



How Ireland's national derogations compare to other EU member states (GDPR Arts. 88-89)

derogation

[dɛrə'geɪʃ(ə)n] 

NOUN

derogations (*plural noun*)

1. an exemption from or relaxation of a rule or law.

"countries assuming a derogation from EC law"

synonyms: [immunity](#) · [exception](#) · [dispensation](#) · [indemnity](#) · [exclusion](#) · [freedom](#) · [\[More\]](#)

While the GDPR is intended to constitute a single text with direct effect across the EU, Member States are permitted to derogate and generally where there are sufficient safeguards in place to protect the rights of the data subject. Of particular interest will be whether the issues of proportionality will be triggered by the Member States.

Further clarification will fall to the courts and the European Data Protection Board.

The derogations

The derogations

Article 88 more specific rules to ensure the protection of the rights and freedoms in respect of the processing of employees' personal data **in the employment context...shall include suitable and specific measures to safeguard** the data subject's

(Recital 155) Member State law or collective agreements, including 'works agreements', may provide for specific rules on the processing of employees' personal data in the employment context, in particular for the conditions under which personal data in the employment context may be processed on the basis of the consent of the employee, the purposes of the recruitment, the performance of the contract of employment, including discharge of obligations laid down by law or by collective agreements, management, planning and organisation of work, equality and diversity in the workplace, health and safety at work, and for the purposes of the exercise and enjoyment, on an individual or collective basis, of rights and benefits related to employment, and for the purpose of the termination of the employment relationship.

Article 89 scientific or historical research purposes or statistical purposes or archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in Articles 15, 16, 18 and 21 subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

The derogations

First up... Article 88 GDPR



Ireland Section 4 DPA 2018

No provision existing other than...

Obligation not to require data subject to exercise right of access under Data Protection Regulation and Directive in certain circumstances 4. (1) A person shall not, in connection with— (a) the recruitment of an individual as an employee, (b) the continued employment of the individual, or (c) a contract for the provision of services to the person by an individual, require that individual to— (i) make a request under Article 15 or under section 86, or (ii) supply the person with data relating to that individual obtained as a result of such a request. (2) A person who contravenes subsection (1) commits an offence and is liable— (a) on summary conviction, to a class A fine or imprisonment for a term not exceeding 12 months, or both, or (b) on conviction on indictment, to a fine not exceeding €50,000 or imprisonment for a term not exceeding 5 years, or both.

Germany

Section 26 sentence of the FDPA sets out general rules for data processing for employment-related purposes, including on employees' consent, processing of special categories of personal data, collective agreements, and includes a specific definition of "employee".

Further **sector-specific provisions exist, for example governing the access to employees' files** (Section 83 German Works Constitution Act) or for civil servants at a federal and state level.

The Others



The Others

Luxembourg

This prior information shall contain a detailed description of the **purpose of the proposed processing**, as well as **the arrangements** for implementing the surveillance system and, where appropriate, the **duration or criteria for the retention of the data**, as well as a formal commitment of the employer of the non-use of the data collected for a purpose other than that explicitly foreseen in the prior information.

(3) Where the processing of personal data referred to in paragraph 1 is implemented:

for the safety and health needs of employees,

for production control or employee benefits, where such a measure is the only way to determine the exact salary, or

within the framework of a working organization according to the mobile timetable in accordance with the provisions of this code...

The Others

Italy

The Garante shall promote the adoption of **code of conducts** for the processing of personal data in the employment sector.

Article 111-*bis*: **Consent is not required in CVs. The controller must inform** the candidate at the very first occasion of contact.

Article 113: **Prohibition of background checks and investigation** on employees' personal opinions.

Article 114: Protection of the employee with regard to remote control.

Article 115: Respect of employee's personality and freedom in the contest of work from **home and smart working**.

The Others

Poland

If it is necessary to ensure the safety of employees or the protection of property or production control or confidentiality of information, the disclosure which could expose an employer to damage, the employer may introduce special supervision over the workplace or the area around the workplace in the form of technical image registration (monitoring).

Monitoring does not include sanitary rooms, cloakrooms, canteens and smoking rooms or premises made available to the organization, unless the use of monitoring in these rooms is necessary to achieve the purpose specified above and does not violate the dignity and other personal rights of employees, and (...) is used in particular through techniques that prevent people from being identified in these rooms.

The image recordings shall be processed by the employer solely for the purposes for which they were collected and stored for a period not exceeding 3 months from the date of recording.

