

French Implementation of the GDPR

AHMED BALADI, GIBSON, DUNN & CRUTCHER LLP,
WITH PRACTICAL LAW DATA PRIVACY ADVISOR

Search the [Resource ID numbers in blue](#) on Westlaw for more.

A Practice Note discussing the requirements of France's Law n°2018-493 of June 20, 2018 implementing the EU General Data Protection Regulation (GDPR). This Note discusses the modifications this law made to Act n°78-17 of January 6, 1978 on information technology, data files and liberties (the "French Data Protection Act" or the "FDPA"). This Note discusses the applicability of French data protection law and the law's specific provisions that differ from the GDPR's requirements, such as rules for processing special categories of personal data and criminal conviction or offense data, limitations on the scope of data subjects' rights, and personal data processing in the employment context.

The EU General Data Protection Regulation (Regulation (EU) 2016/679) (GDPR), which took effect on May 25, 2018, applies directly in each EU member state. The GDPR replaced the EU Data Protection Directive (Directive 95/46/EC) (EU Directive) and the EU member state laws implementing the EU Directive. The GDPR introduced a single legal framework across the EU. However, the GDPR includes several provisions allowing EU member states to enact national legislation specifying, restricting, or expanding the scope of the GDPR's requirements.

France enacted Law n°2018-493 of June 20, 2018 (in French) (French GDPR Law) which modifies the FDPA, rather than repealing and replacing it, to align French data protection law with the GDPR. The French GDPR Law also provides for specific rules on certain topics based on the GDPR's broad opening clauses permitting EU member states to enact national legislation. Organizations must understand

how French data protection law requirements vary and when they apply in addition to the GDPR.

This Note discusses the applicability of French data protection law and specific provisions of the FDPA, including requirements on:

- Processing special categories of personal data, including genetic, biometric, and health data.
- Processing criminal conviction or offense data.
- The age of child consent.
- Limiting the scope of data subjects' rights and data controllers' related obligations.
- Processing personal data for journalistic purposes or academic, artistic, or literary expression.
- Processing national identification number.
- Processing personal data for archiving purposes or scientific or historical research purposes and statistical purposes.
- Processing in the employment context.
- Penalties for GDPR violations.

Following the adoption of the French GDPR Law, the French Data Protection Authority (the "CNIL") identified several issues regarding the readability of the new FDPA. A new ordinance (in French), published on December 12, 2018, along with a new decree, which will modify the decree implementing the FDPA, will enter into force no later than June 1, 2019.

APPLICABILITY OF THE GDPR AND FRENCH LAW

The GDPR applies to:

- Data controllers and data processors that process personal data in the context of the activities of an EU establishment, regardless of whether the data processing takes place in the EU (Article 3(1), GDPR).
- Data controllers and data processors not established in the EU that process personal data about EU data subjects when the processing activities relate to:
 - offering goods or services to EU data subjects, regardless of whether they require payment; or
 - monitoring their behavior that takes place in the EU.(Article 3(2), GDPR.)

Some EU member states have passed national laws that include a territorial scope provision that mirrors Article 3 of the GDPR, while other countries' laws have slightly modified the applicability language in this Article. The French GDPR Law does not include a provision similar to or modifying the GDPR's scope provision.

The existing language in the FDPA on the law's applicability has not been modified and still states that it applies to:

- Data controllers established in France.
- Data controllers not established in France or in another EU member state that use means of processing located in France other than for mere transit purposes.

(Article 5, FDPA.)

This language, which is based on the EU Directive, rather than the GDPR, does not entirely correspond to the applicability conditions in GDPR Article 3. Consequently, FDPA Article 5 may currently apply French law in cases where the GDPR would not have applied because it applies when a data controller uses "means of processing located in France." This may be read to expand the GDPR's applicability provisions. However, it is expected that the applicability provisions in the FDPA will be modified to align with the GDPR in the near future.

The French GDPR Law also introduces a new Article 5-1 to the FDPA which applies French legislation adopted based on the GDPR's broad opening clauses when the individual resides in France, including when the data controller is not established in France (Article 10, French GDPR Law). However, for data controllers established in an EU member state that process personal data for journalistic purposes or academic, artistic, or literary expression, involving the right to freedom of expression and information, the national law where the data controller is established applies, even if the data subject resides in France (Article 10, French GDPR Law, which is based on GDPR Recital 153; see Processing for Journalistic Purposes or Academic, Artistic, or Literary Expression).

