

Equifax Proposed amendments to the Data Protection Regulation

Amendment 1

Article 4. 8 Definitions Consent

Text proposed by the Commission

(8) 'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed

Amendment

(8) 'the data subject's consent' means any freely given specific, informed and explicit indication of his or her wishes by which the data subject, either by a statement or by a clear affirmative action, signifies agreement to personal data relating to them being processed. ***The consent can be implicit when the data subject acts in such a way that a certain amount of personal data must necessarily be processed, for instance by asking for particular goods or services.***

Justification:

The rights of data subjects need to be protected, in particular by making sure that consent has been granted on a free and informed basis.

At the same time, a balance needs to be struck as many services are currently being demanded and provided to data subjects by relying, at least partly, on implicit consent, i.e. consent is granted informally for the performance of one specific data processing action, on the basis of a general consent granted for a general purpose, or consent by proxy. This goes in the direction taken by recital 25 stating that consent should cover all processing activities carried out for the same purpose.

Amendment 2**Article 5 – Principles Regarding the Processing of Personal Data****Text proposed by the Commission****Amendment**

Personal data must be:

- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant, and **limited to the minimum necessary in relation** to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data;
- (d) accurate and kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;..

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- (a) processed lawfully, fairly and in a transparent manner in relation to the data subject;
- (b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes;
- (c) adequate, relevant, and **limited to the minimum necessary in relation proportionate** to the purposes for which they are processed; they shall only be processed if, and as long as, the purposes could not be fulfilled by processing information that does not involve personal data;
- (d) accurate and **where necessary** kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without **undue** delay

Justification:

While the minimisation of data processing is a long established and generally accepted data protection principle, the use of the wording “minimum necessary” is problematic, as it seems to imply that the data held must be minimal for the purposes of each specific processing action. Furthermore, the definition of “minimum necessary” is open to interpretation which leaves data processors in legal uncertainty.

Much of the data held for the conduct of legitimate business practices, while being necessary for the general purposes of these activities, might not be necessary all the time and for each specific processing action. A “proportionate” approach, similar to the concept of “not excessive” data enshrined in the data protection directive of 1995 (Directive 95/46/EC), offer greater flexibility and sensibility to diverse industry requirements without negatively affecting citizens’ rights.

Furthermore, this article also appears to be inconsistent with a number of provisions of existing and proposed EU legislation, namely the Consumer Credit Directive, the “Mortgage Credit Directive”, Anti-Money Laundering Regulations and Counter-Terrorism legislation, which require accuracy and completeness in data provision.”

Amendment 3**Article 6.1.f – Satisfaction of the Legitimate Interest****Text proposed by the Commission****Amendment**

(f) processing is necessary for the purposes of the legitimate interests pursued by **a** controller, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply to processing carried out by public authorities in the performance of their tasks.

(f) processing is necessary for the purposes of the legitimate interests pursued by **a the controller or by the third party or parties to whom the data are disclosed**, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child. This shall not apply: **a) to processing carried out by public authorities in the performance of their tasks, b) to data obtained from public sources, c) to data processed for the prevention of fraud and for credit reports.**

Justification:

Pursuing a legitimate interest is a key motive for lawful data processing in many economic sectors, which is why it is crucial that this criterion be defined as precisely as possible.

This includes stating clearly that a legitimate interest would also be recognised in situations where processing is carried out by a third party on behalf of the original controller, who is responsible for collecting data and consent from the data subject. By not repeating the provisions on third parties of the current legislation, there is a material risk that these entities will be adversely and unwittingly affected. The removal of these words may not have been intentional, as the wording “a controller” is ambiguous in this respect.

Furthermore, it is clear that processing of publicly available information or processing for the purpose of fraud prevention should not fall under the scope of this regulation.

Amendment 4**Article 7 –Conditions for Consent****Text proposed by the Commission****Amendment**

1. The controller shall bear the burden of proof for the data subject's consent to the processing of their personal data for specified purposes.

2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal.

4. Consent shall not provide a legal basis for the processing, where there is a significant imbalance between the position of the data subject and the controller.

1. The controller shall bear the burden of proof for the data subject's consent to the processing of their personal data for specified purposes **according to the context of the data processing**

2. If the data subject's consent is to be given in the context of a written declaration which also concerns another matter, the requirement to give consent must be presented distinguishable in its appearance from this other matter.

