

OUTLINE VIEWPOINTS REGARDING THE DRAFT DATA PROTECTION REGULATION

BITS OF FREEDOM



On 25 January 2012, the European Commission published a proposal to reform the European data protection legal regime. One aspect of its proposal, a proposal for a new Regulation ("the Regulation"), aims to modernise and further harmonise the data protection regime created by the Data Protection Directive (95/46/EC).

Bits of Freedom believes that the Regulation on the whole is a step towards making data protection law fit for the 21st century. We welcome the fact that it starts from the standards and principles set out in the current Directive (95/46/EC) and further enhances, elaborates and improves a number of these standards and principles. Such improvements are necessary, as numerous incidents in recent years have clearly demonstrated that the privacy of internet users is regularly infringed. Both companies and governments have failed to handle data of citizens in accordance with data protection laws and principles. This has resulted in data breaches, circumvention of privacy rules, extensive and often furtive profiling of internet users and, increasingly, surveillance of citizens via social media and other channels.

To solve these issues, strong privacy standards are a must. The Regulation must effectively ensure the right of individuals to assert proper control over their personal data. In order to achieve this, it is crucial to remedy a number of weaknesses in the Regulation that have the potential to undermine this right. Bits of Freedom calls for strong data protection rules that protect citizens in the online environment and that recognize the specific dangers associated with extensive tracking and profiling in the online environment. This one pager summarizes our key messages. Bits of Freedom also drafted specific amendments that reflect these key messages.

KEY MESSAGES

- (1) **Properly define personal data.** The definition (and accompanying recital) of data subject (and therefore personal data) does not properly protect data subjects in all situations because it excludes situations where people can be individualized, tracked and profiled in an online environment. This loophole must be closed.
- (2) **Ensure meaningful consent.** In order to ensure meaningful consent online, both the recitals as well as the definition of consent must be strengthened. Consent cannot be considered valid when data subjects have no real alternatives in the market, or in cases where consent is being used to legitimize excessive data processing. It is important to emphasize that consent can only be obtained for data processing that meets the requirement of proportionality; consent should never be used to legitimize excessive processing of personal data.
- (3) **Limit use of legitimate interest ground.** The legitimate interest ground as proposed provides an unacceptable loophole for abusive or excessive processing. We propose to limit the use of this ground by introducing clear examples of what constitutes a legitimate interest. At the same time, data subjects need a stronger right to opt-out from processing based on this legal ground.
- (4) **Prevent incompatible use of personal data.** Personal data collected for a specific purpose may only be used for other purposes that are compatible with the original purpose. This principle of purpose limitation is one of the fundamental pillars of data protection law and remains extremely important, especially in the online environment where data can be collected and re-combined rapidly and cheaply. We therefore propose to delete the proposed article which allows use of personal data for incompatible purposes.
- (5) **Guarantee transparency and control.** Processing of personal data should always be transparent and understandable for data subjects. Data subjects deserve both accurate information about how their data is going to be processed as well as control over their personal information. Bits of Freedom proposes strengthening the rights to information, access and data portability as well as the obligation on the controller to provide privacy by default.
- (6) **Prohibit furtive profiling.** Bits of Freedom is deeply concerned about the risks associated with profiling, especially online. We propose stronger limitations to the creation of profiles as well as limitations to the use of profiles for measures that affect data subjects. Finally, the right to information and access must be strengthened with respect to profiling.
- (7) **Limit public interest exemptions.** The regulation contains too many exemptions for reasons of 'public interest'. These broad and vague grounds restrict the rights of the data subject (including erasure, to object and profiling), and the obligations of the controller regarding all the fundamental principles as well as regarding obligations on data breaches. We propose clarifying and limiting these grounds.
- (8) **Improve data breach notification rules.** A data breach notification requirement should ultimately protect citizens by informing them when their data are accessed by unauthorized third parties. We propose to strengthen the definition as well as the notification regime in order to provide this protection.
- (9) **Strengthen privacy by design and default.** The concept of privacy by design and default must be strengthened and specified in order to provide meaningful protection to data subjects.
- (10) **Properly define limitations to data protection rules.** Data protection rules should not prevail over other freedoms such as the right to freedom of expression or hinder the right to conduct scientific research. The boundaries of the Regulation must therefore be clear and understandable.