

EU data protection law and migrants' health data: fundamental rights considerations



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- EU General Data Protection Regulation – GDPR ([Reg. 2016/679](#)) → contains rules on automated processing of personal data in EUMS & on the protection and free movement of personal data – ! **within the scope of EU law!**
- Directly applicable as of **25/5/2018**
- **Personal, material** and **territorial scope**: Arts. 1-3, 4(1)
- “**Data subject**”: any natural person → including **migrants**, regardless of their status/nationality
- “**Special categories of data**” (=“**sensitive data**”): include **health data** → in principle: processing prohibited → permissible in limited conditions = enhanced protection, and additional safeguards, compared to other personal data [GDPR Art. 9]

- “**Data concerning health**”: personal data related to the physical/mental health of a natural person, including the provision of health care services, which reveal information about his/her health status
 - GDPR applies to processing **migrants’ health data**
 - more specific instruments governing large-scale EU IT systems in the field of migration/security (SIS II; *VIS recast*) & [Dublin Reg.](#)
- **Main actors under GDPR:**
 - “**Controller**”: natural or legal person, public authority, agency or other body which, alone or jointly with others, **determines the purposes and means of the processing** of personal data...
 - “**Processor**”: natural or legal person, public authority, agency or other body **which processes** personal data **on behalf of the controller**

Justified interferences with fundamental rights under EU law

- Rights to **respect for private life** (Art. 7 of the Charter) and **data protection** (Art. 8 of the Charter) = central to collecting/processing migrants' health data
→ such measures: clear interferences
- Overarching requirement for justified interferences: **necessity & proportionality test** (Art. 52(1) of the Charter) → limitations:
 - be provided for by law,
 - genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others,
 - respect the essence of the right, and
 - be proportionate
- **CJEU:**
 - **all** the above requirements must be complied with + an objective of general interest (e.g. public health) is not, in itself, sufficient to justify an interference [*Digital Rights Ireland, 2014*]
 - cannot compromise the “essence of the right” [*Schrems, 2015*]

Health data under the GDPR: basic principles

- Next to the FR safeguards/data protection principles flowing from Arts. 7-8 of Charter (as interpreted by the CJEU), specific guarantees under EU data protection acquis further corroborate the necessity & proportionality test → for **health data**, see GDPR Art. 9(2)(h)-(i)
 - Art. 9(2)(h) = processing is necessary for **preventive & occupational medicine purposes**
 - Art. 9(2)(i) = processing is necessary for public interest reasons in the **area of public health**
- GDPR allows MS to maintain/introduce **further conditions**, including **limitations**, for processing **genetic, biometric and health-related data**. However, this should not hamper the free flow of personal data within the EU when those conditions apply to cross-border processing of such data [GDPR, recital (53), see also Art. 9(4)]
- Processing of special categories of personal data = may be necessary for reasons of public interest in the areas of public health **without consent** of the data subject → such processing of health data needs be subject to **suitable + specific measures** to protect FR of the individuals concerned (in particular professional secrecy) & should not result in personal data being processed for other purposes by third parties (e.g. employers or insurance and banking companies) [GDPR, recital (54), Art. 9(3)]

- Following the main **legal principles of data protection** [GDPR Art. 5], processing of health data must be
 - lawful, fair and transparent;
 - follow a specific, explicit and legitimate purpose (clearly defined in MS law or Union law); and
 - comply with the requirements of data minimisation, data accuracy, storage limitation, data security and accountability
- Health data cannot be used for profiling [GDPR recital (71), Arts. 4(4) and 22]
- Electronic health file system: needs an explicit legal basis, with all necessary safeguards to ensure that the system is run securely [[Art. 29 WP \(2007\) – WP 131](#)]

Key fundamental rights related aspects (also in the context of *ex ante* IA):

- **Collection** of personal data (safeguards on purpose limitation, data minimisation, etc.)
- **Informing** the persons concerned (Arts. 12-14 GDPR)
- **Storing and processing** personal data in EU large-scale databases → security of processing; protection from unauthorised access (Art. 32 GDPR)
- **Data transfers** to third countries and international organisations (Ch. V of GDPR) → strict safeguards!
- **Data subjects' rights** (access to, correction and deletion of own data stored, restriction of processing) (Art. 8(2) of the Charter; Art. 15-22 GDPR) → can be limited for public health purposes (Art. 23 GDPR)
- **Remedies, liability and penalties** (incl. compensation) – Ch. VIII of GDPR
- **Oversight** mechanisms
 - Member State level (DPAs)
 - EU level (EU-LISA, EDPS, EDPB, etc.)

- Article 29 Working Party (2007), [Working Document on the processing of personal data relating to health in electronic health records \(EHR\)](#)
- [Commission Recommendation of 2 July 2008 on cross-border interoperability of electronic health record systems](#), OJ L 190, 18.7.2008, pp. 37-43
- EDPS (2013), [Opinion of the European Data Protection Supervisor on the Communication from the Commission on 'eHealth Action Plan 2012–2020 – Innovative healthcare for the 21st century'](#), Brussels, 27 March 2013

! Effective data protection is vital for building trust in databases processing/storing health data !

- ✓ Under watchful eyes – biometrics, EU IT-systems and fundamental rights, March 2018
- ✓ Legal Opinion – Interoperability and fundamental rights implications, April 2018
- ✓ Cost of exclusion from healthcare – The case of migrants in an irregular situation, Sept. 2015
- ✓ Fundamental rights of migrants in an irregular situation in the European Union, Nov. 2011, Ch. 6 [healthcare]



Thank you for your kind attention!

? Questions ?

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