3. The data subject shall have the right to withdraw his or her consent at any time. The withdrawal of consent shall not affect the lawfulness of processing based on consent before its withdrawal **nor shall it affect the lawfulness of processing of data based on other grounds.**

4. Consent shall not provide a legal basis for the processing, where there is a significant **and extraordinary** imbalance between the position of the data subject and the controller.

Justification:

The principle that the burden of proof should be the data controller's is a key part of this reform.

However, the requirement for the controller to demonstrate in all circumstances that consent has been given (Article 7(1)) is not workable for companies which do not have a direct relationship with data subjects when consent is given. The burden of proof should therefore respect the context of data processing. This would for instance cover situations in which consent is granted informally for the performance of one specific data processing action, on the basis of a general consent granted for a general purpose (in accordance with recital 25 of the proposed Regulation), or consent by proxy.

In addition, the ability for a consumer to withdraw consent at any time (Article 7(3)) threatens the viability of consent-based services and facilitates identity fraud.

For some industries, such as the credit referencing sector, widely accepted practices that facilitate responsible lending as well as preventing identity fraud and money laundering could be held under the scope of this article due to the current lack of clarity of the text. This is why it should be specified that the right of an individual to withdraw consent shall not affect the lawfulness of processing of data based on other grounds, such as the performance of a contract or pursuing a legitimate interest.

Finally, on paragraph 4 the addition of “extraordinary” would remove the threat that processing of data in day-to-day circumstances such as in an ordinary business relationship would constitute a significant imbalance.

Amendment 5**Article 17.4 – The Right to be Forgotten and to Erasure****Text proposed by the Commission****Amendment**

4. Instead of erasure, the controller shall restrict processing of personal data where:

- (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data;
- (b) the controller no longer needs the personal data for the accomplishment of its task but they have to be maintained for purposes of proof;
- (c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;
- (d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2).

4. Instead of erasure, the controller shall restrict processing of personal data where:

- (a) their accuracy is contested by the data subject, for a period enabling the controller to verify the accuracy of the data ***except that where the processing of data relates to the prevention of fraud or the provision of credit reports . The controller may, notwithstanding such restriction, be permitted to provide to third parties notification that the data is contested including a copy of the contested data in question.***
- (b) the controller no longer needs the personal data for the accomplishment of its task but they have to be maintained for purposes of proof;
- (c) the processing is unlawful and the data subject opposes their erasure and requests the restriction of their use instead;
- (d) the data subject requests to transmit the personal data into another automated processing system in accordance with Article 18(2).

Justification:

The rights to be forgotten and to object are fundamental parts of this reform, though they are not clearly defined in the text which could lead to their being applied in instances where they are not intended.

The rights to be forgotten and to object (beyond a process for rectification of inaccurate data) should not apply where time periods for data retention are clearly informed, and where data controllers have continuing legitimate interests in the processing of this data.

Particularly where time periods for data retention are clearly informed, the application of the rights to be forgotten and to object within the financial services industry could have a detrimental effect on an individual, as insufficient data could lead to an individual's application for credit being declined. Also, a request to be forgotten may not in fact originate from the data subject but could be a malicious or fraudulent application by a third party.

Amendment 6

Articles 18.2 –Right to Data Portability

Text proposed by the Commission

Amendment

2. Where the data subject has provided the personal data and the processing is based on consent or on a contract, the data subject shall have the right to transmit those personal data and any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn.

2. Where the data subject has provided the personal data and the processing is based on consent or on a contract, the data subject shall have the right to transmit those personal data and any other information provided by the data subject and retained by an automated processing system, into another one, in an electronic format which is commonly used, without hindrance from the controller from whom the personal data are withdrawn, ***except where the processing of data is for the prevention of fraud and for credit reports.***

Justification:

Data Portability as a general principle offers the individual greater control over access to personal data. But as currently worded this article could materially affect efforts under other parts of EU law to prevent fraud and to secure the protection of personal data.

There is the potential for significantly increased incidents of fraud (if the law allowed for transmission to the wrong person), for increased likelihood of security breaches (if the data were transmitted by an individual to an unreliable third party) and for data to be falsified or manipulated prior to onward transmission, if the proposed addition is not made.

