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NOTE

from: Presidency
to: Working Group on Information Exchange and Data Protection (DAPIX)
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 the Presidency's revised proposals regarding profiling.

(58) The data subject should have the right – not to be subject to a decision based solely on automated processing, including such forms of processing such as profiling, intended to evaluate certain [personal] aspects relating to his or her performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements *which produces legal effects concerning him or her* or (which) severely affects him or her. However, such **processing** should be allowed when **explicitly** authorised¹ by Union or Member State law, including for fraud and tax evasion² monitoring and prevention purposes and to ensure the security and reliability of a service provided by the controller, or carried out in the course of entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, including specific information of the data subject and the right to obtain human intervention and an explanation of the decision reached after such assessment³. Profiling and automated decision making based on special categories of personal data should only be allowed under specific conditions.

¹ BE suggested adding ' or recommended', with regard to e.g. ECB recommendations.

² Further to MT suggestion.

³ Further to PL suggestion.

Article 4
Definitions

For the purposes of this Regulation:

.....

- (12a) 'profiling' means a form of automated processing (...) intended to create or use a (...) 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 movements¹;
- (12b) 'profile' means a set of data characterising a category of individuals that is intended to be applied to a natural person;

¹ BE, DE, ES, FR, PL, PT, RO, SE and UK scrutiny reservation on the definition of and further references to profiling. BE, LU, SI and RO would prefer reverting to the Council of Europe definition. FR would prefer to merge points (12a) and (12b); COM reservation.

Article 14

Information to be provided where the data are collected from the data subject¹

1a. In addition to the information referred to in paragraph 1, the controller shall provide the data subject² with such further information³ necessary to ensure fair and transparent processing in respect of the data subject⁴, having regard to the specific circumstances and context in which the personal data are processed⁵:

.....

(h) the existence of automated decision making and profiling referred to in Article 20(1) and information concerning (...) the processing, as well as the significance and the envisaged consequences of such processing for the data subject⁶.

.....

¹ DE, EE, ES, NL, SE, FI, PT and UK scrutiny reservation. DE, supported by ES and NL, has asked the Commission to provide an assessment of the extra costs for the industry under this provision.

² DE, EE, and PL asked to insert "on request". DE, DK, NL and UK doubted whether the redraft would allow for a sufficient risk-based approach and warned against excessive administrative burdens/compliance costs. DK and UK in particular referred to the difficulty for controllers in assessing what is required under para. 1a in order to ensure fair and transparent processing. DE, EE and PL pleaded for making the obligation to provide this information contingent upon a request thereto as the controller might otherwise take a risk-averse approach and provide all the information under Article 14(1a), also in cases where not required. UK thought that many of the aspects set out in paragraph 1a of Article 14 (and paragraph 2 of Article 14a) could be left to guidance under Article 39.

³ CZ suggested adding the word 'obviously'.

⁴ FR scrutiny reservation.

⁵ COM reservation on deletion of the words 'such as'.

⁶ SE scrutiny reservation.

Article 14 a

**Information to be provided where the data have not been obtained
from the data subject¹**

.....

2. In addition to the information referred to in paragraph 1, the controller shall provide the data subject with such further information necessary to ensure fair and transparent processing in respect of the data subject, having regard to the specific circumstances and context² in which the personal data are processed (...):

.....

(h) the existence of automated decision making and profiling referred to in Article 20(1) and (3) and information concerning (...) the processing, as well as the significance and the envisaged consequences of such processing for the data subject³.

.....

Article 15

Right of access for the data subject⁴

1. The data subject shall have the right to obtain from the controller at reasonable intervals and free of charge⁵ (...) confirmation as to whether or not personal data concerning him or her are being processed and where such personal data are being processed access to the data and the following information:

.....

(h) in the case of **automated decision making and profiling** referred to in Article 20, knowledge of the logic involved⁶ in any automated data processing as well as the significance and envisaged consequences of such processing⁷.

¹ DE, EE, ES, NL (§§1+2), AT, PT scrutiny reservation.

² ES, IT and FR doubts on the addition of the words 'and context'.

³ PL asks for the deletion of the reference to 'logic'.

⁴ CZ, DE, IE, FI and SE scrutiny reservation. DE, LU and UK expressed concerns on overlaps between Articles 14 and 15.

⁵ DE, FI and SE scrutiny reservation. DE, LU and UK expressed concerns on overlaps between Articles 14 and 15.

⁶ PL reservation on the reference to 'logic': the underlying algorithm should not be disclosed. DE reservation on reference to decisions.

⁷ NL scrutiny reservation. CZ and FR likewise harboured doubts on its exact scope.

Article 20

Automated decision making and profiling¹

1. The data subject shall have the right- not to be subject to a decision based solely on automated processing, including profiling, intended to evaluate certain [personal] aspects relating to his or her performance at work, economic situation, health, personal preferences, or interests, reliability or behaviour, location or movements and which produces legal effects concerning him or her or (which) severely² affects him or her³.

¹ DE, ES, FR, AT, PL, SE and UK scrutiny reservation. COM and HU reservation: COM is of the opinion that that the level of data protection in the current draft of this article is below that of Directive 95/46.

² DE and PL wondered whether automated data processing was the right criterion for selecting high risk data processing operations and provided some examples of automated data processing operation which it did not consider as high risk. PL would prefer to refer to 'significantly'. DE and ES pointed out that there are also cases of automated data processing which actually were aimed at increasing the level of data protection (e.g. in case of children that are automatically excluded from certain advertising).

³ DE thinks this provision must take account of two aspects, namely, whether and under what conditions a profile (= the linking of data which permits statements to be made about a data subject's personality) may be created and further processed, and, secondly, under what conditions a purely automated measure based on that profile is permissible if the measure is to the particular disadvantage of the data subject. DE would like to see a rule included on profiling in regard to procedures for calculating the probability of specific behaviour (cf. Article 28b of the German Federal Data Protection Act, which requires that a scientifically recognized mathematical/statistical procedure be used which is demonstrably essential as regards the probability of the specific behaviour).

1a. A data subject may be subject to a decision referred to in paragraph 1 in the following cases and under the condition that the data controller implements all suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, such the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision¹:

- (a) is necessary for the entering into, or performance of, a contract between the data subject and a data controller¹ or
- (b) is (...) authorized by Union or Member State law to which the controller is subject and which also specifies suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or
- (c) is based on the data subject's explicit consent (...).

2. (...)

3. Automated **decision making and profiling** shall not² (...) be based on special categories of personal data referred to in Article 9(1), unless points (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's legitimate interests are in place³.

4. (...)

5. (...)⁴

¹ NL had proposed to use the wording 'and arrangements allowing him to put his point of view, inspired by Article 15 of Directive 95/46..

² CZ and PL pleaded in favour of introducing 'solely'.

³ BE, FR, IT, PL, PT, AT, SE and UK reservation FR and AT reservation on the compatibility with the E-Privacy Directive. BE would prefer to reinstate the term 'solely based', but FR and DE had previously pointed out that 'not ... solely' could empty this prohibition of its meaning by allowing sensitive data to be profiled together with other non-sensitive personal data. DE would prefer to insert a reference to the use of pseudonymous data.

⁴ PL suggested adding the following para.: 'The European Data Protection Board shall be entrusted with the task of issuing guidelines, recommendations and best practices in accordance with Article 66 paragraph 1(b) and (ba) for further specifying the criteria and conditions for profiling pursuant to paragraph 2'.