

Using sensitive data to prevent discrimination by artificial intelligence: does the GDPR need a new exception?

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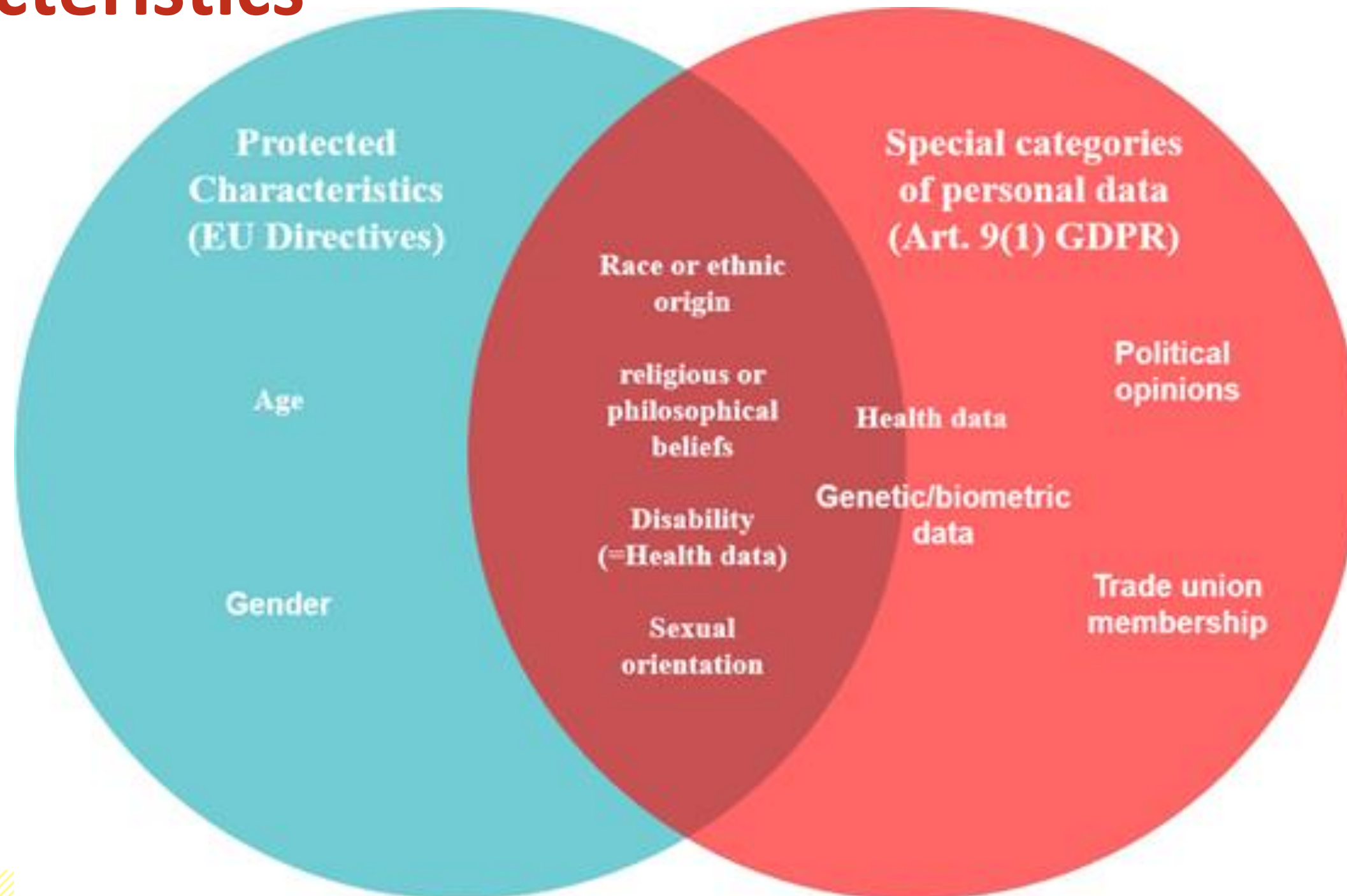
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Why is collecting special categories of data necessary?

- Proxy attributes “hide” correlations
- E.g.: postal code is often a proxy for social-economical status
- Therefore: need data on e.g. ethnicity to “black box”-test

Overlap between special categories and protected characteristics



Art. 9 GDPR

- In principle: collection/use is banned
- Two types of exceptions
 - Consent
 - “Union or member state law”

Do we need a new exception? In favour

- Organisations can then test for discrimination
- Fits in “non-discrimination by design”-approach

Do we need a new exception? Against (1)

- Merely collecting the data may be problematic
- Data breaches may occur
- Collection can have a “chilling effect” and infringe on privacy

Do we need a new exception? Against (2)

- Use of the data
 - Unforeseen new uses of data
 - Special category data is discrimination-sensitive
- “The world is not ready” for bias testing

Safeguards

No perfect safeguards exist

- Synthetic datasets: not ideal (privacy vs. utility trade-off)...
- Third party: complex...
- Data collection: voluntary collection or inferred data?

Article 10(5) AI Act proposal: original text (2021)

- High-risk systems
- Strictly necessary
- “Appropriate” safeguards
 - But: who decides “appropriate”?

11 May 2023: compromise text European Parliament

- In principle: anonymized/synthetic data.
- **Else** more safeguards required:
 - Pseudonymized data
 - Appropriate cyber security/data retention/...
 - Ban on transmitting data to third party
 - Duty to document necessity of collection

Wrap-up

- In many situations, the GDPR bans the collection of sensitive data
- Arguments are more or less balanced
- Unclear what the “correct” safeguards are

Thank you!

- **We'd love to chat if you have questions or suggestions!**

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