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PROFILING OF DATA SUBJECTS

The introduction of restrictions on profiling is probably one of the most relevant novelties introduced by the GDPR, which seeks to protect data subjects from practices nowadays common in the information society, such as the analysis of information through data mining techniques. Such techniques allow the extraction of new information that can be used for different purposes, such as sorting data subjects by profiles or making automated decisions.

Current situation

Although Directive 95/46/EC does not expressly define the concept of “profiling”, it does include some tangential references to it. Article 15 of the Directive expressly refers to the automated processing of a data subject’s personal data conducted to evaluate aspects concerning him or her (the Directive mentions, by way of example, his or her performance at work, creditworthiness, reliability or conduct). This provision allows Data Controllers to make automated individual decisions, based on profiled data, in two ways: (i) when the decision is taken in the course of the entering into, or performance, of a contract between the Data Controller and the data subject, or (ii) when it is authorized by a law that also contains measures to safeguard the interests of the data subject. On the other hand, the first paragraph of Article 15 indicates that Member States must guarantee to any data subject the right not to be subject to automated decisions that produce legal effects that concerns them or significantly affects them. This kind of processing includes what is currently known as “profiling”.

In addition, Article 12(a) of the Directive establishes that data subjects have the right to obtain from the Data Controller, in the context of a right of access request, knowledge of the logic involved in the automated decision-making process, which also includes the logic involved in an earlier stage: the preparation of the profiled data.

What’s new?

The GDPR now includes a definition of “profiling” in Article 4(4). Profiling is defined as *“any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements”*. Profiling therefore comprises of two elements: (i) the automated processing of a person's data, and (ii) the extraction of different kinds of conclusions about a data subject or to predict his or her behaviour.

Profiling is a type of processing of personal data, so the Data Controller must have a legal ground for such processing and observe all the data protection principles. When performing profiling, Recital 71 of the GDPR imposes on the Data Controller the obligation to use appropriate mathematical and statistical procedures to ensure that the results are accurate and the risk of error is minimal. These procedures should also prevent possible discriminatory consequences that may arise because of criteria such as race or ethnicity, political opinions or religious beliefs, health status, sexual orientation or any other type of sensitive information.

Profiled data can have multiple uses, but the GDPR only expressly mentions two of them: (i) for automated decision making process, and (ii) for direct marketing purposes.

It is quite common for profiling to be used to facilitate companies with their decision-making process. Thus, Article 22 of the GDPR states that a data subject has the right not to be subject to the profiling which produces legal effects concerning him or her or significantly affects him or her. However, the Data Controller shall be entitled to carry out profiling, in any case, provided that:

- i.) it is necessary to enter into, or perform, a contract between the Data Controller and the data subject, or;
- ii.) it is authorized by a EU or the corresponding EU Member State law which also includes measures to safeguard the data subject's rights, freedoms and interests, or;
- iii.) it is based on the data subject's explicit consent.

GDPR also includes express references in Article 21.2 and in Recital 70 to the use of profiled data for the purposes of direct marketing. In such a case, the data subject has the right to object to such processing to the extent it relates to direct marketing.

Regardless of the purpose of the profiled data, the Data Controller must inform affected data subjects of the profiling and its consequences, as well as the logical methodology used to carry it out.

Furthermore, the Data Controller will be required to carry out privacy impact assessments in relation to such processing operation, as profiling could result in a high risk of the data subject's rights and freedoms. Article 35 of the GDPR states that *"a data protection impact assessment referred to [Article 35.1] shall in particular be required in the case of: (a) systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling"*.

Finally, in relation to the activity of companies located outside the EU, the development of profiling activities increases the likelihood of GDPR applicability since, as set out in Chapter 1 of this Guide ("Territorial Scope"), one of the criteria used to determine GDPR territorial scope is the monitoring of data subjects residing within the EU. Recital 24 of the GDPR clarifies that profiling is a key element in determining whether monitoring is being carried out.

What to do to adapt?

Data Controllers who conduct profiling activities must check that they have a legal ground to carry out profiling and inform data subjects of its profiling activities, its logic and its consequences.

In addition, Data Controllers must also carry out privacy impact assessments in relation to its profiling operations, which shall need to be documented in order to comply with the accountability principle introduced by the GDPR.

Practical example

A company that provides marketplace and intermediation services between customers and sellers in the sports sector has decided to improve the accuracy of the target audience of its newsletter, which contains special promotions of certain items. The company has started a profiling operation in order to identify customers who are likely to be interested in buying American Football helmets. The company therefore creates a new database, comprising its North American male customers aged between 14 and 40, with the aim of sending them a specific newsletter with information on the American Football helmets.

The company has carried out a profiling activity, therefore it must comply with all the obligations stated in this Chapter of the Guide.

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