Organizations potentially subject to French law must review the territorial scope provisions of the law to determine when it applies.

For more on the GDPR's applicability and scope, see Practice Note, Determining the Applicability of the GDPR ([w-003-8899](#)).

DATA PROTECTION OFFICERS

The GDPR requires data controllers and data processors to appoint a data protection officer (DPO) under certain circumstances (Article 37(1), GDPR; see Practice Note, Data protection officers under the GDPR and DPA 2018 ([w-010-3427](#))). The GDPR allows EU member states to require DPO appointments in additional situations (Article 37(4), GDPR). The French GDPR Law does not require appointing a DPO under additional circumstances or change the requirements or obligations applicable to DPOs under the GDPR.

PROCESSING SPECIAL CATEGORIES OF PERSONAL DATA

The GDPR and the French GDPR Law prohibit processing special categories of personal data unless an exception applies (Article 9(1), GDPR; Article 8, French GDPR Law). Special categories of personal data include:

- Racial or ethnic origin.
- Political opinions.

- Religious or philosophical beliefs.
- Trade union membership.
- Genetic data.
- Biometric data.
- Data concerning health or sex life.
- Sexual orientation.

(Article 9(1), GDPR; Article 8, French GDPR Law.)

GDPR EXCEPTIONS PERMITTING PROCESSING

The GDPR permits organizations to process special categories of personal data when:

- The data subject explicitly consents to the processing (Article 9(2)(a), GDPR). GDPR Article 9(2)(a) permits EU member state law to prohibit the use of explicit data subject consent as a legal basis for processing special categories of personal data. The French GDPR Law does not prohibit this.
- The processing is necessary for:
 - carrying out the data controller's obligations and exercising the data controller's or data subjects' rights in the field of employment law, social security, and social protection (Article 9(2)(b), GDPR);
 - protecting the vital interests of the data subject or another person and the data subject is physically or legally incapable of consenting (Article 9(2)(c), GDPR);
 - establishing, exercising, or defending legal claims or whenever courts are acting in their judicial capacity (Article 9(2)(f), GDPR);
 - reasons of substantial public interest (Article 9(2)(g), GDPR);
 - purposes of preventive or occupational medicine to assess the working capacity of a data subject, medical diagnosis, or for the provision of health or social care or treatment, the management of health or social care systems and services, or under a contract with a healthcare professional (Article 9(2)(h), GDPR);
 - reasons of public interest in the area of public health (Article 9(2)(i), GDPR);
 - archiving in the public interest (Article 9(2)(j), GDPR); or
 - scientific, historical research, or statistical purposes (Article 9(2)(j), GDPR).
- The processing relates to the legitimate activities of certain non-profit organizations, is based on appropriate safeguards, and relates to certain persons (Article 9(2)(d), GDPR).
- The processing relates to personal data made public by the data subject (Article 9(2)(e), GDPR).

Exceptions not Requiring a Basis in EU or Member State Law

Some exceptions to the prohibition on processing special categories of personal data do not refer to EU or member state law. These exceptions provide a sufficient legal basis for processing special categories of personal data under the GDPR without the need for a further basis in EU or member state law, including:

- Explicit consent. However, EU or member state law may prohibit the use of data subject consent as a legal basis for processing (Article 9(2)(a), GDPR).
- Processing necessary to protect a natural person's vital interests and the data subject is incapable of giving consent (Article 9(2)(c), GDPR).

- Processing relating to the legitimate activities of certain non-profit organizations, based on appropriate safeguards, and relating to certain persons (Article 9(2)(d), GDPR).
- Processing relating to personal data made public by the data subject (Article 9(2)(e), GDPR).
- Processing necessary for establishing, exercising, or defending legal claims or whenever courts are acting in their judicial capacity (Article 9(2)(f), GDPR).

