

## **Commission guidance on the application of Union data protection law in the electoral context**

Submitted by Department for Digital Culture Media and Sport on 10 October 2018

### **SUBJECT MATTER**

1. The Communication from the European Commission sets out guidance on the application of the General Data Protection Regulation (GDPR) with regard to political parties' use of people's data for campaigning purposes. The objective of the guidance is to make clear which data protection obligations apply to the processing activities of political parties in the context of elections. The communication places an emphasis on national data protection authorities, as enforcers of the GDPR, to make full use of their strengthened powers to address possible infringements, in particular those relating to the micro-targeting of voters.
2. The publication of the communication is timely for two reasons:
  - The Information Commissioner's Office (ICO) investigation into political campaigning practices and the importance of protecting personal data in the electoral context which has become a key issue for the functioning of democracy - the ICO investigation is specifically mentioned in the Communication.
  - The upcoming European Parliament election in May 2019.
3. The Communication acknowledges that the report from the Information Commissioner's Office on the use of data analytics in political campaigns together with the Opinion of the European Data Protection Supervisor on online manipulation and personal data confirm the growing impact of micro-targeting in the electoral context.
4. The Communication goes on to explain that the General Data Protection Regulations (GDPR), which came in to force on 25 May 2018, provides the Union with the tools necessary to address instances of unlawful use of personal data in the electoral context. It further states that this will only be effective in protecting the integrity of democratic politics if there is a firm and consistent application of the rules.
5. The Commission explains that since this will be the first time the GDPR will be applied in the European Parliament Election, it is important to provide clarity to all actors involved in the election process such as national electoral authorities, political parties, data brokers and analysts, social media platforms and online ad networks. This Communication sets out the obligations on the national data protection authorities as enforcers of the GDPR to make full use of their strengthened powers

to address possible infringements, particularly in relations to micro- targeting of voters.

6. The next part of the Communication explains how the GDPR strengthens the data protection framework making the union more equipped to deal with cases of personal data abuse in the future and makes all actors more accountable and responsible for how they deal with personal data. It sets out how the GDPR addresses some of the shortcomings in the previous data protection framework by harmonising key notions such as consent, strengthening individual rights to receive information about the processing of their data, introducing rules on personal data breaches as well as establishing a corporation mechanism between data protection authorities and strengthening their enforcement powers.
7. In completing the data protection framework summary, the Communication explains the role of the newly established European Data Protection Board which groups all national data protection authorities and plays a key part in the application of GDPR by issuing guidelines, recommendations and best practice. It further mentions the Directive on privacy and electronic communications (e-Privacy Directive) which completes the Union's data protection framework. It explains that the Commission's proposal for a Regulation on Privacy and Electronic Communication (e-Privacy Regulation) currently under negotiation, will widen the scope to include internet based electronic communication services.
8. The Communication sets out key obligations of the various active actors in GDPR in relation to the electoral context such as European and national political parties to ensure they process personal data lawfully, fairly and in a transparent manner for specified purposes only. In order to clarify, the communication explains personal data as all data relating to an identified or identifiable natural person. This will often include special categories of personal data (sensitive data) and data analytics can further infer sensitive data from sets of non sensitive data.
9. Taking all of the above into account, the communications goes on to highlight the data obligations which appear of particular reference in the electoral context as summarised below.
10. Data Controllers and Processors - The Communications refers to the notion of accountability for controllers as a key feature of the GDPR. It goes further to emphasis that the controller must put in place measures that are appropriate to the risks and implement data protection by design from the onset. They must be able to demonstrate compliance with the GDPR. It continues by stating that the role of the data controller or processor has to be assessed in individual cases. In the electoral context the data controller could be political parties, individual candidates, platforms and data analytics companies and the national electoral authorities. The Communication explains that organisations offering platforms and data analytics to individuals in the Union also have to comply with GDPR.
11. The Communication goes on to explain the principles, lawfulness of processing and special conditions for sensitive data stating that actors involved in elections can only process personal data including those obtained from public sources in accordance with the principles related to processing of personal data and based on the limited

grounds clearly identified by the GDPR. It explains that the most relevant grounds for lawfully processing in the electoral context appear to be consent of the individual, compliance with a legal obligation under the legislation, or the performance of a task carried out in the public interest of one of the actors. The Communication goes further to say that legitimate interest can sometimes be relied on in an electoral context if their interests are not overridden by the interests or the fundamental rights and freedom of the individuals concerned.

12. The Commission make it clear that when consent is used as a legal ground for processing it should be given by the individual through a clear and affirmative action and is free and informed. It explains that Public Authorities involved in the electoral context process personal data to comply with a legal obligation or the exercise of a public task. A public authority may also disclose certain information on individuals included in electoral lists or registers of residents to political parties only when specifically authorised by Member States law.
13. The Communication explains that processing for electoral purposes will often involve sensitive data which requires that specific, stricter conditions are fulfilled including the person giving explicit consent or have made the data concerned public. Political parties can also process sensitive data if there is substantial public interest and appropriate safeguards are in place. The Commission further clarifies other conditions when processing of sensitive data may be appropriate such as for disclosure within the political party. It make it clear that the purpose for processing the data should be made clear at the time of collection and this can only be further processed for a compatible purpose otherwise a new legal ground must be provided. It explains that political parties must apply due diligence and check that data has been obtained lawfully before using data received from a third party.
14. The Communication addresses transparency requirements explaining the importance of properly informing the individuals of the existence of processing operation and its purposes in the interest of fair and transparent processing. It states that the GDPR clarifies the obligations of the data controllers to inform the individual of the identity of the controller, purpose of processing, recipients of personal data, source of the data, existence of an automated decision making and any other information necessary to ensure fair and transparent processing. It further explains that the GDPR requires such information to be given in a concise, transparent, intelligible and easily accessible form using clear and plain language. Information has to be provided to individuals at each stage of the processing not only when data is collected.
15. The Communication also addresses the issue of profiling, automated decision making and micro-targeting explaining that profiling is a form of automated data processing used to analyse or predict aspects concerning personal preferences, interests, economic situation and similar. Profiling can be used to micro target individuals and the Cambridge Analytica case has shown the challenges raised by micro targeting methods on social media. The GDPR obliges all data controllers for example political parties or data analysts to inform the individuals when they use such profiling techniques. This follows the GDPR rules of lawfulness, fairness, transparency and purpose limitation. Micro targeting fall under automated decision making when they

