



Health emergency towards data protection or health emergency and privacy: paradoxical or not?

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Introduction

- ❑ Applicability of the article 8 EHRC and Directive 95/46 on the protection of individuals with regard to the processing of personal data and on the free movement of such data ;

Towards

- ❑ Urgent health services



Introduction

□ Types of processing:

- Data related to the workforce;
- Data related to the patient/injured.

□ Types of risks:

- Access by governmental authorities
- Access by third parties



Introduction

□ Legal questions:

- How to protect the personal data concerning patient/injured outside Europe?
- Is the European regulation applicable outside Europe?



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The article 8 EHRC

- “1 Everyone has the right to respect for his private and family life, his home and his correspondence.
- 2 There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.”



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Scope of the Directive 95/46

“This Directive shall apply to the processing of personal data wholly or partly by automatic means, and to the processing otherwise than by automatic means of personal data which form part of a filing system or are intended to form part of a filing system.” (article 3, 3)



Scope of the Directive 95/46

“Personal data filing system ('filing system') shall mean any structured set of personal data which are accessible according to specific criteria, whether centralized, decentralized or dispersed on a functional or geographical basis” (art. 1, 3)



Scope of the Directive 95/46

- Data processing =**
- Registration
 - Collecting
 - Modification
 - Utilisation
 - Transmission
 - Diffusion
 - Destruction
 - Etc...



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Sources

□ Council of Europe

- Article 8 European Convention on human rights;
- Convention n°108 of the European Council.



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Main principles

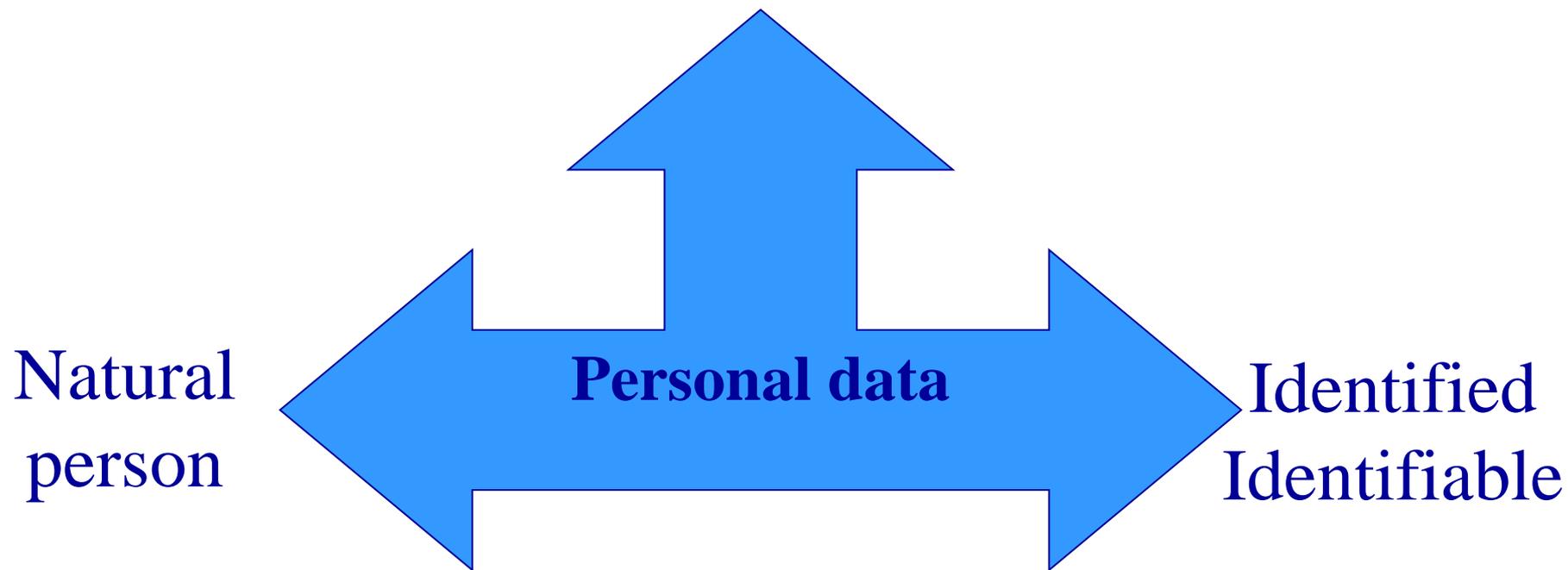
- Transparency;
- Determinate processing;
- Proportionality;
- Lawful;
- Security and confidentiality;
- Adequation.