Exceptions Requiring a Basis in EU or Member State Law

The other GDPR Article 9 exceptions permitting processing refer to EU or member state law and require data controllers to consult EU or member state law to determine the lawful basis for processing under these Articles. The exceptions requiring a basis in EU or member state law include when the processing is necessary for:

- Carrying out the data controller's obligations and exercising the data controller's or data subjects' rights in the field of employment law, social security, and social protection (Article 9(2)(b), GDPR).
- Reasons of substantial public interest (Article 9(2)(g), GDPR).
- Purposes of preventive or occupational medicine to assess the working capacity of a data subject, medical diagnosis, or for the provision of health or social care or treatment, the management of health or social care systems and services, or under a contract with a healthcare professional (Article 9(2)(h), GDPR).
- Reasons of public interest in the area of public health (Article 9(2)(i), GDPR).
- Archiving in the public interest, scientific, or historical research purposes, or statistical purposes (Article 9(2)(j), GDPR).

For more on processing special categories of personal data under the GDPR, see Practice Note, Overview of EU General Data Protection Regulation: Special categories of personal data ([w-007-9580](#)).

FRENCH LAW EXCEPTIONS THAT PERMIT PROCESSING SPECIAL CATEGORIES OF PERSONAL DATA

The French GDPR Law makes limited changes to the rules for processing special categories of personal data under the FDPA. The FDPA permits organizations to process special categories of personal data under more narrow circumstances than the GDPR, including when:

- The data subject expressly consents to the processing, except in cases where the law provides that the prohibition on processing may not be lifted by the data subject's consent.
- The processing is necessary for:
 - protecting human life and the data subject is physically or legally incapable of consenting;
 - establishing, exercising, or defending legal claims;
 - purposes of preventive medicine, medical diagnosis, providing healthcare or treatment, or managing healthcare services and a medical professional carries out the processing or another individual bound by a duty of confidentiality; or
 - public research under Article L. 112-1 of the Research Code.
- The processing relates to health data processed for public interest purposes and the processing complies with FDPA Chapter IX.

- The processing relates to the legitimate activities of certain non-profit organizations.
- The processing relates to personal data made public by the data subject.
- The processing relates to the re-use of public information contained in certain judgments and decisions provided the processing does not permit re-identification of individuals.
- The statistical processing is carried out by the National Institute of Statistics and Economic Studies or one of the ministerial statistical offices in compliance with Act No. 51-711 of 7 June 1951 further to an opinion from the National Council for Statistical Information.

(Article 8, FDPA; Article 8, French GDPR Law.)

GENETIC, BIOMETRIC, AND HEALTH DATA

The French GDPR Law amends the FDPA by adding a provision:

- Permitting processing health data for treatment purposes when justified by the public interest.
- Permitting employers or administrations (public-sector employers) to process biometric data when necessary for workplace access control and when necessary for employees to use devices and applications within the workplace.

(Article 8, French GDPR Law, which implements GDPR Article 9(4).)

The French data protection authority (CNIL) may publish standard regulations on the processing of genetic, biometric, and health data. The CNIL may also require additional technical and organizational measures for this processing. (Article 11, FDPA as modified by French GDPR Law.) The CNIL will also authorize the processing of genetic or biometric data necessary for authentication or identification of individuals that is carried out on behalf of the State acting in its official authority (Article 27, FDPA as modified by the French GDPR Law).

The FDPA requires data controllers processing health data to declare compliance with the relevant standard regulations of the CNIL. If the processing does not comply, the data controller must obtain the CNIL's prior authorization for the processing (Article 54, FDPA).

PROCESSING CRIMINAL CONVICTION AND OFFENSE DATA

The GDPR only permits processing personal data relating to criminal convictions or offenses when either:

- Carried out under the control of official authority (for example, the police).
- Authorized by EU or member state law providing for appropriate safeguards for data subjects.

(Article 10, GDPR.)

The French GDPR Law modifies the FDPA to authorize the processing of criminal conviction or offense data under additional circumstances (Article 9, FDPA; Article 13, French GDPR Law, which implements GDPR Article 10; see FDPA Exceptions Permitting Processing and Additional French Law Exceptions Permitting Processing).

FDPA EXCEPTIONS THAT PERMIT PROCESSING CRIMINAL CONVICTION AND OFFENSE DATA

The FDPA already permitted processing criminal conviction or offense data under certain circumstances, including by:

- The courts, public authorities, and legal entities that manage public services within the framework of their legal jurisdiction.
- Representatives of the law as strictly necessary to exercise the functions granted to them by law.
- Certain legal persons mentioned in the French Intellectual Property Code, such as royalty collection and distribution societies, for administering rights on behalf of victims of infringements and for defending these rights.

(Article 9, FDPA.)

