

## ARTICLE 29 DATA PROTECTION WORKING PARTY



**Advice paper on essential elements of a definition and a provision on profiling within the EU General Data Protection Regulation**

**Adopted on 13 May 2013**

This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

The secretariat is provided by Directorate C (Fundamental Rights and Union Citizenship) of the European Commission, Directorate General Justice, B-1049 Brussels, Belgium, Office No MO-59 02/013.

Website: [http://ec.europa.eu/justice/data-protection/index\\_en.htm](http://ec.europa.eu/justice/data-protection/index_en.htm)

## **Advice paper on essential elements of a definition and a provision on profiling within the EU General Data Protection Regulation**

The connection and linking of personal data to create profiles may have significant impacts on the basic right to data protection. Profiling enables a person's personality or aspects of their personality – especially behaviour, interests and habits – to be determined, analyzed and predicted. In many cases this is done without the data subject's knowledge. This is why data subjects can be treated with insufficient transparency and therefore may feel unable to exercise sufficient control over the processing of their personal data.

Profiling has found its way into many areas of life in the form of consumer profiles, movement profiles, user profiles and social profiles, for example. However, due to the widespread availability and possibility of linking data on the Internet and the fact that technical devices whose operation is based on the processing of personal data pervade our everyday lives, the online world can present one of the biggest challenges to the right to the protection of one's personal data in the 21st century, considering, for example, the geo-location capabilities of mobile devices that most of us carry with us most of the time. Also, the back-drop of Big Data needs to be taken into account here.

As already stated in its Opinion 01/2012 on the data protection reform proposals (WP 191)<sup>1</sup> the Working Party believes that more must be done to explain and mitigate the various risks that profiling can pose.

With respect to the ongoing legislative debate in the European Parliament and the Council the Working Party proposes the following essential elements for a definition and provision on profiling within the new EU data protection legal framework:

### **1. Proposal for a definition on profiling**

In the light of the increasing usage of profiling technologies in the private and in the public sector and their possible impacts on the basic right to data protection, the Article 29 Working Party deems it is necessary to include a definition of profiling in Article 4 of the General Data Protection Regulation. This view is shared by the Rapporteur of the European Parliament for the General Data Protection Regulation, Jan Albrecht<sup>2</sup>.

Based on the 2010 Council of Europe Recommendation on profiling<sup>3</sup> and the Commission's wording in Article 20(1), the Working Party proposes the following definition:

“Profiling” means any form of automated processing of personal data, intended to analyse or predict the personality or certain personal aspects relating to a natural person, in particular the analysis and prediction of the person's health, economic

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<sup>1</sup> Opinion 1/2012 on the data protection reform proposals, WP 191, p. 14

<sup>2</sup> Draft report on the proposal for a regulation of the European Parliament and of the Council on the protection of individual with regard to the processing of personal data and on the free movement of such data (General Data Protection Regulation) of 16 January 2013 (COM(2012)0011 – C7-0025/2012 – 2012/0011(COD), Amendment 87, p. 66.

<sup>3</sup> Council of Europe, Recommendation CM/Rec(2010)13 of the Committee of Ministers to member states on the protection of individuals with regard to automatic processing of personal data in the context of profiling of 23 November 2010

situation, performance at work, personal preferences or interests, reliability or behaviour, location or movements.

## **2. Improving Article 20**

### **a. Scope**

Article 20(1) of the General Data Protection Regulation as proposed by the Commission has developed the basic elements of Article 15 of the Directive 95/46/EC, but the provision still merely focuses on the outcome of profiling – i.e. *“a measure which produces legal effects concerning this natural person or significantly affects this natural person”* – rather than profiling as such, i.e. the creation and the use of personal profiles by data controllers, before a measure or even decision is taken which has an effect on the data subject.

