text would nullify those effects. The Council later tries to limit those risks with a new proposal under Article 12 but fails to address all the concerns. The only solution to prevent this blatant abuse is to maintain the wording of Article closer to the Commission proposal as recommended in our amendment.

EDRI's proposal for Article 10

- 1. If the data processed by purposes for which a controller processes personal data do not, or have ceased to, require the identification of a data subject permit the controller to identify a natural person, the controller shall not be obliged to acquire or process additional information in order to identify the data subject for the sole purpose of complying with any provision of this Regulation.**
- 2. Where as a consequence the data controller is unable to comply with a request of the data subject, it shall inform the data subject accordingly. In such cases, the data subject, may, however, provide voluntarily additional information to enable the controller to identify his or her information, for the purpose of exercising his or her rights pursuant Chapter III of this Regulation.**