ADDITIONAL FRENCH LAW EXCEPTIONS PERMITTING PROCESSING

The French GDPR Law modifies the FDPA to permit the following additional entities to process criminal conviction and offense data:

- Legal persons governed by private law collaborating for the public service of justice and belong to the categories specified in a decree adopted based on the CNIL's opinion, to the extent strictly necessary to their mission.
- Natural and legal persons for the purpose of taking legal action as a victim, accused party, or to enforce a judgement, for a period proportionate to these purposes.
- Re-users of public information contained in judgements rendered by administrative and judicial jurisdictions, provided the purposes of processing do not enable the re-identification of data subjects.

(Article 13, French GDPR Law, which modifies Article 9, FDPA and which implements GDPR Article 10.)

The CNIL may publish standard regulations relating to processing criminal conviction and offense data and impose additional requirements on data controllers (Article 11, FDPA, as modified by the French GDPR Law). The CNIL has not yet published any standard regulations on this topic.

PROCESSING FOR SECONDARY PURPOSES

The GDPR generally restricts data processing to the original collection purpose unless an exception applies, for example:

- The data subject consents to processing for a secondary purpose.
- An EU or member state law, which is a necessary and proportionate measure to safeguard certain important objectives, permits the processing for a secondary purpose (see GDPR Article 23 Objectives that Permit Restrictions to Data Subject Rights).

(Article 6(4), GDPR.)

The French GDPR Law does not include any additional clauses permitting secondary processing. However, under the FDPA further processing for statistical, scientific, and historical purposes is considered compatible with the original collection purpose if the processing complies with the FDPA and the data controller does not use the personal data to make decisions about data subjects (Article 6, FDPA).

All other secondary processing must comply with the GDPR's requirements for secondary processing under GDPR Article 6(4).

In the absence of data subject consent, the secondary processing purpose must be compatible with the original processing purpose. To determine the secondary processing purpose's compatibility, the data controller should consider the criteria specified in GDPR Article 6(4).

CHILD CONSENT

The GDPR permits EU member states to lower the age of child consent below 16 years old, provided the age is not lower than 13 years old (Article 8(1), GDPR). The French GDPR Law reduces the age of child consent to 15 years old. For children under 15 years old, both the child and the parent or legal guardian must consent (Article 20, French GDPR Law, which implements GDPR Article 8(1)). This requirement differs from the GDPR's consent requirements for children, which only requires consent from the parent or legal guardian (Article 8(1), GDPR).

Any information provided to children must be easily understandable and given in clear and plain language (Article 20, French GDPR Law).

DATA SUBJECTS' RIGHTS

The GDPR grants data subjects several rights and imposes several obligations on data controllers relating to those rights in Articles 12 to 22 and 34 (see Practice Note, Data Subject Rights Under the GDPR ([w-006-7553](#))). The GDPR permits EU member states to restrict the scope of data subjects' rights and data controllers' related obligations found in these Articles when the restriction is a necessary and proportionate measure in a democratic society to safeguard certain objectives (Article 23, GDPR) (see GDPR Article 23 Objectives that Permit Restrictions to Data Subject Rights).

GDPR ARTICLE 23 OBJECTIVES THAT PERMIT RESTRICTIONS TO DATA SUBJECT RIGHTS

EU member states may restrict the scope of data subjects' rights and data controllers' related obligations in GDPR Articles 12 to 22 and 34 when the restriction is a necessary and proportionate measure to safeguard:

- National security.
- Defense.
- Public security.
- The prevention, investigation, detection, or prosecution of criminal offenses or the execution of criminal penalties.
- Other important public interests of the EU or member state, in particular economic or financial interests, including monetary, budgetary and taxation, public health, and social security.
- Judicial independence and proceedings.
- The prevention, investigation, detection, and prosecution of breaches of ethics for regulated professions.
- Monitoring, inspection, or regulatory functions connected to the exercise of official authority regarding national or public security, defense, other important public interests, prevention of crime, or breaches of ethics for regulated professions.
- Protection of the individual or the rights and freedoms of others.
- Enforcing matters of civil law.

(Article 23(1), GDPR.)

