

ABERDEEN 2040

IP, Data Protection, and Platform Regulation

The case of research exceptions

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Agenda

1. Data-driven scientific research: the “L” factor
2. Research exceptions in Europe
 - Copyright
 - Data protection
3. Two paradoxes
4. Ways forward

Research questions

1. Is the law facilitating research with computational methods?
2. Is the law creating a level playing field for the different research actors?

Exceptions

- InfoSoc Directive: research exception
- Database Directive: exceptions to restricted acts and the sui generis right
- Copyright in the DSM Directive (CDSMD): Text and data mining (TDM)
- GDPR: research “exemption”/”exception”
- Etc...

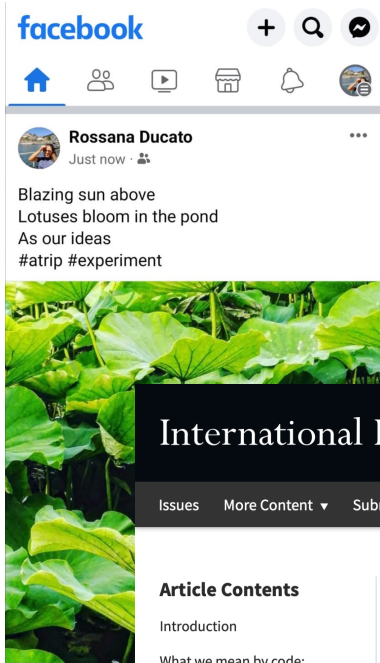
Exceptions

For the purpose of this talk...

- InfoSoc Directive: research exception
- Database Directive: exceptions to restricted acts and the sui generis right
- **Copyright in the DSM Directive (CDSMD): Text and data mining (TDM)**
- **GDPR: research “exemption”/“exception”**

Copyright and Data Protection

Interesting parallels and several occasions of overlapping in computational research



International Data Privacy Law

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Introduction

What we mean by code: terminology and basic structures

Personal data under the GDPR and other definitional questions

JOURNAL ARTICLE

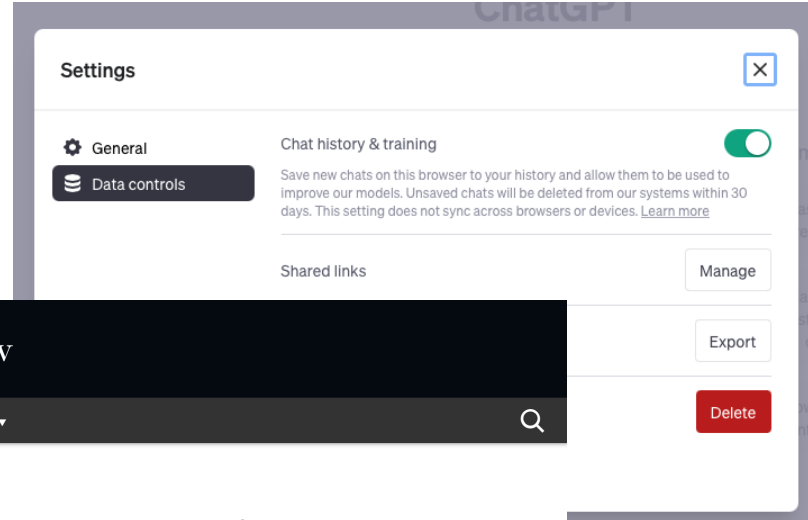
Code as personal data: implications for data protection law and regulation of algorithms

Nadezhda Purtova ✉, Ronald Leenes

International Data Privacy Law, ipad019, <https://doi.org/10.1093/idpl/ipad019>

Published: 12 October 2023

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TDM exceptions in the CDSMD



Art. 3

TDM for RESEARCH



Art. 4

**TDM for “EVERYONE/THING
ELSE”**

Art. 3

Text and Data Mining for research purposes

Member States shall provide for an exception to the rights provided for in Article 5(a) and Article 7(1) of Directive 96/9/EC, Article 2 of Directive 2001/29/EC, and Article 15(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out, for the purposes of scientific research, text and data mining of works or other subject matter to which they have lawful access.

- Mandatory exception
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- Purpose: scientific research

What is scientific research under the CDSMD?