Next up....Article 89 GDPR



Processing for **archiving purposes in the public interest, scientific or historical research purposes or statistical purposes, shall be subject to appropriate safeguards**, in accordance with this Regulation, for the rights and freedoms of the data subject. Those safeguards shall ensure that **technical and organisational measures are in place in particular in order to ensure respect for the principle of data minimisation.**

³Those measures may include pseudonymisation provided that those purposes can be fulfilled in that manner. ⁴Where those purposes can be fulfilled by further processing which does not permit or no longer permits the identification of data subjects, those purposes shall be fulfilled in that manner.

Article 89

Article 89

Where personal data are processed for **scientific or historical research purposes or statistical purposes**, Union or Member State law may provide for derogations from the rights referred to in [Articles 15, 16, 18](#) and [21](#) subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

Where personal data are processed for archiving purposes in the public interest, Union or Member State law may provide for derogations from the rights referred to in [Articles 15, 16, 18, 19, 20](#) and [21](#) subject to the conditions and safeguards referred to in paragraph 1 of this Article in so far as such rights are likely to render impossible or seriously impair the achievement of the specific purposes, and such derogations are necessary for the fulfilment of those purposes.

Where processing referred to in paragraphs 2 and 3 serves at the same time another purpose, the derogations shall apply only to processing for the purposes referred to in those paragraphs.

Ireland

The DPA provides for restriction on the exercise of data subject rights in certain circumstances, namely, the right of a data subject in cases where it is necessary to safeguard important objectives of general public interest;¹⁶ or a data subject where the processing is for archiving purpose in the public interest, scientific or historical research purposes or statistical purposes.¹⁷

Section 60, Chapter 3, Part 3 DPA.

Section 61, Chapter 3, Part 3 DPA.

Section 42 (which transposed Article 89, with additional requirements)

Section 36 (which details the “suitable and specific measures” that may be required to avail of Article 89.)

In terms of health research (which is broadly defined), the new Health Research Regulations are also worth consideration. These regs are very prescriptive. In particular, they generally require consent unless approval has been granted by a Committee appointed by the Irish Minister for Health.

Ireland

Section 36

DPA 2018

Processing for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes 36. (1) Subject to suitable and specific measures being taken to safeguard the fundamental rights and freedoms of data subjects, personal data may be processed, in accordance with Article 89, for— (a) archiving purposes in the public interest, (b) scientific or historical research purposes, or (c) statistical purposes. (2) Processing of personal data for the purposes referred to in subsection (1) shall respect the principle of data minimisation. (3) Where the purposes referred to in paragraph (a), (b) or (c) of subsection (1) can be fulfilled by processing which does not permit, or no longer permits, identification of data subjects, the processing of information for such purposes shall be fulfilled in that manner.

Ireland

Section 48

DPA 2018

Processing of special categories of personal data for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes 48. Subject to compliance with section 36, the processing of special categories of personal data is lawful where such processing is necessary and proportionate for— (a) archiving purposes in the public interest, (b) scientific or historical research purposes, or (c) statistical purposes.

Ireland Section 61 DPA 2018

...where processing of data is for archiving purposes in the public interest, the rights of a data subject set out in Articles 15, 16, 18, 19, 20 and 21 are restricted to the extent that—

- the exercise of any of those rights would be likely to render impossible, or seriously impair, the achievement of those purposes, and
- such restriction is necessary for the fulfilment of those purposes.

...where processing of data is for scientific or historical research purposes or statistical purposes, the rights of a data subject set out in Articles 15, 16, 18 and 21 are restricted to the extent that—

- the exercise of any of those rights would be likely to render impossible, or seriously impair, the achievement of those purposes, and
- such restriction is necessary for the fulfilment of those purposes.

Germany

Section 22(2) BDSG.
Section 28(1) BDSG.
Section 22(2) BDSG.

The BDSG permits processing of special categories of personal data (in all cases, permitted only where appropriate and specific measures are taken to safeguard the interests of the data subject):

..or scientific or historical research or statistical purposes (where necessary for these purposes and the interests of the controller substantially outweigh those of the data subject); and

..for archiving purposes in the public interest.

Germany

Special categories of data (in particular Section 22 GDPAA)

The GDPAA permits the processing of sensitive data if the processing is **necessary for the purpose of, for example, preventive medicine, employee working capacity assessments, medical diagnosis, health and social care treatments, management or systems, agreements with health professionals ...**for health services, drugs or medical products). However, such processing is **only possible if safeguards are taken to protect such data. These safeguards must be tailored to the circumstances of the individual case** and take into account the state of technological knowledge, costs of implementation and the nature, scope, context and purposes of processing, as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons. These "*suitable and specific*" safeguards may include technical and organizational measures, pseudonymisation, encryption, or the appointment of a Data Protection Officer (the GDPAA lists overall 10 different examples).