When the data controller restricts data subjects' rights or limits its own obligations to ensure the GDPR Article 23 objectives, the data controller must consider, as appropriate:

- The purposes of the processing or categories of processing.
- The categories of personal data.
- The scope of the restrictions.
- The safeguards to prevent abuse or unlawful access or transfer.
- The specification of the controller or categories of controllers.
- The retention periods and the applicable safeguards, considering the nature, scope, and purposes of processing or categories of processing.
- The risks to the rights and freedoms of data subjects.
- The right of data subjects to be informed about the restriction, unless doing so is prejudicial to the purpose of the restriction. (Article 23(2), GDPR.)

FRENCH LAW EXCEPTIONS TO DATA SUBJECT RIGHTS

The French GDPR Law varies the following data subject rights or related data controller obligations when necessary to safeguard the GDPR Article 23 objectives (see GDPR Article 23 Objectives that Permit Restrictions to Data Subject Rights):

- Information right (see Information Right).
- Data breach notification (see Data Breach Notification).
- Automated decision-making (see Automated Decision-Making).

The French GDPR Law also restricts several data subject rights when public archive services process personal data for archival purposes in the public interest (see Processing for Scientific or Historical Research, Statistical Purposes, or Archiving in the Public Interest for a discussion of these limits to data subject rights).

INFORMATION RIGHT

The French GDPR Law provides for exceptions to data subjects' information rights. These exceptions implement the Law Enforcement Directive (Directive (EU) 2016/680 of the European Parliament and of the Council) (April 27, 2016) and are not related to the GDPR. These exceptions are outside the scope of this Note.

DATA BREACH NOTIFICATION

The GDPR requires notification of data breaches to data subjects and the relevant supervisory authority under certain circumstances. A decree adopted on August 1, 2018 specifies the processing activities that are exempt from the duty to notify of a data breach. For example, the decree does not require notification when processing health data for which notification of an unauthorized disclosure or access is likely to pose a risk to national security, considering the volume of data concerned and the information relating to private life.

This exception only applies when disclosure of the breach is likely to create a risk of national security, national defense, or public security. (Article 24, French GDPR Law, which implements GDPR Article 23.)

This exception also only applies to processing necessary:

- To comply with a legal obligation that requires the processing.
- For the performance of a task carried out in the public interest. (Article 24, French GDPR Law.)

AUTOMATED DECISION-MAKING

The GDPR grants data subjects the right not to be subject to a decision based solely on automated processing, including profiling, which has legal or other significant effects on the data subject (Article 22(1), GDPR). This right does not apply when the automated decision is:

- Necessary for entering into or performing a contract with the data subject (Article 22(2)(a), GDPR).
- Authorized by EU or member state law applicable to the data controller if the law requires suitable measures to safeguard the data subject's rights and freedoms and legitimate interests (Article 22(2)(b), GDPR).
- Based on explicit data subject consent (Article 22(2)(c), GDPR).

For more on this right under the GDPR, see Practice Note, Data Subject Rights Under the GDPR: Automated Decision-Making Objection Right ([w-006-7553](#)) and Automated Decision-Making Obligations ([w-006-7553](#)).

Under the French GDPR Law, data subjects' right not to be subject to automated decision-making does not apply to the processing of special categories of personal data if the processing is both:

- Justified by the public interest.
- Authorized by a decree, adopted based on the opinion of the CNIL.

(Article 8, French GDPR Law, which implements GDPR Article 22(2)(b).)

The French GDPR Law also prohibits data controllers from basing decisions on automated processing, including profiling, when the decision produces legal effects or other significant effects on the data subject, unless:

- The processing is necessary for entering into or performing a contract with the data subject.
- The data subject explicitly consents.
- The processing relates to certain administrative decisions, provided the data controller:
 - does not process special categories of personal data; and
 - explicitly informs the data subject of the automated decision-making.

(Article 21, French GDPR Law, which modifies Article 10, FDPA.)

DEROGATIONS FOR SPECIFIC PROCESSING SITUATIONS

The GDPR provides additional rules that apply to seven specific processing situations (Articles 85 to 91). These Articles permit EU member states to enact further rules that apply to the specified types of processing. The French GDPR Law introduces further rules that apply to:

- Processing for journalistic purposes and purposes of academic, artistic, or literary expression (see Processing for Journalistic Purposes or Academic, Artistic, or Literary Expression).
- Processing national identification number (see Processing Identification Number).
- Processing for archiving in the public interest, scientific or historical research purposes, or statistical purposes (see Processing for Scientific or Historical Research, Statistical Purposes, or Archiving in the Public Interest, or Archiving in the Public Interest).

