



Dear Mr Millidge,

I am writing you on behalf of Bits of Freedom, an independent NGO that protects citizens' privacy rights online. I was sent a copy of your e-mail of 14 March regarding Royal Mail Group's proposals and observations regarding the draft Data Protection Regulation (the "Regulation"), sent to the members of the JURI Committee.

In this letter, you address the impact of the Regulation on the rights of freedom of expression, the right to engage in work and the right to conduct a business, but choose to ignore the fundamental right to privacy and protection of personal data.

I would therefore like to use this opportunity to respond to those statements where the right to privacy and data protection is most clearly in peril.

1. Article 4 - Definitions

With respect to the definition of consent, you state that 'adequate notification' of data subjects will provide enough protection. The conduct of the data subject after such notification will indicate his/her (possible) consent. This will in practice maintain the current situation where data subjects are confronted with lengthy statements and where not dismissing such unusable information will be regarded as consent. The Commission's proposal defines 'explicit consent' as a 'statement' or 'clear affirmative action', which appears more than adequate to address your stated concerns. Your letter fails to even attempt to explain why this is not the case.

Finally, you state that it is unclear what information is subject to the Regulation. However you do not address which causes this confusion and why the definition laid down in Article 2(a) of Directive 95/46/EC (the "Directive") is suddenly no longer workable, fifteen years after its entry into forces. In the absence of compelling reasons to the contrary, which you have failed to provide, the definition as proposed by the European Commission is to be preferred over proposed complex, unpredictable and bureaucratic carve-outs for 'anonymous' and 'pseudonymous' data, to be interpreted in the light of changing "risks", "harms" and "contexts".



2. Article 6 - Lawfulness of Processing

It is true that parties should be able to justify data processing when it comes to prevention of crimes or protecting other rights and freedoms of third parties. This does however not mean that article 6(1)(f) needs to be extended. Such forms of processing can be based on the Restrictions laid down in Article 21 of the Regulation.

Furthermore, you refer to third party direct marketing as an 'established and reputable activity' which 'enables individuals to access goods and services'. Prohibition of such activities based on legitimate interest will, according to your letter, have negative effects on i.a. 'the rights and freedoms of individuals'. If your assertion regarding the welcome effects on data subjects is true, then there is no barrier to obtaining consent for such activities. Your assertion is that direct marketing companies, providing a compelling service, are unable to market this notion to consumers.

3. Article 20 - Measures based on profiling

It is extremely difficult to assess what constitutes a negative effect on a natural person, especially when data controllers get to decide this for data subjects. Allowing profiling of natural persons based on the perceived outcome of such profiling will therefore in practice not provide any meaningful protection. It would be much better as well as simpler and easier for business to determine whether the profiling has any legal or other significant effects - and then allow it, based on a number of legal grounds, as introduced in article 20(2) of the Regulation.

4. Article 19 - Right to object

In your letter, you support the right of data controllers to process personal data of citizens, even after citizens have indicated that there are valid reasons ('relating to their particular situation') to cease the processing. In other words: when a citizen no longer wants to put its data under the control of a data controller, and has good reasons to decide so, his or her choice to withdraw its data will not be valid. With this assertion, you completely undermine the right of data subjects to control their personal data. Valid reasons presented by a data subject should always prevail over the interests of data controllers to keep processing data.



5. Article 7 - Conditions for consent

In your letter, you state that you are in favor of removing the 'significant imbalance' test from Article 7, because it is 'impractical'. Such removal would have a huge impact on the protection of personal data, as it allows data controllers to demand consent when data subjects have no real possibility to decline. This completely undermines the current rule laid down in the Directive, that consent needs to be a 'free' indication of wishes.

Finally, you perceive the right to withdraw consent as a factor that will lead to uncertainty in contractual relations. I would like to bring to mind that data processing that is necessary for the conclusion or performance of contracts can be based on the legal ground included in article 6(1)(b). Prohibiting withdrawal of consent will not affect processing based on this legal ground. It is however once more directly contradictory to the rule that consent should be freely given.

Yours sincerely,

Janneke Slöetjes