Recital 12 & Art. 2

- OBJECT: It “cover[s] both the natural sciences and the human sciences”(Recital 12. See also, Database Directive, recital 36)
- SUBJECT: Conducted by **research organisations**, i.e. “universities or other higher education institutions and their libraries, [...] entities such as research institutes and hospitals that carry out research” and **cultural heritage institutions**, i.e. public accessible libraries, museums, national archives, public sector broadcasting organisations (and persons attached)
- **PRIMARY GOAL of these institutions: Not-for-profit/public interest mission**
- Exclusion: “organisations upon which commercial undertakings have a decisive influence allowing such undertakings to exercise control because of structural situations, such as through their quality of shareholder or member, which could result in preferential access to the results of the research” (Recital 12)

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- Mandatory exception
- Not overridable by contract (see art. 7)
- Exception to the right of reproduction/extraction
- Restricted beneficiaries
- Purpose: scientific research
- Pre-condition: Lawful access

What is the lawful access in the CDSMD?

Recital 14 (in relation to Art. 3)

“access to content based on an **open access policy** or through **contractual arrangements** between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in the case of subscriptions taken by research organisations or cultural heritage institutions, the **persons attached thereto** and covered by those subscriptions should be deemed to have lawful access. Lawful access should also cover access to content that is **freely available online**”

Controversial aspects of Art. 3 CDSMD

- **Narrowly designed** (Hilty and Richter, 2017; Geiger, Frosio and Bulayenko 2018; Rosati 2018; Ducato and Strowel, 2018; Margoni and Kretschmer 2022)
 - ‘person attached’ to the beneficiaries of the exception is rarely mentioned in the national transpositions of the CDSMD or narrowly constructed
- “Another significant limitation found in both Arts. 3 and 4 is that they only exempt potential infringements of the **right of reproduction** but not of the right of distribution or communication to the public, nor of the (unharmonized) right of adaptation” (Margoni and Kretschmer 2022)
- “Subjecting TDM research to market access does **discriminate research** according to research organisations’ market power. Only few research organisations will be able to acquire licences for all databases that are relevant for a TDM research project” (Geiger, Frosio, Bulayenco, 2018)

Research in the GDPR

Conceptual distinction between:

- Historical research
- Scientific research
- Statistical purposes
- Archival purposes

Similar legal regime:

- Exceptions to data protection principles
- Derogations to data subject rights

The notion of scientific research in the GDPR

Recital 159

“The processing of personal data for scientific research purposes should be interpreted **in a broad manner** including for example **technological development and demonstration, fundamental research, applied research and privately funded research.**”

- The concept should not be stretched beyond its common understanding. It should refer to projects run “in accordance with relevant sector-related methodological and ethical standards, in conformity with good practice” (EDPB, 2018)

“In addition, it should take into account the Union's objective under **Article 179(1) TFEU** of achieving a European Research Area.”

Research in the GDPR

Conceptual distinction between:

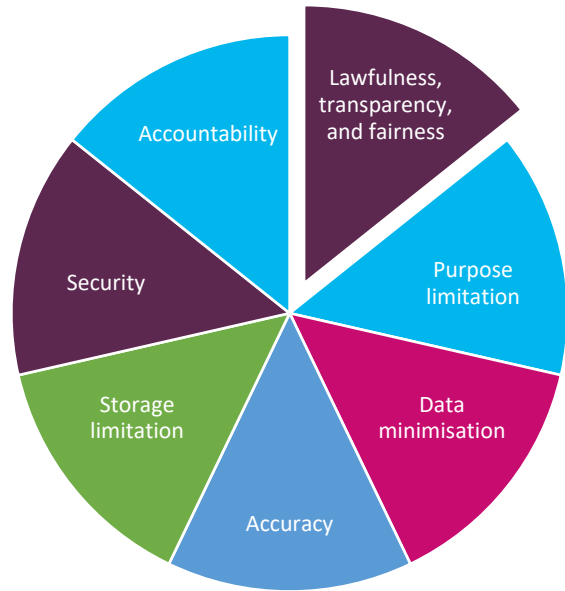
- Historical research
- Scientific research
- Statistical purposes
- Archival purposes

Similar legal regime:

- **Exceptions to data protection principles**
 - **Exception to the principle of purpose limitation**
- Derogations to data subject rights

A premise on data protection principles

Data protection principles (Art. 5 GDPR)

