CONFEDERATION OF INDUSTRY
OF THE CZECH REPUBLIC

PRAGUE, 28 NOVEMBER 2017

Position to the material of Article 29 Working Party: Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679

INTRODUCTION

Profiling is a frequent process included into a modern way of data processing: it is immanently connected with big data analytics, in artificial intelligence machine learning and the automated decisions or automated deductions or recommendations are an efficient tool how to ensure a very quick and objective result from the evaluation process. Therefore, for data controllers, the new duty imposed by GDPR to refrain from adopting solely automated decisions based on profiling, with certain narrow number of exemptions from this rule, represents a remarkable endangerment of their legal certainty if they would be entitled to legally use their new technologies simplifying and accelerating their decision-making procedures.

In this regard, the present Guidelines proposed by WP 29 represent a very important sign to all the service providers, basing their services on processing also the personal data. A sign leading to the decision whether new technologies can represent a positive factor within decision-making procedures, or if they should, in the opposite, more invest into the capacity and expertise of their human decision-makers.

New duties concerning ban of solely automated decisions based on profiling in certain cases represent remarkable new administrative burden for the data controllers as well as certain legal uncertainty; however, the Commission, when presenting GDPR Proposal, has not paid enough attention to this new burden and has not evaluated the potential impacts of GDPR in this field. In this situation, the data controllers and data processors seek for clear and understandable guidance precising their obligations and offering possible simple recipes and sets of good practices examples on how to get compatible with their duties arising from GDPR in the field of profiling and automated decision making.

We are, therefore, expecting from the present WP 29 Guidelines to fulfil these expectations and, especially, to give the data controllers a comprehensive guide, how should they handle the new duties in the field of profiling and automated decision making at one side and not to resign on using new technologies enabling automated (and, therefore, strictly objective and, for more, very exact and quick) evaluation of the processed data (including personal data) and consequent easing of decision-making procedures.

Following the publication of the present Guidelines approved at the meeting of the Article 29 Working Party as an advisory body of the European Commission in the field of personal data protection on 3th October 2017, Confederation of Industry of the Czech Republic (further referred as “SP CR”) would like to make the following comments to the published document:

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INTRODUCTORY REMARKS OF SP CR:

- *WP 29 in the present Guidelines explains that profiling means gathering information about an individual (or group of individuals) and analysing their characteristics or behaviour patterns in order to place them into a certain category or group, and/or to make predictions or assessments about, for example, their ability to perform a task, interests or likely behaviour.[1] To complete the initial description of the terminology, WP 29 explains that automated decisions can be based on any type of data, for example data provided directly by the individuals concerned (such as responses to a questionnaire), data observed about the individuals (such as location data collected via an application) and/or derived or inferred data such as a profile of the individual that has already been created (e.g. a credit score).[2] Only the third case is a case of an intersection of the issues of profiling and automated decision, where GDPR implies special set of obligations to data controllers.*

- *WP 29 in its Guidelines reasonably admits that an automated decision based upon profiling may lead to increased efficiency and resources savings[3]. **Limiting these procedures by GDPR will, therefore, obviously cause, in the opposite, a decreased efficiency and more financial requirements (dedicated to a personal capacity to ensure a human element within the decision making procedures etc.). However, the European legislator did not pay any attention to this new administrative and financial burden caused to the data controllers and data processors by GDPR.** Therefore, it would be fair from WP 29 to explain why GDPR imposed such a burden and if it, from the other side, will lead into a better position of a data subject. Nonetheless, there is no such an explanation to be found in the present Guidelines.*

- *Among the exceptional cases where the automated decision making based on profiling is allowed, there is the **"performance of a contract" exemption** described as not including solely the point of view of a data controller (greater consistency or fairness of the decision making process, reduction of risk of customers failing to meet payments for goods or services and/or enabling to deliver decisions within a shorter time and improving the efficiency), but also other points, similarly as described in the WP 29 Opinion on legitimate interest, should be present. **This explication is, however, not sufficient for the data controllers and, for their better legal certainty, they reasonably expect deeper explication from the part of WP 29 what should and should not be considered as a necessity to perform a contract. We therefore suggest to use, as a good practice example, possible blacklisting of such cases.***

- *In the present Guidelines, **WP 29 does not describe in a clear and understandable way, what is the actual difference between "legal effects" and "similarly significant effects" and does not describe how serious do the "similarly significant effects" have to be to be able to cause the ban of automated decision making**. There should be also described more examples on where the decision*

[1] See page 7 of the present Guidelines.

[2] See page 8 of the present Guidelines.

[3] See page 5 of the present Guidelines.

has the potential to significantly influence the circumstances, behaviour or choices of the individuals concerned[4] *caused by other than legal effects.*

Following this general evaluation, SP CR further formulates its recommendations which should, according to our opinion, lead to the revision of the present Guidelines so that it will ensure better applicability of GDPR, mainly in the practice within enterprises. In the same time, we use this opportunity to comment the proposed text of the Guidelines with the aim to attract the attention to some unclear points and, therefore, to eliminate the possible negative impacts of the Guidelines.

