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NOTE

from: Presidency
to: Working Group on Information Exchange and Data Protection (DAPIX)
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FREMP 20 COMIX 82 CODEC 300
Subject: Proposal for a regulation of the European Parliament and of the Council on the
protection of individuals with regard to the processing of personal data and on the
free movement of such data (General Data Protection Regulation)
- Profiling

Delegations will find attached a Presidency note concerning profiling.

1. Background

During the 2014 March JHA Council, the Presidency has invited the Council to indicate whether the draft Regulation, like Directive 95/46, should limit itself to regulating automated decision-making namely (but not exclusively) based on profiles that provide legal effects or significantly affect individuals or should provide also for a specific regime regarding the creation and use of profiles. The majority of delegations appeared to be of the opinion that the scope of the profiling provision in the future General Data Protection Regulation should, like the current Directive 95/46/EC, limit itself to regulating automated decision-making that has legal effects or significantly affects individuals. Other delegations pleaded in favour of specific provisions on profiling. It was indicated that work at a technical level should therefore continue on that basis.

2. Main elements of the Presidency compromise

Following the indications provided by the Ministers, the Presidency has worked on a compromise text taking also into account also the Council's of Europe Recommendation CM/Rec (2010)13 on the protection of individuals with regard to automatic processing of personal data in the context of profiling.

The Presidency's compromise consisted of the following elements¹:

- a definition of "profiling", which circumscribes profiling to "a form of automated processing intended to create or use a personal profile to evaluate personal aspects relating to a natural person, in particular to analyse or predict aspects concerning performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements" (Article 4(12a));
- a definition of "profile" as "a set of data characterising a category of individuals that is intended to be applied to a natural person"(Article 4(12b));

¹ Latest Presidency texts on Profiling 5344/2/14 DATAPROTECT 4 JAI 22 MI 38 DRS 7 DAPIX 4 FREMP 4 COMIX 28 CODEC 91 and DS 1197/14 DATAPROTECT JAI MI DRS DAPIX FREMP COMIX CODEC.

- specific information requirements on the existence of automated decision making and/or profiling as well as the significance and the envisaged consequences of such processing for the data subject (Articles 14(1a)(h) and 14a(2)(h));
- a specific requirement under the right of access pertaining to the knowledge of the logic involved in any automated processing as well as to the significance and the envisaged consequences of such processing (Article 15(1)(h));
- a provision regulating automated decision making, which enshrines the principle that every data subject has the right not to be subject to a decision or a measure evaluating personal aspects relating to him or her based solely on automated processing, including profiling, which produce legal effects or severely affect him or her (Article 20(1)); such decisions are only possible if based on consent, contract or Union or Member State law (Article 20(2));
- a provision prohibiting decisions or measures of the type mentioned above to be taken on the basis of special categories of personal data, unless processing is based on (explicit) consent or Union or Member State law and suitable measures to safeguard the data subject's legitimate interests are in place (Article 20(3)).

The Presidency's aim was and remains to ensure that the provision to be adopted should not fall short of the level of protection offered by Article 15 of the current Data Protection Directive

3. Pending issues

The last discussions concerning profiling at technical level took place during the DAPIX meeting of 10-11 April 2014, following which the Presidency requested delegations to send comments on the redrafted text and invited replies to the following questions¹:

- *“What is currently regulated in your national law implementing Art 15 of the 1995 Directive? Is profiling as defined in Art. 4 (12a) covered by your national law?”*

¹ CM 02513/14.

- *“Do you consider decisions based solely on automated processing (in the meaning of Art. 15 of the Data Protection Directive) as identical with the notion of profiling (in combination with the notion of profile as defined in Art 4 (12b) or do you consider profiling as a sub-category of automated decision making?”*
- *“Do you consider a “profile” (conceived as information related to a natural person in his/her capacity as consumer or social networks user) as identical with the notion of profile as defined in Art. 4 (12b)?”*

The discussions at DAPIX as well as the subsequent replies provided by twelve delegations¹ have shown that there are still issues that require further clarification and that it is necessary to further streamline the text in order to improve its overall coherence.

Some delegations consider that there is still considerable confusion being created by the introduction of the definition of "profiling" and "profile", also in relation to their articulation with automated decision-making.

Some others considers that the two definitions could be a way forward with a preference being given to the definition of profiling as provided for under the IE Presidency text – taken over by the LT Presidency – which referred to "any form of automated processing" not to "a" form of automated processing². Under the IE and LT Presidencies texts the legal consequences of such a definition implied that there was a right of the data subject not to be subject to a decision producing legal effects concerning him or her or severely affected him or her but only when the decision was based on automated processing intended to create or use a profile (contrary to the situation present today in Directive 95/46/EC on automated individual decisions or the current compromise).

Within the definition of profiling itself, the aspect of “creating a profile” was also questioned.

¹ 6079/2/14 REV2 DATAPROTECT 20 JAI 58 MI 116 DRS 19 DAPIX 12 FREMP 20 COMIX 82 CODEC 300.

² 17831/13 DATAPROTECT 201 JAI 1149 MI 1166 DRS 223 DAPIX 158 FREMP 209 COMIX 700 CODEC 2973.

With respect to the Presidency questions, the replies of the Member States indicate that profiling has not been specifically defined in the national law implementing Directive 95/46/EC. Delegations also point out that profiling is a category/form of automated processing without necessarily providing the basis for decisions or measures having legal effects or severely affecting the data subject (i.e. automated decision making). It is also pointed out that not all profiling activities necessarily rely on automated processing.

Finally, a majority of the Member States replying to the questionnaire did not equate a “profile” conceived as information related to a natural person in his/her capacity as consumer or social networks user with the notion of profile as proposed in the Presidency compromise (a set of data characterising a category of individuals that is intended to be applied to a natural person).

4. Possible elements for a way forward

In light of the above and against the background of the 2014 JHA March Council ministerial guidance, the Presidency suggests considering the following avenues for advancing the discussion on automated individual decision making:

- Removing the definitions of “profiling” and “profile” and clarifying by means of a recital that “profiling” constitutes an example of a form of automated processing of personal data which could lead to automated decision making towards individuals;
- Maintaining the logic of Directive 95/46/EC in the core provision of the Draft Regulation (Article 20) and provide the right of the data subject not to be subject to a decision or to a measure, which produces legal effects or severely affects him or her and which is based solely on automated processing of data intended to evaluate certain personal aspects relating to him (such as his performance at work, creditworthiness, reliability, conduct) ;

- Examining whether further clarifications are necessary regarding automated decision making when based
 - on special categories of personal data, or
 - when based on a “personality profile”¹, in view of the particularly high risks of discrimination and possible attacks on individuals personal rights and dignity, especially as regards children;
- Streamlining further all the provisions relating to automated decision making (Articles 14, 14a, 15, 20 and corresponding recitals) with a view to ensure a coherent legal regime;
- Linked to the streamlining of the text, reconsider the terminology used in the title of Article 20 and use the concept of “Automated decision making” or “Automated individual decisions”.

¹ “Personality profile” is meant as a collection of personal data that permits an assessment of essential characteristics of the personality of a natural person).