produce sufficiently significant effects on individuals such that it affects the circumstances, behaviours or choices of the individual or have a prolonged or permanent impact on the individual. The Communication explains that in the electoral context controllers need to ensure that any processing using profiling techniques that could stop individuals from voting or to make them vote in a specific way is lawful in accordance with the GDPR principles and conditions.

16. The Communication refers to the issue of security and accuracy of personal data in the electoral context given the size and possible content including sensitive data. The GDPR requires controllers and processors of personal data to implement appropriate techniques and organisation measures to ensure a level of security appropriate to the risks of processing such personal data. The Communication states that political parties and other actors involved in the electoral process have to pay particular attention to ensure the accuracy of personal data when big data sets are concerned and when data is compiled from different sources. Inaccurate data must be immediately erased or rectified and where necessary update.
17. The Communication refers to data protection impact assessments introduced by the GDPR. The impact assessment is required when processing is likely to result in a high risk to the rights and freedoms of individuals. It explains that this is the case in electoral context when a data controller evaluates, systematically and extensively, personal aspects of an individual (including profiling), significantly affecting the individual, and when the controller processes sensitive data on a large scale. The impact assessments to be carried out by the various actors in the context of elections should include the elements necessary to address the risks involved in such processing particularly the lawfulness of processing also for data sets obtained from third parties and the transparency requirements.
18. The final part of the Communication looks at the rights of individuals who now have stronger rights under the GDPR. Individuals have the rights to object to processing (for example of data included in the electoral lists transmitted to political parties) if the processing is based on the legitimate interest or the public interest grounds. In order for individuals to exercise their rights under GDPR, all actors involved have to provide the necessary tools and settings. GDPR also grants individuals the right to lodge a complaint to a supervisory authority and to a judicial review. In certain Member States national legislation allows a non - government organisation to lodge a complaint without being mandated by an individual. This is particularly relevant in the electoral context given the large number of persons potentially concerned.

## **SCRUTINY HISTORY**

19. There is no previous scrutiny history on this item.

## **MINISTERIAL RESPONSIBILITY**

20. The Minister for Digital and the Creative Industries is the minister responsible for the Data Protection Act 2018.

21. The Secretary of State for Digital, Culture, Media and Sport has overall responsibility for data protection policy.

## **INTEREST OF THE DEVOLVED ADMINISTRATIONS**

22. Data Protection is a reserved matter under the UK's devolution settlements and no devolved administration interests arise. The devolved administrations however do have an interest in this area and remain informed of all involvements.

## **LEGAL AND PROCEDURAL ISSUES**

23. There are no legal or procedural issues. This is not a proposal for legislation. The Government will however monitor the activities of the European Commission and will ensure that the Commission does not encroach into areas which are beyond its competence as set out in the EU treaties, particularly in relation to the area of national security.

## **APPLICATION TO THE EUROPEAN ECONOMIC AREA**

24. The content of the Communication does not relate specifically to the European Economic Area.

## **SUBSIDIARITY**

25. The Commission Communication is not legally binding, nor does it raise any issues of subsidiarity. It merely clarifies the intentions of the Regulation in regards to the processing of personal data in the electoral context. The guidance has been prepared in run up to the European Commission elections in May 2019 and to address some of the concerns raised by the Information Commissioner's Office in regards to the processing of personal data by political parties.

## **POLICY IMPLICATIONS (including exit implications where appropriate)**

26. This communication is non-binding.
27. On 23 June 2016, the EU referendum took place and the people of the United Kingdom voted to leave the European Union. Until exit negotiations are concluded, the UK remains a full member of the European Union and all the rights and obligations of EU membership remain in force. During this period the Government will continue to negotiate, implement and apply EU legislation. The outcome of these negotiations will determine what arrangements apply in relation to EU legislation in future once the UK has left the EU.

## **CONSULTATION**

28. A consultation is not necessary in relation to this Communication.

## **IMPACT ASSESSMENT**

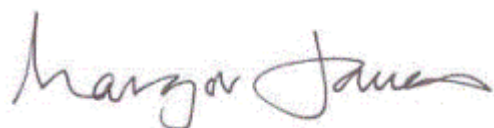
29. An impact assessment is not necessary in relation to this Communication

## **FINANCIAL IMPLICATIONS**

30. There are no financial implications in relation to this Communication.

## **TIMETABLE**

31. The Communication expects the proposed guidance to be in place before the 2019 European Parliament elections.

A handwritten signature in black ink that reads "Margot James". The signature is written in a cursive, flowing style.

**Margot James MP**  
**Minister for Digital and the Creative Industries**  
**Department for Digital, Culture, Media and Sport**