



The Right to Privacy and DP vs. the Right to be Informed: Frameworks and the Role of Official Statistics

Dr Edina Harbinja, Aston University, UK

e.harbinja@aston.ac.uk

03 November 2020, UNECE Expert Meeting on
Modernizing Statistical Legislation

Outline

- Key legal instruments in the area
- Key tensions between GDPR and statistics
- Specific framework for the protection of data collected for statistical purposes
- PSI Directive
- Open Data Directive
- Conclusion: Key challenges

Key legal instruments

- The right to privacy – referred to in European law as the right to respect for private life
- Emerged in international human rights law in the Universal Declaration of Human Rights (UDHR), adopted in 1948, as one of the fundamental protected human rights (article 12)
- **The European Convention on Human Rights (ECHR) – Article 8** - everyone has the right to respect for his or her private and family life, home and correspondence.
- Charter of Fundamental Rights of the EU - Article 7 (Respect for private and family life)
- OECD - Guidelines on the Protection of Privacy and Transborder Flows of Personal Data (updated in 2013)

EU instruments on data protection – in force

- Treaty on the Functioning of the European Union, Article 16
- Charter of Fundamental Rights of the European Union, Article 8 (Protection of personal data)
- Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (**General Data Protection Regulation**), OJ 2016 L 119
- Privacy and Electronic Communications Directive 2002/58/EC revised Oct 2009 (upcoming: e-Privacy Regulation)

Council of Europe

- ECHR, Article 8 (right to respect for private and family life, home and correspondence)
- Relevant: Article 10 (Freedom of expression) – ‘to receive and impart information’
- Modernised Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (**Modernised Convention 108**)

Privacy vs data protection

- Differ in their formulation and scope.
- The right to respect for private life consists of a **general prohibition on interference**, subject to some public interest criteria that can justify interference in certain cases.
- The protection of personal data is viewed as **an active right, putting in place a system of checks and balances** to protect individuals whenever their personal data are processed.
- The processing must comply with the essential components of personal data protection - **independent supervision and respect for the data subject's rights**.

GDPR and statistical purposes – applicable basis for processing

- One of the conditions set out in Article 6 of GDPR must apply. The data subject must be advised which legal basis for processing is used (Article 13(1)(c), Article 14(1)(c))
- **Public interest/official authority** - “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” – Article 6(1)(e), GDPR (also recitals 41 and 45)
- **Legal Obligation** - “processing is necessary for compliance with a legal obligation to which the controller is subject” – Article 6(1)(c), GDPR

GDPR consent - issues

- “consent should not provide a valid legal ground for the processing of personal data in a specific case where there is a clear **imbalance between the data subject and the controller**, in particular where the controller is a **public authority** and it is therefore unlikely that consent was freely given in all the circumstances of that specific situation” – recital 43, GDPR
- Public authorities (particularly government departments) should not usually be relying on consent
- Statistics: consent for a survey ≠ GDPR consent ≠ in other sector - specific legislation
- Consent may be sought for ethical reasons but this does not mean it must be the lawful basis
- **Ethics vs other laws vs data protection**

Special Category Data

- “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**” – Article 9(2)(j), GDPR

Statistical purposes - important considerations

- 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 – Recital 162, GDPR
- ‘...the **legitimate expectations of society for an increase of knowledge** should be taken into consideration’ Recital 113
- **Data minimisation** principle (vs the need to collect as much data as possible)
- **Pseudonymisation** – the risk of reidentification
- **Safeguards** - technical and organisational measures

Specific framework for the protection of data collected for statistical purposes

- Article 338(2) TFEU
- **Statistical confidentiality**
- Regulation 223/2009 on European statistics
- For microdata access: Regulation (EU) No 557/2013 on access to confidential data for scientific purposes
- EUROPEAN STATISTICS CODE OF PRACTICE For the National Statistical Authorities and Eurostat (EU statistical authority) Adopted by the European Statistical System Committee 16th November 2017
- UN: the Fundamental Principles of Official Statistics 2014; Generic Law on Official Statistics (2016) and the Guidance on Modernizing Statistical Legislation (2019)

Public Sector Information Directive

- PSI Directive 2003 (amended 2013)
- The wide **definition of personal data** vs confidential data
- PSI containing personal data create a tension which typically leads to PSI remaining locked
- Making available PSI for re-use for all commercial and non-commercial purposes risks violating **the principle of purpose limitation**
- The principle of **data minimisation**

Open Data Directive

- Directive (EU) 2019/1024 of the European Parliament and of the Council of 20 June 2019 on open data and the re-use of public sector information
- Excluded: **data protected by statistical confidentiality**
- AND 'as undermining **the protection of privacy and the integrity of the individual**, in particular in accordance with Union or national law regarding the protection of personal data' (art. 2)
- **New provision: high-value datasets (art. 14) – statistics (Annex 1)**

Open data

- Datasets shall be:
 - (a) available free of charge;
 - (b) machine readable;
 - (c) provided via APIs; and
 - (d) provided as a bulk download, where relevant. (art. 14 (2)).
- Recital 28 - the principle **‘as open as possible, as closed as necessary’**
- Repeals the PSI Directive 2003 (amended 2013), with effect from 17 July 2021

Conclusion: Key challenges

- Ensuring **effective and sustainable access** to new data sources to produce **innovative statistical products and services**, to increase the NSI capacity to provide new insight into **evidence-based policy-making**
- VS
- The right to keep the data secret (privacy), or the access to PD under conditions laid down by the law (DP)
 - **Where is the balance?**
 - Is statistical confidentiality = data protection = privacy?
 - NSI as national data stewards

Thank you!

Dr Edina Harbinja

e.harbinja@aston.ac.uk

@EdinaRI