Certain data processors would also not be able to fulfil the provisions of existing and proposed EU legislation, namely the Consumer Credit Directive, the “Mortgage Credit Directive”, Anti-Money Laundering Regulations and Counter-Terrorism legislation, which require accuracy and completeness in data provision.

Amendment 7

Article 19.1: *Right to object*

Text proposed by the Commission

Amendment

1. The data subject shall have the right to object, on grounds relating to their particular situation, at any time to the processing of personal data which is based on points (d),(e) and (f) of Article 6(1), unless the controller demonstrates compelling legitimate grounds for the processing which override the interests or fundamental rights and freedoms of the data subject.

1. The data subject shall have the right to object, on grounds relating to their particular situation, at any time to the processing of personal data which is based on points (d),(e) and (f) of Article 6(1), unless the controller demonstrates compelling legitimate grounds for the processing which override the interests or fundamental rights and freedoms of the data subject, ***such as the processing of data for the prevention of fraud and for credit reports.***

Justification:

The rights to be forgotten and to object (beyond a process for rectification of inaccurate data) should not apply where time periods for data retention are clearly informed, and where data controllers have continued legitimate interests in the processing of this data for the purposes of achieving objectives already enshrined in legislation.

Applying the rights to be forgotten and to object to non transactional or social data could have a detrimental effect on an individual, as insufficient data can lead to an individual's application for goods and services being declined.

There is also the risk that a request to be forgotten may not in fact originate from the data subject but could be a malicious or fraudulent application by a third party.

Amendment 8**Article 20 –Measures based on Profiling****Text proposed by the Commission**

1. Every natural person shall have the right not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.

2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:

(a) is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; or

(b) is expressly authorized by a Union or Member State law which also lays down suitable measures to safeguard the data subject's legitimate interests; or

(c) is based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.

Amendment

1. Every natural person shall have the right **to request** not to be subject to a measure which produces legal effects concerning this natural person or significantly affects this natural person, and which is based solely on automated processing intended to evaluate certain personal aspects relating to this natural person or to analyse or predict in particular the natural person's performance at work, economic situation, location, health, personal preferences, reliability or behaviour.

2. Subject to the other provisions of this Regulation, a person may be subjected to a measure of the kind referred to in paragraph 1 only if the processing:

(a) is carried out in the course of the entering into, or performance of, a contract, where the request for the entering into or the performance of the contract, lodged by the data subject, has been satisfied or where suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the right to obtain human intervention; or

(b) is expressly authorized by a Union or Member State law which also lays down suitable measures to safeguard the data subject's legitimate interests; or

(c) ~~is based on the data subject's consent, subject to the conditions laid down in Article 7 and to suitable safeguards.~~ is consistent with the requirements of Article 6.

Justification:

Profiling is a normal and frequently used tool in many sectors, and the simple application of this article would have serious consequences for the wider economy. A clarification of the language of this text would ensure the security of individuals' data, while allowing consensual and economically useful activities to continue.

One activity which would be particularly impacted by Article 20(1) is the provision of scoring models. Scoring models are used extensively across the EU by businesses:

to help determine credit-worthiness, and to identify fraud and money-laundering;

to provide reassurance with regard to an individual's ability to afford repayments; and to manage credit accounts and collections.

Credit and other scoring systems are widely recognised to be highly effective, transparent, consistent, and non-discriminatory ways of assimilating large amounts of (often conflicting) data in order to make decisions.

Profiling for the purposes of credit scoring can be clearly distinguished from profiling for social media purposes, not least in that this profiling is clearly notified to the individual in advance. Credit scoring has personal benefits for data subjects. It allows consumers the benefit of transparent, quick and objective decision-making in connection with credit applications, and protects them against the very serious consequences of taking on credit they cannot afford to repay. It therefore also has public interest benefits in supporting economic growth.

At a time when the issue of indebtedness is high on the European agenda, data subject rights are better protected by rights individuals can use in connection with processing (such as ensuring that the data used in automated profiling is accurate, and that decisions can be reviewed), rather than a broad restriction on specific types of processing.

With these protections in place, automated profiling could be permitted if it is otherwise compliant with the provisions of this draft Regulation. As amended this article would offer more flexibility of interpretation to make the provision more workable, while still guaranteeing the protection of individuals' rights."