Main principles

Personal data:

All information





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Main actors

The data subject:

The identified or identifiable natural person related to any information.

- Recital 26:

« whereas, to determine whether a person is identifiable, account should be taken of all the means likely reasonably to be used either by the controller or by any other person to identify the said person; whereas the principles of protection shall not apply to data rendered anonymous in such a way that the data subject is no longer identifiable; »



Main actors

The data controller:

The natural or legal person, public authority, agency or any other body which alone or jointly with others determines the purposes and means of the processing of personal data.



Main actors

The data processor:

The natural or legal person, public authority, agency or any other body which processes personal data on behalf of the controller



Main actors

Recipient:

natural or legal person, public authority, agency or any other body to whom data are disclosed, whether a third party or not



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Processing « normal » data

□ The data might be processed only if:

- the data subject has unambiguously given his/her consent, what means;

- ❖ Free
- ❖ informed
- ❖ Specific

or

- processing is necessary for the performance of a labor contract to which the data subject is party or if processing is necessary for complying with legal obligations to which the controller is submitted; or
- Etc



Processing « normal » data

- The NGO collect mainly information about the workforce, injured or died people's family. Is it in accordance with the Directive?:
 - The legitimization can be found in the article 7a or 7b;



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Processing sensitive data

□ The personal sensitive data (e.g. data about the Healthcare) might not be processed, except if:

- the data subject has given his/her explicit (written) consent, what means:

- ❖ Free
- ❖ informed
- ❖ Specific ... consent

or

- processing is necessary in order to protect the vital interests of the data subject; or



Processing sensitive data

- processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, or
- processing is necessary in order to protect the vital interests of the data subject; or
- processing of the data is required for the purposes of preventive medicine, medical diagnosis, the provision of care or treatment or the management of health-care services, or
- Etc.



Processing sensitive data

- ❑ The NGO processing involve obviously sensitive data which will concern health, sex life, or reveal religious belief, ethnic origin, etc.
- ❑ The NGO can legitimate that by the concept of vital interest of the data subject.



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Confidentiality of processing

- ❑ The article 16 sets a principle of confidentiality towards people working under the authority of the data controller or processor;
- ❑ He cannot process data without instruction from the controller.



Confidentiality of processing

□ In other words:

Persons involved in data processing shall not collect, process or use personal data without authorisation. On taking up their duties such persons shall be required to give an undertaking to maintain such confidentiality. This undertaking shall continue to be valid after termination of their activity.



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Security

- ❑ Implementation of appropriate technical and organizational measures to protect personal data.
“Having regard to the state of the art and the cost of their implementation”.
- ❑ Where processing is carried out on data controller’s behalf, need to choose a processor providing sufficient guarantees in respect of the technical security measures and organizational measures governing the processing to be carried out, and must ensure compliance with those measures.



Security

- ❑ The carrying out of processing by way of a processor must be governed by a binding agreement between the processor and the controller.
- ❑ any person acting under the authority of the controller or of the processor, including the processor himself, who has access to personal data must not process them except on instructions from the controller, unless he is required to do so by law.