- Secrecy obligations (see Secrecy Obligations).
- Processing in the employment context (see Processing in the Employment Context).

PROCESSING FOR JOURNALISTIC PURPOSES OR ACADEMIC, ARTISTIC, OR LITERARY EXPRESSION

The French GDPR Law modifies the applicability provisions under the FDPA for data controllers that process personal data for journalistic purposes or academic, artistic, or literary expression. In these cases, the national law where the data controller is established applies if the data controller is established in an EU member state, as opposed to the law of the country where the data subject resides (Article 10, French GDPR Law, which is based on GDPR Recital 153 and which implements GDPR Article 85; see Applicability of the GDPR and French Law).

PROCESSING IDENTIFICATION NUMBER

The French GDPR Law permits data controllers to process national identification number only when specified in a decree adopted based on an opinion of the CNIL. The decree must define the categories of data controllers that may process this data and the acceptable purposes of processing (Article 11, French GDPR Law, which modifies Article 22, FDPA and which implements GDPR Article 87).

Certain exemptions apply permitting data controllers to process national identification number for purposes of public statistics, scientific or historical research, and e-government teleservices, provided the number is encrypted (Article 11, French GDPR Law).

PROCESSING FOR SCIENTIFIC OR HISTORICAL RESEARCH, STATISTICAL PURPOSES, OR ARCHIVING IN THE PUBLIC INTEREST

Certain GDPR Articles relating to data subject rights and data controller obligations do not apply to public archive services that process personal data for archival purposes in the public interest, to the extent honoring the rights renders impossible or seriously impairs the achievement of the public interest purposes. The following rights may be restricted in these cases:

- Access right under GDPR Article 15.
- Rectification right under GDPR Article 16.
- Processing restriction right under GDPR Article 18.
- Right to be notified about recipients of personal data in connection with rectification, erasure, and processing restriction requests under GDPR Article 19.
- Data portability right under GDPR Article 20.
- Data processing objection right under GDPR Article 21.

(Article 14, French GDPR Law, which modifies Article 36, FDPA and which implements GDPR Article 89).

The French GDPR Law permits data controllers to retain personal data for longer than necessary when processing personal data for archiving in the public interest, scientific or historical research purposes, or statistical purposes (Article 14, French GDPR Law, which modifies Article 36, FDPA and which implements GDPR Article 89).

The French Heritage Code and other laws and regulations applicable to public archives determine the appropriate safeguards required by the GDPR when processing personal data for archiving in the public interest, scientific or historical research purposes, or statistical purposes. (Article 14, French GDPR Law, which modifies Article 36, FDPA and which implements GDPR Article 89).

In addition, a decree adopted on August 1, 2018 further clarifies the conditions under which a data controller may limit data subjects' rights when processing personal data for scientific or historical research, statistical purposes, or archiving in the public interest. The data controller should only restrict data subjects' rights when the restriction is necessary for the data controller to achieve the purpose of processing and exercising the right makes it impossible or seriously impairs the achievement of the processing purpose. In addition, data controllers must ensure that data resulting from these processing purposes are both:

- Only accessed or modified by authorized personnel.
- Not disseminated unless anonymized first.

SECRECY OBLIGATIONS

EU member states may adopt rules specifying the powers of supervisory authorities with respect to data controllers and data processors subject to an obligation of professional secrecy or other equivalent secrecy obligation (Article 90, GDPR). The French GDPR Law states that organizations cannot invoke a secrecy obligation against the CNIL, except when the information is covered by:

- Professional secrecy in lawyer and client relationships.
- Secrecy protecting journalistic sources.
- Medical secrecy.

(Article 5, French GDPR Law, which modifies Article 44, FDPA and which implements GDPR Article 90).

The medical secrecy obligation is only enforceable against the CNIL for information processed for preventive medicine, medical research, medical diagnosis, and for the administration of care and treatment or the management of health services. The disclosure of individual health data may only be done under the authority and in the presence of a doctor. (Article 5, French GDPR Law, which modifies Article 44, FDPA.)

