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Isabelle Falque-Pierrotin
Chairman Working Party Article 29
JUST-ARTICLE29WP-SEC@ec.europa.eu
presidenceg29@cnil.fr

28 November 2017

Re: Guidelines on Automated individual decision-making and profiling for the purposes of Regulation 2016/679

Dear Ms Isabelle Falque-Pierrotin,

The 39 European credit reference agencies (CRAs) members of ACCIS, the Association for Consumer Credit Information Suppliers, welcome the opportunity to comment on the Guidelines on Automated individual decision-making and Profiling of the Article 29 Data Protection Working Party.

On the prohibition of fully automated decision-making (page 12).

The Guidelines examine Article 22(1) from a restrictive perspective. Often the text in the Guidelines refers to 'prohibited' conducts that data controllers should refrain from incurring. For example, on page 12, where the Guidelines read "*Article 22(1) sets out a general prohibition*" […].

Presenting Article 22(1) as if it imposes a prohibition that limits or restricts what the data controller may do is not aligned to the intent and letter of the GDPR. Reasons:

i. Article 22(1) in the GDPR refers to the right of the data subject not to be subject to decision-making based solely on automated processing. It does not impose a 'prohibition' on controllers. There is no reference to Article 22(1) as a 'prohibition' in the GDPR Articles or Recitals. The legal basis for profiling remains Art 6(1) f).

ii. There are prohibitions in the GDPR that are identified as such within the agreed GDPR text[1]. These contrast with the wording in Article 22(1). It is therefore clear in both the text (Article 22(1)) and the interpretative Recital (71) that this should be interpreted as a data subject's right.

iii. We also consider that to adopt a prohibition stance does not meet the intention behind the agreed GDPR text. This is because two proposed provisions that would have included a "prohibition" into Article 22 of the GDPR were not agreed and were not adopted into the final text. An earlier draft of the European Parliamentary GDPR proposals included what was, in effect, a prohibition on automated decision-making. It would have had the GDPR restrict measures based on profiling so that these "*shall not be based solely or predominantly on automated processing*." This is wording that did not make the final agreed text.

[1] For example: Article 9(1) and its interpretative Recitals, 51 & 52; Article 44 and its interpretative Recital 107; and Article 6(4) and its interpretative Recital 50.

As a conclusion, we are concerned that if the WP29's interpretation of GDPR Article 22 is agreed with provision that this should be construed as a "prohibition":

i. This will be an incorrect interpretation on the text, and
ii. It will have significant consequences for both financial institutions and consumers which were not necessarily foreseen at the time of GDPR adoption.

On the disclosure of the 'logic involved' (page 14)

According to Articles 13(2) (f), 14(2) (g) and 15(1) h), if a data controller is making automated decisions as described in Article 22(1), it has to provide meaningful information about the 'logic involved'. According to the Guidelines (page 14), the controller should: "*find simple ways to tell the data subject about the rationale behind, or the criteria relied on in reaching the decision*". We agree with this statement. That said, our interpretation to date has been that Article 22 should have little new impact to the activity by which CRAs build and model scores, given that the building of scores is not a decision-making activity in itself. CRAs do not make lending decisions. Our longstanding view, which has been shared with you earlier this year at the April Fablab, is that it is only at the point that scores are used in a decision by a lender that a decision is made, and in the CRA's understanding, then falls within Article 22(1).

The Guidelines elaborate further as the aforementioned sentence continues: '*without **necessarily always** attempting a complex explanation of the algorithms used or disclosure of the full algorithm*' [**our emphasis**]. We think that this addition will be harmful to the risk assessment models of the financial sector for the following:

i. The additional text suggests that a starting point is disclosing aspects of algorithms, whereas the GDPR states that meaningful information should be provided and the guiding principle is that of fairness and transparency.

ii. The rights of the data subject are sufficiently ensured as transparency is granted with Articles 13, 14 and 15 and the right of rectification and erasure (Articles 16 and 17) in regard to any personal data used for profiling.

iii. Our concern is that any further elaboration has the propensity to erode intellectual property. The disclosure of algorithms on any occasion would be an issue, both in terms of competition and protection of intellectual property rights. It should rather be stated, that - in principle - the right of the data subject does not include the disclosure of the full algorithm.[2]

iv. Setting aside for one moment the trade secret issues this sentence continuation potentially raises, we should also be mindful of the societal benefit of providing higher-level information, such as minimising the propensity for exploitation and credit fraud.

[2] This view has been confirmed by the Germany Federal Court of Justice 28.01.2014 – VI ZR 156/13, which ruled that there is an overriding protectable interest in not disclosing algorithms (as industry property rights) to the public. According to this judgement, no information has neither to be given on the fact which data to what extent influenced the profile/score, which categories have been used or which category a data subject has been assigned to. Otherwise the algorithm would be disclosed.

In conclusion, we raise concerns with the elaboration in the Guidelines on meaningful information pertaining to algorithms other than '*finding simple ways to tell the data subject about the rationale behind, or the criteria relied on in reaching the decision'*. In our view, this reinforcement suffices to maintain the balance of the EU fundamental rights and freedoms of data subjects and those of organisations to conduct their business and protect their intellectual property rights and trade secrets as intended under Recital 63.

We are at your disposal for any questions.

Yours sincerely,

Enrique Velázquez
Director General
ACCIS