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Comment

Clarity, surprises, and further questions in the Article 29 Working Party draft guidance on automated decision-making and profiling

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A B S T R A C T

The Article 29 Data Protection Working Party's recent draft guidance on automated decision-making and profiling seeks to clarify European data protection (DP) law's little-used right to prevent automated decision-making, as well as the provisions around profiling more broadly, in the run-up to the General Data Protection Regulation. In this paper, we analyse these new guidelines in the context of recent scholarly debates and technological concerns. They foray into the less-trodden areas of bias and non-discrimination, the significance of advertising, the nature of "solely" automated decisions, impacts upon groups and the inference of special categories of data—at times, appearing more to be making or extending rules than to be interpreting them. At the same time, they provide only partial clarity – and perhaps even some extra confusion – around both the much discussed "right to an explanation" and the apparent prohibition on significant automated decisions concerning children. The Working Party appears to feel less mandated to adjudicate in these conflicts between the recitals and the enacting articles than to explore altogether new avenues. Nevertheless, the directions they choose to explore are particularly important ones for the future governance of machine learning and artificial intelligence in Europe and beyond.

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1. Background

In relation to a data subject, Article 22 of the General Data Protection Regulation (GDPR)[1] prohibits (with exceptions) any "decision based solely on automated processing, including profiling, which produces legal effects concerning him or her or similarly significantly affects him or her". This right was ported to the GDPR from the Data Protection Directive (DPD) 1995 (arts 12(a) and 15),[2] and itself borrowed from early French data

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[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), OJ 2016 L 119/1.

[2] Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to

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protection (DP) law.[3] The intent of the 1995 provision was to respond to fears in the early days of digitisation that automated, and hence potentially inscrutable and unchallengeable, decisions might prejudice access to important facilities such as credit, housing or insurance. In practice, the provision was little known and largely unused. However since it was migrated to Article 22 of the GDPR with little substantive change, the right has become the subject of much academic attention[4] for its possible utility in curbing the power of complex, opaque and often invisible machine learning (ML) algorithms. Such systems commonly now make or, more often, support decisions of huge citizen and consumer importance in public and private sector domains such as criminal justice, welfare, taxation, search, marketing, entertainment and political opinion-making. Much concern has been raised in legal, policy and journalistic circles over whether such systems may create discriminatory, biased or unfair results.[5]

Art 22 is not a simple article to construe, being rife with exceptions and complications. The right is excluded if the decision is necessary for a contract, authorised by Member State law, or based on explicit consent. If the first or third exceptions apply, then minimum explicitly prescribed safeguards must be put in place. Furthermore if the decision is based on "special" categories of personal data (defined in art 9 of the GDPR and including sensitive data such as health, race and religion), then automated decision-making is only allowed on the basis of explicit consent or substantial public interest (usually where lives are at risk) and again, "safeguards" must be put in place. What these "safeguards" entail has become particularly controversial especially when considering if, as some have claimed,[6] a "right to an explanation" of how or why algorithmic system made a decision is implied or explicit in the GDPR.

Art 22 is not the only part of the GDPR to have been pressed into service to regulate the rise of algorithmic decision-making. Information and access rights in arts 13–15, again derived from a longstanding pedigree in the DPD but now interestingly tweaked, provide for the first time that data subjects must be informed of the very existence of automated decision-making, including profiling, in addition to "meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject". What this "meaningful information" might entail, both in theory and practice, has again become a subject of considerable enquiry.[7]

Against the backdrop of this renewed global interest in art 22 and other parts of the GDPR as remedies with which to "enslave the algorithm",[8] the Article 29 Data Protection Working Party (A29WP)'s release of their draft guidance on "Automated individual decision-making and Profiling"[9] has been eagerly awaited. The document is wide ranging, and weightier (in a literal sense, by page count) than any other GDPR guidance yet published by the body. Included are the definitions of both automated decision-making and profiling; elaborations and analysis of the specific automated decision-making provisions in Article 22; as well as the more general provisions on profiling and automated decision-making elsewhere in the GDPR. In addition, specific issues on children and data protection impact assessments (DPIAs) are explored. Best practice recommendations and a reading list are annexed.

2. Implications for information and access rights

In an important paper, Wachter et al. claim the information and access rights in Section 2 of the GDPR only guarantee general and *ex ante* information around algorithmic systems rather than *ex post* information about how an automated decision related to a particular data subject's circumstances was generated.[10] This conclusion has been relatively controversial, particularly in relation to how much 'heavy lifting' is done by the new addition of the term "meaningful" in comparison to the DPD.[11]

Implicitly and without fanfare, the A29WP appears to align themselves with Wachter et al's view, by agreeing that the arts 13–15 right to "meaningful information about the logic involved" provides a "more general form of oversight", rather than "a right to an explanation of *a particular* decision" [italics original].[12] The information should consist of "simple ways to tell the data subject about the rationale behind, or the criteria relied on in reaching the decision, without necessarily always

the processing of personal data and on the free movement of such data, OJ 1995 L 281/31.

[3] Lee A Bygrave, 'Minding the Machine: Article 15 of the EC Data Protection Directive and Automated Profiling' (2001) 17 Computer Law & Security Report 17 at 17.

[4] Bryce Goodman and Seth Flaxman, 'European Union regulations on algorithmic decision-making and a "right to explanation" ' (ICML Workshop on Human Interpretability in Machine Learning (WHI 2016), New York, NY, 2016); Mireille Hildebrandt, 'The Dawn of a Critical Transparency Right for the Profiling Era' in J Bus and others (eds.) *Digital Enlightenment Yearbook 2012* (IOS Press, 2012); Dimitra Kamarinou, Christopher Millard and Jatinder Singh, 'Machine Learning with Personal Data' (2016) Queen Mary School of Law Legal Studies Research Paper No. 247/2016; Sandra Wachter, Brent Mittelstadt and Luciano Floridi, 'Why a right to explanation of automated decision-making does not exist in the General Data Protection Regulation' (2017) 7 International Data Privacy Law 76; Lilian Edwards and Michael Veale, 'Slave to the Algorithm? Why a "Right to an Explanation" is Probably Not the Remedy You Are Looking For' (2017) 16 Duke Law and Technology Review 18.

[5] See eg Campolo and others, *AI Now 2017 Report* (AI Now Institute 2017); Solon Barocas and Andrew Selbst, 'Big Data's Disparate Impact' 104 California Law Review 671.

[6] Goodman and Flaxman *op. cit.*

[7] Edwards and Veale (n 4).

[8] Lilian Edwards and Michael Veale, 'Enslaving the algorithm: From a "right to an explanation" to a "right to better decisions" ' (Brussels Privacy Symposium, Vrije Universiteit Brussel, 2017). Available on SSRN: https://ssrn.com/abstract=3052831.

[9] Article 29 Working Party (A29WP), 'Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679' (WP 251, 3 October 2017). <https://perma.cc/3X54-2DGC>.

[10] Wachter and others *op. cit.*

[11] See eg Andrew Selbst and Solon Barocas, 'Regulating Inscrutable Systems', draft on file with authors; cf Andrew Selbst and Julia Powles, 'Meaningful Information and the Right to Explanation' (2017) 17 International Data Privacy Law <https://ssrn.com/abstract=3039125> accessed 10 December 2017.

[12] A29WP (n 9), section 2 at 24.

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