

Secondary Use of Data and Further Processing Under the GDPR

Definitions

As one of our background research topics, we have tackled in a 1+MG task force the question if secondary use is equivalent to data further processing under the GDPR. Neither the GDPR nor other sources provide a clear definition. Secondary use is often defined context specific. From this, three main interpretations of what “secondary use” means have been observed:

- Use of data for a purpose other than anticipated at the time of collection
- Use of data for different categories of purposes
- Use of data for a purpose that was not driving data collection (arguably, this is the most reasonable interpretation, meeting the way we are discussing secondary use in 1+MG)

Further processing is not explicitly defined in the GDPR, but based on Art. 5(1)(b) [*“Personal data shall be [...] collected for specified, explicit and legitimate purposes and not further processed in a manner that is incompatible with those purposes”*] can be inferred to mean “the processing of personal data for purposes other than those for which the personal data was collected”.

This means that under the GDPR, the following constitutes further processing:

- Any opportunistic use of data that has already been collected
- Any use, even if for a directly related purpose, that was not driving data collection (example: reporting of infectious test results to a public health authority; pseudonymisation of research data)

What constitutes a collection?

Based on the phrasing in some parts of the GDPR, it could be assumed that “data collection” refers to collecting data from the data subject directly and does not cover what is otherwise phrased as “obtaining” data from another source. Indeed, the GDPR differentiates in some articles between data “collection from the data subject” and “obtaining data from another source”. However, our analysis suggests that “data collection” is used as an umbrella term encompassing both cases where no further specification is made. This is the case in particular for Art. 5, where the principle of purpose limitation, i.e. the collection “for specified, explicit and legitimate purposes” should apply independent of the source of the data.

Also Art. 13 and 14 give good examples where Art. 13 refers to data directly collected from the data subject and Art. 14 refers to data obtained from other sources; both seem to assume the purpose for this is primary and further processing is only added for additional processing. Therefore, in our view, “[data] collected for specified, explicit and legitimate purposes” under

Art. 5(1)(b) should be interpreted broadly, referring to both data collection from an existing source and obtaining directly from the data subject.

Difference between further processing (under the GDPR) and secondary use of data

Secondary use focuses on the entire lifecycle of data. Any processing for a purpose other than the one driving the collection constitutes secondary use.

For the identification of further processing, it is important to analyse the processing chain. Following the phase approach, also suggested by the CJEU, the processing chain can cover a succession of controllers whose processing is connected because it builds on another, but in itself, the processing is independent unless there is joint controllership, where the entities are defining jointly the purpose and the essential means for the processing. The controller sharing data with an independent controller can be seen as an “upstream controller” to a recipient controller. Or from the view of the upstream controller sharing the data, the recipient controller is a downstream controller.

Further processing should be understood in relation to a given controller in the processing chain. A controller always processes data collected for a specified purpose as primary processing, independent of where the data was collected from. This is applicable along the entire processing chain, with each new collection providing a “reset”. (As long as the purpose has been clearly defined and is lawful).

On the other hand, disclosure of this data by the upstream controller is, in most cases, further processing by the upstream controller. As a consequence, it is the upstream controller who is responsible for the compatibility test introduced in Art. 6(4) of the GDPR, and ascertaining that the processing by the downstream controller is lawful.

Because of this, we strongly recommend that the data-providing controller enters in a contractual agreement with the data-recipient controller. The agreement should clearly, and as narrowly as possible, define the purpose(s) for which data are collected by the data-recipient.

Dependence on the proximity of purposes

A downstream data controller that is collecting data for a specific and lawful purpose is performing a primary processing activity. It does not matter in this case if the purpose of this processing is related to the purpose for which the data were collected. As long as it is legitimately possible to process data for this purpose, the downstream controller does legitimate primary processing. It is the original controller who does further processing by sharing the data for the downstream controller’s purpose and therefore, any considerations on compatibility of the collection purpose and the downstream purpose are with the original controller doing further processing.

Compatibility of further processing for research purposes

Compatibility can be established based on the test provided by Art. 6(4). However, such test is not needed if the further processing is for research because Art. 5(1)(b) states that processing for scientific research purposes can be presumed to be not incompatible. Another possibility where such test is not needed is that processing is based on consent or a legal requirement.

Legal basis for compatible further processing

It is often assumed that compatible further processing can rely on the same legal basis as the collection of the data, based on a sentence in Recital 50 to this regard. However, in another part of the same Recital, it is also pointed out that the requirements for that legal basis have to be met. We therefore concluded that no automatic transferal of the legal basis can take place and also compatible further processing still needs to justify its chosen legal basis. This is in line with legitimacy and purpose limitation being cumulative requirements under Art. 5 and cannot replace each other.

Application for data sharing in research

If the above assumptions are used to analyse the situation of data sharing, we find the following situations:

- Direct data sharing by a **research organisation to a data user:**
→ **Further processing**
- Data sharing by a research organisation **to a data permit authority:**
→ **Further processing**
- Data sharing **by a permit authority to data user**
→ **Primary processing**
- Processing **by data users for their intended use (such as research):**
→ **Primary processing**