SPECIFIC COMMENTS:

According to our opinion, WP29 goes outside the scope of GDPR in the following points:

- ***Interpretation of the right of a data subject not to be subject to a decision based solely on automated processing, including profiling as the direct prohibition of fully automated individual decision-making including profiling:*** *the respective Art 22 of GDPR implies that the data subject "shall have the right not to be subject.."; however, WP 29, according to our opinion, goes with its interpretation beyond this text of GDPR explaining that, "as a rule, there is a prohibition on fully automated individual decision-making"*[5] ***It should be explained why WP 29 uses such a kind of interpretation and why it deduced that the right not to be subject to an automated decision making should not be interpreted as the right to invoke such a kind of decision making. In the other case (if the explanation will not be provided or actually does not exist), WP 29 should admit that a "milder" interpretation should take place, that is to say that the right not to be subject to an automated decision based on profiling only means that a data subject has the right to oppose such a kind of decision making.***

RECOMMENDATIONS:

Following the aforementioned points, SP CR recommends to:

1. ***In Section A Profiling to make clearer what constitutes Profiling (page 6-7):*** *Make clear that profiling under the GDPR requires action to be taken on collected data to evaluate, analyse or predict personal aspects relating to a natural person. The mere collection of data is not profiling. Furthermore, specify that data collection for the purposes of later evaluation does not equate to profiling until the evaluation actually takes place. Provide more examples of profiling in the digital context, highlighting its increased commonality in the marketplace and use in a variety of different industries and the public sector.*

2. ***Make clear Section III Specific provisions on automated decision-making as defined in Article 22 (page 9)****, explaining why WP 29 interprets the right not to be subject to a decision based solely on automated processing (Art 22 GDPR) as a rule of prohibition of such a kind of decision making, instead of interpreting it as the right of a data subject to invoke such a decision. Reconsider the direct prohibition interpretation and its effects on many legitimate types of automated decision*

[4] See page 11 of the present Guidelines.

[5] See page 9 of the present Guidelines.

making and adopt the alternative interpretation (right to be invoked) as mentioned below. The WP should also provide an interpretation of "legal" effects and "similarly significant effects" It should also highlight the importance of organisational accountability and other GDPR protections and safeguards in ensuring avoidance of risks and harms to individuals resulting from ADM processes, even if the automated decisions are not covered by Article 22(1).

3. ***Adopt the "right to be invoked approach" within Section III Specific provisions on automated decision-making as defined in Article 22 (page 9):*** *to interpret Article 22 in a more narrow sense, acknowledging that it is equally protective of individuals, more realistic, workable and practical for both individuals and organisations and more accurately aligned with the other provisions of the GDPR.*

4. ***Interpret in more particular Legal Effect and Similarly Significant Effect (page 10-11 "Legal" or "Similarly Significant" Effects)****: Clarify that for an automated decision making process to produce a "similarly significant" effect it must rise to the same level as producing a "legal effect," which is a high bar. Specify that a similarly significant effect must be much greater or significantly more than trivial and highlight that reaching such a level is reserved for only the most impactful "solely" ADM. Provide more examples of automated decisions producing legal and similarly significant effects.*

5. ***Acknowledge the special position, low risk and high importance for development of the Digital Single Market of Data to Train Machine Learning and Algorithms within Exceptions from the Prohibition (page 12)*** *and to clarify that using data to train or enhance algorithms are exempt from the requirements of Article 22 of the GDPR.*

6. ***Explain the Right not to be subject to a decision based solely on automated decision-making (page 15)*** *by clarifying that the nature and scope of human intervention in a given automated decision-making process is highly contextual and can include a range of measures. It should be clearly stated that the ultimate goal of human intervention should be to ensure correct automated processing and a fair decision.*

7. ***Clarify the Right to Object to Profiling (page 25 guidelines - Article 21 – Right to Object):*** *Clarify that that Article 21(1) does not impose a different legitimate interest standard than Article 6(1)(f).*

8. ***Add more examples of organisational best practices to provide guidance on Best Practices and Safeguards (page 30 Good Practice Recommendations for Article 22 and Recital 71 – Appropriate Safeguards):*** *more examples be accomplished to take to ensure ample protection against misapplications of profiling and ADM under the GDPR.*

9. ***Exclude from Section V. Children and Profiling of the present Guidelines first sentence of last article, page 26 stating: "Because children represent a more vulnerable group of society, organisations should, in general, refrain from profiling them for marketing purposes."***
   The WP29 statement references a study on marketing to children aged 6 to 12 yet, as written, it could be interpreted more broadly, to apply that study's findings to anyone under 18. That implies that anyone under 18 should not be exposed to personalized advertising, irrespective of whether consent has been obtained.

Such an approach would be inconsistent with the GDPR's existing protections for children, where children of 16 years (or from 13-16, depending on member states' discretion) are deemed mature enough to give consent to the processing of their personal data without parental authorization.

As written, WP29's draft guidance may be interpreted to mean that a 16-year-old cannot lawfully consent to personalized advertising (given that consent is likely to be the lawful basis for much personalized advertising under the GDPR). This position is out of step, given that a 16-year-old in many member states can lawfully consent to sex, marriage or surgical treatment, or join the armed forces.