Germany

Processing of data for research purposes and statistical purposes
(Section 27 GDPAA)

The GDPAA makes use of the opening clause of Article 9(2) lit. j) GDPR and permits processing of sensitive data without consent **for scientific or historical research and for statistical purposes**, if the processing is necessary for these purposes and the data controller's interest to process that data significantly outweighs the data subject's interest.

To safeguard the interests of the data subject, the data controller must apply **"suitable and specific measures"**. Under these measures, **sensitive data processed for these purposes must be anonymised**, if the respective research or statistical purpose permits this, and the legitimate interest of the data subject do not prejudice such anonymisation.

Netherlands

Article 24

The Bill provides for the following derogations in relation to sensitive personal data. The following four conditions are satisfied cumulatively:

- a) processing is necessary for scientific or historical research purposes or statistical purposes in accordance with Article 89(1) GDPR;
- b) the research serves a public interest;
- c) **obtaining explicit consent is impossible or costs disproportionate effort**; and
- d) the research provides for **suitable and specific safeguards** to protect the privacy of the data subject against disproportionate harm.

Italy Art.'s 99-110

Article 99: Possibility of **further data retention** for archiving purposes in the public interest, scientific or historical research purposes or statistical purposes.

Article 102: The Garante **shall promote code of conducts** related to the processing for archiving purposes in the public or historical research.

Article 106: The Garante shall promote code of conducts related to the processing for scientific research and statistical purposes.

Article 107: Consent for the processing of particular categories of data in the field of scientific research and statistical purposes can be provided in a **simplified manner**.

Italy Art.'s 99-110

Article 110: Consent is not required for the processing of health data in the medical, biomedical and epidemiological field, if such processing is required by law or by regulation, with due regard to [Article 9.2 \(j\)](#) GDPR, and a DPIA is conducted and made publicly available by the controller. Further, the consent is still not necessary if it is impossible to inform data subjects or the outcome of the research might be compromised by such effort. In such last cases, the controller must implement appropriate measures and must submit the research program to the competent ethical committee and obtain a green light. In addition, the controller shall also consult the Garante, according to [Article 36](#) GDPR.

Article 110-bis: 4. Personal data collected for clinical activities by nursing and recovery institutions for the purposes of scientific research by third parties do not consist in re-use of data, hence no prior authorization is required in such cases

Luxembourg Article 65

Given the nature, scope, context and purpose of the processing as well as the risks, the degree of probability and severity of which varies, for the rights and freedoms of natural persons, the controller implemented for scientific or historical research purposes, or for statistical purposes, must implement the following additional appropriate measures :

1 ° the appointment of **a data protection officer**;

2 ° carrying out an **analysis of the impact of the processing operations** envisaged on the protection of personal data;

3 ° **anonymisation, pseudonymisation** within the meaning of article 4 (5) of Regulation (EU) 2016/679 or other functional separation measures ensuring that data collected for scientific or historical research purposes, or for statistical purposes, can not be used to make decisions or actions with regard to the data subjects;

4 ° the use of a **trusted third party functionally independent of the data controller** for the anonymisation or pseudonymisation of the data;

5 ° **encryption of personal data in transit and at rest**, as well as key management in accordance with the state of the art;

6 ° the use of **technologies that strengthen** the protection of the privacy of the persons concerned;

Luxembourg Article 65

7 ° the **introduction of restrictions** on access to personal data within the controller;

8 ° **log files** that establish the reason, the date and time of the consultation and the identification of the person who collected, modified or deleted the personal data;

9 ° **sensitization of personnel** involved in the processing of personal data and professional secrecy;

10 ° the **regular evaluation of the effectiveness of the technical and organizational measures** put in place through an independent audit;

11 ° prior establishment of a **data management plan**;

12 ° the **adoption of sectoral codes of conduct** as provided for in Article 40 of Regulation (EU) 2016/679 approved by the European Commission pursuant to Article 40 (9) of Regulation (EU) 2016/679 .

The **controller shall document** and justify for each project for scientific or historical research purposes or for statistical purposes the exclusion, if any, of one or more of the measures listed in this article. Check to see if the same applies for archiving purposes.

Member States are permitted derogate from certain rights under GDPR where generally, such a restriction is **proportionate, and there are sufficient safeguards** in place to protect the rights of the data subject.

It will fall to the courts and the European Data Protection Board to provide further clarification.

No quick fix to understand the derogations.

Various derogation trackers out there – encourage consultation with them.

Summary