PROCESSING IN THE EMPLOYMENT CONTEXT

The GDPR permits EU member states, by law or by collective agreements, to provide more specific rules on processing personal data in the employment context (Article 88, GDPR). The French GDPR Law amends the FDPA by adding a provision permitting employers or administrations to process biometric data when necessary for workplace access control and when necessary for employees to use devices and applications within the workplace (Article 8, French GDPR Law, which implements GDPR Articles 88 and 9(4)). This processing must comply with any relevant standard regulations issued by the CNIL (Article 11, FDPA as modified by French GDPR Law).

Other French laws, including provisions of the French Labor Code, also regulate employee data processing. Both the GDPR and other French law provisions therefore apply to data processing in the employment context. In the case of a conflict, the GDPR prevails pursuant to the principle of primacy of European law.

OTHER GDPR DEROGATIONS

PRIOR CONSULTATION AND AUTHORIZATION REQUIREMENTS

The GDPR requires data controllers to consult with the relevant supervisory authority prior to processing when a data protection impact assessment under GDPR Article 35 indicates that the processing would result in a high risk to data subjects in the absence of measures to mitigate the risk (Article 36(1), GDPR). The GDPR permits EU member states to require data controllers to consult with and obtain prior authorization from the relevant supervisory authority for certain processing carried out in the public interest, including processing relating to social protection and public health (Article 36(5), GDPR).

The French GDPR Law requires data controllers to seek authorization from the CNIL under the conditions provided by Article 54 of the FDPA for certain processing relating to health research, studies, and evaluations further to the opinion of different committees (Article 16, French GDPR Law, which created Article 64, FDPA).

SUPERVISORY AUTHORITY

The French GDPR Law establishes the CNIL as the national supervisory authority (Article 1, French GDPR Law, which modifies Article 11, FDPA and which implements GDPR Article 54) and states the conditions for cooperation between the supervisory authorities of different EU member states (Article 6, French GDPR Law). In addition to the powers specified in GDPR Article 58, the French GDPR Law grants additional powers to the CNIL including, for example, the power to:

- Investigate in the context of controlling online communications services. Agents of the CNIL may use an assumed identity to perform online activities necessary for this purpose (Article 44, FDPA, as modified by the French GDPR Law). A decree, adopted based on an opinion of the CNIL, specifies additional conditions applicable to this type of activity (in particular, the obligation to draw up a transcript which must include a description of the performed online activities and it must be addressed to the data controller or data processor).
- Impose orders on data controllers and data processors to comply with the GDPR's requirements (Article 7, French GDPR Law).
- Impose a penalty for non-compliance with these orders, per day of delay, of not more than EUR100,000 (Article 7, French GDPR Law).

In addition to the CNIL's advisory powers, the CNIL may also authorize certain data processing, including, for example:

- Data processing carried out on behalf of the State acting in the exercise of its official authority relating to genetic or biometric

data necessary for authentication or identification of individuals (Article 11, French GDPR Law, which modifies Article 27, FDPA).

- Health data processing justified by a public interest (Article 16, French GDPR Law, which modifies Article 54, FDPA).
- Processing national identification number (Article 11, French GDPR Law, which modifies Article 22, FDPA).

COMPLAINTS ON BEHALF OF DATA SUBJECTS

The GDPR permits EU member states, in their national laws, to allow certain not-for-profit bodies, organizations, or associations to lodge a complaint with a supervisory authority independent of a data subject's authorization to lodge the complaint (Article 80(2), GDPR).

The French GDPR Law does not restate the GDPR's provision but it does permit a data subject to mandate one of these organizations to lodge a complaint with a supervisory authority on its behalf (Article 26, French GDPR Law, which creates Article 43 quarter, FDPA).

ADMINISTRATIVE FINES FOR PUBLIC AUTHORITIES AND BODIES

Under the French GDPR Law, the administrative fines imposed under GDPR Articles 83(4) and 83(5) may not be imposed on processing carried out by the State (Article 7, French GDPR Law, which modifies Article 45, FDPA).

OTHER PENALTIES FOR GDPR VIOLATIONS

The French GDPR Law authorizes the CNIL to impose sanctions other than administrative fines, including, for example:

- Partially or totally suspending binding corporate rules.
- Ordering the data controller to comply with the GDPR and pay a penalty for each day it delays compliance.
- Temporarily suspending the certification issued for the data controller or data processor.
- Temporarily suspending the accreditation delivered to a certification body or a body in charge of a code of conduct.
- Temporarily suspending the authorization given for health data processing justified by public interest purposes.

