

Derogations and special conditions



At a glance



Member States retain the ability to introduce derogations where these are required for the purposes of national security, prevention and detection of crime and in certain other situations. In line with case law of the Court of Justice of the European Union, any such derogation must respect *“the essence”* of the right to data protection and be a necessary and proportionate measure.

For these special purposes, the Regulation either requires or permits Member States to introduce supplemental laws. In the case of historical and scientific research, statistical processing and archiving, this can even provide a lawful basis for processing sensitive data.

Other special topics where Member State law is foreseen include processing of employee data, processing in connection with freedom of expression and professional secrecy (where restrictions of supervisory authority audit rights are foreseen).

Controllers (and, in some cases, processors) will need to check for and adjust to different Member State approaches in these areas.



To do list



Assess whether any processing you carry out may be subject to derogations or special conditions under the GDPR.



Where a derogation or special condition may apply to your processing, establish the jurisdictions in which this processing takes place.



Consider further lobbying work in countries where you may be affected by the introduction of local restrictions.



Where professional secrecy rules apply to any personal data received or obtained by a controller or processor, ensure these are appropriately marked so they can be protected from disclosure to supervisory authorities



Degree of change

Unknown – Many of the same categories of derogations and special conditions apply as provided for in Directive 95/46 EC (the “Data Protection Directive”), but there is a difficulty in anticipating compliance with such derogations & special conditions because they will depend on how Member States introduce, or retain, laws and rules in this area.

Commentary

Special cases

The GDPR contains broad derogations and exemptions in two main areas: (1) in Chapter III Section 5, regarding “restrictions” to obligations and data protection rights; and (2) in Chapter IX, regarding “specific processing situations”.

Article 23 - Restrictions

Article 23 of the GDPR creates the right for Member States to introduce derogations to data protection law in certain situations; this is also the case in the Data Protection Directive. Member States can introduce derogations from transparency obligations and data subject rights, but only where the measure “*respects the essence of ... fundamental rights and freedoms and is ... necessary and proportionate ... in a democratic society*”.

The measure must safeguard one of the following:

- national security;
- defence;
- public security;
- the prevention, investigation, detection or prosecution of criminal offences or breaches of ethics in regulated professions;
- other important public interests, in particular economic or financial interests (e.g. budgetary and taxation matters);
- the protection of judicial independence and proceedings;
- the exercise of official authority in monitoring, inspection or regulatory functions connected to the exercise of official authority regarding security, defence, other important public interests or crime/ethics prevention;
- the protection of the data subject, or the rights and freedoms of others; or
- the enforcement of civil law matters.

In order for a measure to be acceptable, it must (in accordance with Article 23(2)) include specific provisions setting out:

- the purposes of processing;
- the affected categories of data;
- the scope of the restrictions to the GDPR which are introduced by the measure;

- safeguards to prevent abuse, unlawful access or transfer;
- the controllers who may rely on the restrictions;
- the applicable retention periods and security measures;
- the risk to data subjects' rights and freedoms; and
- the right of data subjects to be informed about the restriction, unless this is prejudicial to the purpose of the restriction.

Articles 85-91: “Specific Data Processing Situations”

The provisions in Chapter IX GDPR provide for a mixed set of derogations, exemptions and powers to impose additional requirements, in respect of GDPR obligations and rights, for particular types of processing. These different provisions build upon specific processing situations already handled by the Data Protection Directive.

Article 85: Freedom of expression and information

This provision requires Member States to introduce exemptions to the GDPR where necessary to “*reconcile the right to the protection of personal data...with the right to freedom of expression and information.*” Although this Article is wider in scope than Article 9 of the Data Protection Directive, Article 85(2) makes specific provision for processing carried out for journalistic purposes, or for the purposes of academic, artistic or literary expression. Member States will be required to notify the Commission on how they have implemented this requirement and of any changes to such laws.

Article 86: Public access to official documents

This provision expands on Recital 72 of the Data Protection Directive, and allows personal data within official documents to be disclosed in accordance with Union or Member State laws which allow public access to official documents. This is not without limit - such laws should, according to Recital 154 GDPR, “*reconcile public access to official documents...with the right to protection of personal data*”. Directive [2003/98/EC](#) (the “PSI Directive”) on the “*re-use of public sector information*” does not alter the obligations on authorities, or rights of individuals, under the GDPR.

Article 87: National identification numbers

This effectively replicates the right of Member States to set their own conditions for processing national identification numbers under the Data Protection Directive. The only expansion is to clarify that this requires appropriate safeguards to be put in place.

Article 88: Employee data

Member States are permitted to establish (either by law or through collective agreements) more specific rules in respect of the processing of employee personal data, covering every major aspect of the employment cycle from recruitment to termination. This includes the ability to implement rules setting out when consent may be deemed valid in an employment relationship. Such rules must include specific measures to safeguard the data subject's "dignity, legitimate interests and fundamental rights" and the GDPR cites transparency of processing, intragroup transfers and monitoring systems as areas where specific regard for these issues is required. Member States must notify the Commission of any laws introduced under this Article by the time the GDPR enters into force, and must also notify it of any amendments.

Article 89(1) and (2): Scientific and historical research purposes or statistical purposes

Article 89(1) acknowledges that controllers may process data for these purposes where appropriate safeguards are in place (see section on [lawfulness of processing and further processing](#) and [sensitive data and lawful processing](#)). Where possible, controllers are required to fulfil these purposes with data which does not permit, or no longer permits, the identification of data subjects; if anonymisation is not possible, pseudonymisation should be used, unless this would also prejudice the purpose of the research or statistical process.

Article 89(2) allows Member States and the EU to further legislate to provide derogations from data subject rights to access, rectification, erasure, restriction and objection (subject to safeguards as set out in Article 89(1)) where such rights "render impossible or seriously impair" the achievement of these specific purposes, and derogation is necessary to meet those requirements.

The recitals add further detail on how "scientific research", "historical research" and "statistical purposes" should be interpreted. Recital 159 states that scientific research should be "interpreted in a broad manner" and includes privately funded research, as well as studies carried out in the public interest. In order for processing to be considered statistical in nature, Recital 162 says that the result of processing should not be "personal data, but aggregate data" and should not be used to support

measures or decisions regarding a particular individual.

Article 89(1) and (3): Archiving in the public interest

The same derogations and safeguards exist for "archiving in the public interest" as are mentioned above in respect of processing for research and statistical purposes, except that derogations may also be granted for the right to data portability. Further detail is included in Recital 158, which suggests that this should only be relied upon by bodies or authorities that have an obligation to interact with records of "enduring value for general public interest" under Member State or Union law.

Article 90: Obligations of secrecy

This Article allows Member States to introduce specific rules to safeguard "professional" or "equivalent secrecy obligations" where supervisory authorities are empowered to have access to personal data or premises. These rules must "reconcile the right to protection of personal data against the obligations of secrecy", and can only apply to data received or obtained under such obligation. Again, Member States must notify the Commission of any laws introduced under this Article by the time the GDPR enters into force, and must also notify it of any amendments.

Article 91: Churches and religious associations

This Article protects "comprehensive" existing rules for churches, religious associations and communities where these are brought into line with the GDPR's provisions. Such entities will still be required to submit to the control of an independent supervisory authority under the conditions of Chapter VI (see section on [co-operation and consistency between supervisory authorities](#)).



Where can I find this?

Derogations
Article 23, Recital 73

Special conditions
Articles 6(2), 6(3), 9(2)(a), 85-91
Recitals 50, 53, 153-165