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Transfer of data to third country

- ❑ The articles 25 and 26 of the Directive 95/46 regulate the transfer of data to the third countries.
- ❑ The transfer is allowed if and only if the third country ensures an “adequate level” of protection of the personal data.
- ❑ Some exceptions are set up by the Directive (important public interests, specific agreement, performance of a contractual commitment, etc).



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Law applicable

□ Is the Directive 95/46 applicable outside Europe?

- Article 4:

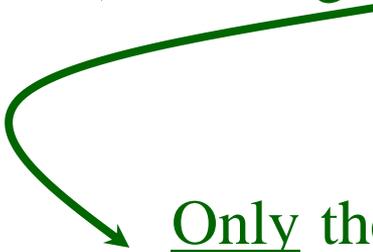
- ❖ If the data controller is established in Europe, the activity must be carried out within the European territory.
- ❖ If the data controller is not established in Europe and makes use of an equipment, automated or otherwise, situated on the EU territory.
- ❖ If those conditions are not encountered, the Directive 95/46 is not applicable;
- ❖ If one of those conditions is met, all the data subject data (European or not) are protected by the Directive 95/46. if the data are transferred from EU to third countries, art 25 and ff are applicable: no transfers except if “adequate protection” is offered by the recipient.



Law applicable

❑ Is the article 8 of the European convention on Human Rights applicable outside Europe?

- Loizidou versus Turkey (European Court of Human Rights, 23.03.1995) = European Public order;
- Article 6 European Union (Treaty of Amsterdam);
- Exception of public order (see recognized even by WTO).
- European countries have the duty to protect the privacy (including the data) of the European citizens.



Only the European citizens are protected by the C of E. convention.



Law applicable

- What about the non European citizens if the Directive 95/46 are not applicable?
 - ❖ The European public order is available only towards the European citizens. The non European citizens can not enjoy that protection!



Law applicable

□ What about the NGO?

- Directive 95/46;
 - ❖ Where is the NGO established?
 - ❖ Who determines the objectives of the processing and its means?
 - ✓ The NGO?
 - ✓ The Health care professionals acting abroad?
 - ❖ What is the status of the physicians and local workforce of the NGO?
 - ✓ data processor?
 - ✓ employee?
 - ✓ End user?



Law applicable

- ❖ Is the processing carried out in the context of an activity on the European territory?
 - ✓ Are the data centralized on the European territory?
 - ✓ If it does: the answer is no
 - ✓ If it doesn't: the answer is yes.



Law applicable

- Article 8 of the EHRC:
 - ❖ We have to analyze the question from the data subject side:
 - ✓ Is the data subject an European citizen or not?
 - ✓ Does he enjoy the protection provided under the article 8 of the EHRC



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Problems

- In some situation, the data subject is without any protection as such non European citizens who don't enjoy the benefit of the Directive 95/46.
- In other situations, the data subject can enjoy a full protection.



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Try to get solutions

- ❑ Process the data in a country member of the European country with workforce and physicians having the status of end user or data processor;
- ❑ Bilateral agreement on the model of the “safe harbor”;
- ❑ Foreign country has ratified the EHRC... and the Convention n° 108 (“source of the Directive 95/46”);
- ❑ Immunity of the NGO at the international level as the Red Cross organization.



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Conclusions

- ❑ The NGO might protect the data they process under European legislation under certain conditions;
- ❑ The European Union or Council of Europe should encourage third countries to parties at the EHRC and the convention n°108;
- ❑ Create a system equivalent to the “safe harbor” as regards specific sector.
- ❑ Immunity of the NGO at the international level as the Red Cross organization.



Conclusions

- ❑ Impose penalty to the country violating the duty of secrecy of a NGO as:
 - ❖ Black list?
 - ❖ Economic sanctions?
 - ❖ Publication in the press?
 - ❖ Etc.

- ❑ We haven't dealt with the issue of medical secrecy even if it can be a solution as a quite universal concept. However, it is subject to the local law as a local appreciation and application. It can be very weak.



Thank you for your attention.

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