(Article 7, French GDPR Law, which modifies Articles 45 and 46, FDPA.)

For more on enforcement and sanctions under the GDPR, see Practice Note, GDPR and DPA 2018: enforcement, sanctions and remedies (UK) ([w-005-2487](#)).

CLASS ACTION PROCEDURE

The French GDPR Law introduces a class action procedure available to data subjects to obtain compensation for moral or material damages before the civil or administrative jurisdictions (Article 25, French GDPR Law, which modifies Article 43 ter, FDPA and which implements GDPR Article 80).

FRENCH LAW AND GDPR STATUTORY REFERENCES

Subject Matter	French GDPR Law Article and FDPA Article	GDPR Article(s) Permitting Member State Derogation
Applicability of the French law (see Applicability of the GDPR and French Law)	5 and 5-1, FDPA	
Appointing a data protection officer (see Data Protection Officers)	NA	37(4)
Requirements for processing special categories of personal data (see Processing Special Categories of Personal Data)	8, FDPA	9(2)(a), (b), (g), (h), (i), (j), 89(2), 89(3)
Requirements for processing genetic, biometric, and health data (see Genetic, Biometric, and Health Data)	8, 11, FDPA and 1, 8, GDPR Law	9(4)
Requirements for processing criminal conviction and offense data (see Processing Criminal Conviction and Offense Data)	9 and 11, FDPA and 13, GDPR Law	10
Processing for secondary purposes (see Processing for Secondary Purposes)	6, FDPA	6(4) and 23(1)
Age of child consent (see Child Consent)	7-1, FDPA and 20, GDPR Law	8(1)
Limitations on data subject rights (see Data Subjects' Rights and French Law Exceptions to Data Subject Rights)	40, FDPA and 24, GDPR Law	23
Automated decision-making (see Automated Decision-Making)	8, 10, FDPA and 8 and 21, GDPR Law	22(2)(b)
Requirements when processing for journalistic purposes or academic, artistic, or literary expression (see Processing for Journalistic Purposes or Academic, Artistic, or Literary Expression)	5-1, FDPA and 10, GDPR Law	85
Processing national identification number (see Processing Identification Number)	22, FDPA and 11, GDPR Law	87
Processing for scientific or historical research and for statistical purposes (see Processing for Scientific or Historical Research, Statistical Purposes, or Archiving in the Public Interest)	36, FDPA and 14, GDPR Law	89(2)
Processing for the purpose of archiving in the public interest (see Processing for Scientific or Historical Research, Statistical Purposes, or Archiving in the Public Interest)	36, FDPA and 14, GDPR Law	89(3)
Secrecy obligations (see Secrecy Obligations)	44, FDPA and 5, GDPR Law	90(1)
Processing employee personal data (see Processing in the Employment Context)	8, 11, FDPA and 8, GDPR Law	9(4) and 88
Prior consultation and authorization requirements (see Prior Consultation and Authorization Requirements)	16, GDPR Law, which created Article 64, FDPA.	36(5)

Subject Matter	French GDPR Law Article and FDPA Article	GDPR Article(s) Permitting Member State Derogation
Supervisory authority (see Supervisory Authority)	11, 22, 27, 44, 49-1 to 49-4, 54, FDPA and 1, 5, 6, 7, 11, 16 GDPR law	54
Complaints on behalf of data subjects (see Complaints on Behalf of Data Subjects)	43 quarter, FDPA and 26, GDPR Law	80(2)
Administrative fines (see Administrative Fines for Public Authorities and Bodies)	45, FDPA and 7, GDPR Law	83(7)
Additional penalties for GDPR violations (see Other Penalties for GDPR Violations)	45, 46, FDPA and 7, GDPR Law	83(7)
Class actions (see Class Action Procedure)	43 ter, FDPA and 25, GDPR Law	80

ABOUT PRACTICAL LAW

Practical Law provides legal know-how that gives lawyers a better starting point. Our expert team of attorney editors creates and maintains thousands of up-to-date, practical resources across all major practice areas. We go beyond primary law and traditional legal research to give you the resources needed to practice more efficiently, improve client service and add more value.

If you are not currently a subscriber, we invite you to take a trial of our online services at legalsolutions.com/practical-law. For more information or to schedule training, call **1-800-733-2889** or e-mail referenceattorneys@tr.com.