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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 proposals regarding profiling.

- 58) Automated processing of personal data and profiling should be subject to specific conditions to safeguard the rights and freedoms of the data subject. In particular the principles and the conditions for the lawfulness of processing personal data should apply. Every data subject should have the right not to be subject to a decision which is based on automated processing of data intended to evaluate certain personal aspects relating to a natural person. However, such processing should be allowed when expressly authorised by Union or Member State law, including for fraud 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 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 (...). Automated processing and profiling (...) based on special categories of personal data should only be allowed under specific conditions.

Article 4
Definitions

For the purposes of this Regulation:

.....

(12a) 'profiling' means any form of automated processing (...) intended to create or use a (...) profile by evaluating personal aspects relating to a natural person, in particular the analysis and prediction of 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, RO and SE scrutiny reservation. BE, FR, LU, SI and RO would prefer reverting to the Council of Europe definition. 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 shall² provide the data subject 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 **processing** referred to in Article 20(...) and information concerning (...) the **processing**, as well as the significance and the envisaged consequences of such **processing for** the data subject.⁶

.....

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 **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 subject.³*

.....

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'.

Article 15

Right of access for the data subject¹

1. The data subject shall have the right to obtain from the controller at reasonable intervals and free of charge² (...) 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 **processing** referred to in Article 20, knowledge of the logic involved³ in any automated data processing as well as the significance and envisaged consequences of such processing⁴.

.....

¹ DE, FI and SE scrutiny reservation. DE, LU and UK expressed concerns on overlaps between Articles 14 and 15.

² DE, ES, HU, IT and PL reservation on the possibility to charge a fee. DE, LV and SE thought that free access once a year should be guaranteed.

³ PL reservation on the reference to 'logic': the underlying algorithm should not be disclosed. DE reservation on reference to decisions.

⁴ NL scrutiny reservation. CZ and FR likewise harboured doubts on its exact scope.

Article 20

Automated processing and profiling¹

1. Every data subject shall have the right not to be subject to a decision based solely on automated processing of data intended to evaluate certain personal aspects relating to a natural person, such as 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 severely² affects him or her unless such processing **is subject to suitable measures to safeguard the data subject's rights and freedom and his or her legitimate interests, such as the rights of the data subject to obtain human intervention on the part of the controller, to express his or her point of view, and to contest the decision, and:**
 - (a) is **necessary for** the entering into, or performance of, a contract between the data subject and a data controller and suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the rights of the data subject to obtain human intervention on the part of the controller, to express his or her point of view, and to contest the decision³; or
 - (b) is (...) authorized by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate interests; or
 - (c) is based on the data subject's explicit consent (...).

¹ DE, ES, FR, AT, PL, SE and UK scrutiny reservation. COM 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. 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 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. BE suggested adding this for each case referred in paragraph 2.

- 1a. In accordance with this Regulation and in particular with Articles 5 and 6, profiling may take place only under condition that:**
- (a) the profile shall not be processed for any other purpose than the one for which it is created and used, in particular not for the purpose of supporting measures or decisions which produce legal effects concerning the data subject or severely affects him or her, unless point (a), (b) or (c) of paragraph 1a applies; and**
- (b) the controller implements appropriate measures to safeguard the rights and freedoms of the data subject, including information on the existence of profiling as well as on the significance and the envisaged consequences of the profiling in accordance with point (h) of Article 14(1a) and point (h) of Article 14a(2)¹.**
2. (...)
3. **Processing referred to in paragraphs 1 and 1a shall not (...) 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 interests² are in place.**
4. (...)
5. (...)

¹ 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).

² 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.