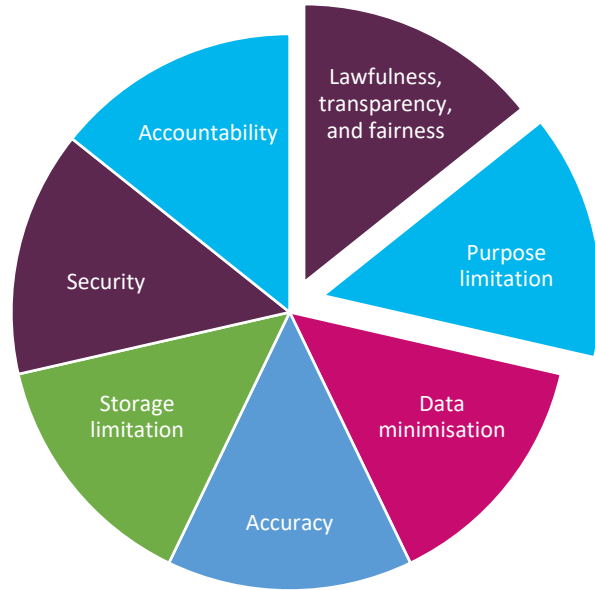


LAWFULNESS

1. The processing must respect the law (including copyright)
2. You must rely on a lawful basis to process personal data
 - consent, contract, legal obligation, vital interests, public task, legitimate interest (Art. 6)
 - Further conditions for sensitive data (Art. 9)

A premise on data protection principles

Data protection principles (Art. 5GDPR)



PURPOSE LIMITATION

You can process data only for a specific and identified purpose **or** a compatible purpose

The research exception in the GDPR

Art. 5(1)(b) and Recital 50 GDPR

“further processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes shall, in accordance with Article 89(1), not be considered to be incompatible with the initial purposes”

- Presumption of non-incompatibility
- It allows the re-use of lawfully collected data for research purposes (i.e. you do not need another lawful basis – *although this point is contested!*)
- Condition: you need to implement appropriate safeguards, such as data minimisation and pseudonimisation
 - but these rules already applicable to any processing..
 - To make the provision effective, it implies that the re-use for scientific purposes will require a more tailored assessment

Critical points on the research exception in the GDPR

- “Many **commercial actors** in particular may state ‘research’ as their goal while ignoring specific regulations such as the ones referred to above. We believe that the exemptions for scientific research should only apply to research in the public interest, and that the general rules of the data protection regulation should apply to any measures in the interest of the data subject arising from such processing” (BBMRI, 2015)
- “The sheer amount of data that many large commercial actors may possess, taken together with the existence of a legal grounds such as ‘legitimate interests’ or ‘further processing for scientific research’ and the relative weakness of their forms of ethical review may often provide an **advantage in terms of the ability to conduct research, particularly with big data.**” (Quinn 2021)

Wrapping up – Scientific research exceptions

CDSMD	GDPR
No specific definition of scientific research	No specific definition of specific research (exemplifications)
Available only to research orgs and cultural heritage institutions (+ 'persons attached thereto')	Available to anyone
Lawful access	Lawful basis
Research purposes (but <i>de facto</i> mainly non-commercial)	Any research purpose

Two paradoxes

- Paradox 1: copyright interests seem to be protected more vigorously than personal data

CDSMD	GDPR
No specific definition of scientific research	No specific definition of scientific research (exemplifications)
Available only to research orgs and cultural heritage institutions (+ 'persons attached thereto')	Available to anyone
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Two paradoxes

- Paradox 2: since lawful access is a pre-condition, those who already have access to the data or can pay for it are practically advantaged and can benefit fully from the exceptions

How do we move forward?

Paradox 1: Narrow scope of scientific research in the CDSMD

- Reconsidering the *numerus clausus* of beneficiaries and the purpose of the TDM exception

“That does not mean that all of these groups should enjoy the same privileges, but they should all be enabled to access necessary information freely, and if necessary, against remuneration” (Geiger and Jutte, 2023)

Potential criteria to take into account to expand the list of beneficiaries:

1. Use of the scientific method;
2. Respect of the relevant ethical standards for research;
3. Publication of the results and black alleys or other forms of benefit sharing

How do we move forward?

Paradox 2: Lawful access as a barrier to research

- Eliminate the lawful access requirement (e.g. Japan) from the TDM exception
 - Practical shortcoming: if there are technological protection measures, the access can be *de facto* prevented
- Create proactive measures to enhance access to data
 - A series of initiatives at the EU level (e.g. DSA, DGA, Data Act), but quite limited and sectorial
 - E.g. in the DSA vetted researchers (including NGOs) can access data controlled by private actors *but only very large online platforms and to investigate systemic risks*

Takeaways

- Copyright and Data Protection: parallels and overlaps
- Research exceptions are not designed to guarantee access to data (but they should!)
- Paradox: the exceptions are *de facto* favouring those who already have access to data
- Positive news: several initiatives to encourage the access and re-use of data at the EU level
- But... need of more «lawful access» conditions for people doing research
- Shift from research exceptions to a «right to research» (Geiger and Jutte, 2023)



Thanks for your attention!

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