The Article 29 Working Party deems it necessary to take a step back: A comprehensive approach should determine specific legal requirements not only for the usage and further processing of personal data but already for the collection of data for the purpose of profiling and the creation of profiles as such. It therefore welcomes Rapporteur Albrecht’s proposal to broaden the scope of Article 20 covering processing of personal data for the purpose of profiling or measures based on profiling.<sup>4</sup> The Working Party regards this as a necessary step towards more legal certainty and more protection for individuals with respect to data processing in the context of profiling.

The Working Party suggests to include in Article 20 the following additional elements in order to provide for a balanced approach on profiling and mitigate the risks for data subjects:

### **b. Greater transparency and control for data subjects**

From the perspective of the data subject, a mitigation of risks may particularly be achieved by greater transparency and more individual control on the decision on whether or not own personal data may be processed for the purpose of profiling or measures based on it.

Building on CoE Recommendation CM/Rec(2010)13, para. B(4), Article 20 should therefore provide for additional information requirements for data controllers, including information that personal data will be used in the context of profiling, the purposes for which the profiling is carried out and the logic involved in the automatic processing.

As regards the aspect of control and lawfulness, the Working Party underlies to uphold the legal grounds for processing as contained in Article 20(2) of the Commission’s proposal. It underlines in particular the importance of explicit consent as a legal basis for data processing also in the context of profiling.

Data subjects should also have the right to access, to modify or to delete the profile information attributed to them and to refuse any measure or decision based on it or have any measure or decision reconsidered with the safeguard of human intervention.

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<sup>4</sup> Draft report, *ibid.*, Amendment 38 (Recital 58), p. 32, Amendment 158, p. 104

### **c. More responsibility and accountability of data controllers**

As concerns the data controller, a higher degree of responsibility and accountability with respect to the usage of profiling techniques are key aspects of risk reduction. In particular, profiling should be subject to suitable measures to safeguard the data subject's rights and freedoms, where appropriate taken on the basis of a data protection impact assessment as foreseen in Art 33 of the General Data Protection Regulation.<sup>5</sup> Such safeguards should comprise the usage of data protection friendly technologies and standard default settings, particularly in the online world, as well as specific measures for data minimization, including obligations or incentives for controllers for anonymization or pseudonymization in the context of profiling, and data security as well as human intervention in defined cases.

### **d. A balanced approach to profiling and role of the EDPB**

Given the fact that profiling may have different effects on individuals' privacy the Article 29 Working Party deems it necessary to take a balanced view. The new EU Data Protection Regulation should provide for clear rules on the lawfulness and on the conditions for the processing of personal data in the context of profiling on the one hand, while on the other hand leave a reasonable degree of discretion to assess the actual effects – positive and negative – and the degree of intrusiveness of a specific processing type or measures on data subjects.

The Working Party therefore supports an approach in Article 20(1), which covers profiling or measures based on it to the extent only that they significantly affect the interests, rights or freedoms of the data subject. Where profiling does not significantly affect the interests, rights or freedoms of the data subject, Article 20 does not apply and the lawfulness of processing is to be assessed in the light of the other provisions of the Regulation. However, given the broadness of the term “significantly affect”, a mechanism is needed to interpret and specify this phrase for practical application. This mechanism should not only take the scope of the basic right to data protection into account. It should also assess the interests of controllers and should comprise an analysis of possible and actual impacts of profiling technologies on data subjects' rights and freedoms.

In the view of the Working Party, this task could best be performed by the European Data Protection Board, which should be empowered to issue guidelines on the interpretation and application of Article 20 in specific processing contexts.

Done at Brussels, on 13 May 2013

*For the Working Party*  
*The Chairman*  
*Jacob KOHNSTAMM*

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<sup>5</sup> The Article 29 Working Party repeatedly dealt with Privacy Impact Assessments as a tool to implement data protection in IT procedures or IT systems, see as an example Opinion 9/2011 on the revised Industry Proposal for a Privacy and Data Protection Assessment for RFID Applications (including Annex), WP 175