Comment

Clarity, surprises, and further questions in the Article 29 Working Party draft guidance on automated decision-making and profiling

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ABSTRACT

The Article 29 Data Protection Working Party’s recent draft guidance on automated decision-making and profiling seeks to clarify European data protection (DP) law’s little-used right to prevent automated decision-making, as well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...
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 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.

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, 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.

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”, the Article 29 Data Protection Working Party (A29WP)’s release of their draft guidance on “Automated individual decision-making and Profiling” 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. 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.

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]. 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

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5 Goodman and Flaxman op. cit.
6 Goodman and Flaxman op. cit.
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