

Profiling and automated decision-taking



At a glance



- The automated decision-taking rules are similar to the equivalent rules contained in the Data Protection Directive (proposals to introduce restrictions on any 'profiling' were, in the end, not included in the final GDPR).
- The rules affect decisions:
 - taken solely on the basis of automated processing; and
 - which produce legal effects or have similarly significant effects.
- Where the decision is:
 - necessary for the entry into or performance of a contract; or
 - authorised by Union or Member State law applicable to the controller; or
 - based on the individual's explicit consent

then automated processing can be used. However, suitable measures to protect the individual's interests must still be in place.
- There are additional restrictions on profiling based on sensitive data – which need explicit consent, or to be authorised by Union or Member State law which is necessary for substantial public interest grounds.



To do list



Check what significant automated decision-taking is used. Identify any decisions which rely on

- Consent;
- Authorisation by law;
- or which relate to sensitive data or children.



If automated decision-taking is based on consent, ensure this is explicit.



If automated decision-taking is authorised by law, check if this is Union or Member State law; maintain a watching brief to see if Member States will seek to make any changes to the law to reflect the GDPR.



If automated decision-taking is based on sensitive data:

- Check if you can obtain explicit consent;
- If not, you will need to lobby for Member State (or Union) legal support for such processing.



If automated decision-taking involves children, seek advice: this is restricted.



Meaning of profiling

Profiling is “any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict certain aspects concerning that natural person’s performance at work, economic situations, health, personal preferences, interests, reliability, behaviour, location or movement”.

During the legislative process, there were attempts to introduce significant restrictions on all profiling. However, in the end, these were not included – although Recital 72 does note that the EDPB may publish guidance on profiling.

Restrictions on automated decision-taking with significant effects

Restrictions on decisions based solely on automated processing (which could include profiling), apply if the decisions produce legal effects or similarly significantly affects the data subject. Recital 71 gives the example of online credit decisions and e-recruiting; it also makes clear that the objectionable element is the lack of human intervention.

Individuals have a right not to be subject to such decisions. (This could either be read as a prohibition on such processing or that the processing may take place but that individuals have a right to object to it. This ambiguity is also present in the Data Protection Directive and Member States differ in their approaches to the point).

Such significant automated processing can be used if it is:

- necessary to enter into, or to perform, a contract between a data subject and controller;
- authorised by Union or Member State law; or
- based on the individual’s explicit consent.

Automated decisions based on explicit consent or contractual fulfilment

In the first and third cases (contract performance and consent), the controller must implement suitable measures to safeguard the data subject. At a minimum, this must include a right to obtain human intervention for the data subject to be able to express his or her point of view and to contest the decision.

The equivalent provisions in the Data Protection Directive stated that this was not necessary if the effect of the decision was to grant the individual’s request. This is not carried across into the GDPR perhaps because in contexts such as finance and insurance, as long as a contract is offered (even if on difficult terms), the controller could say that the individual’s request had been granted, thus avoiding the purpose of the provisions.

Recital 71 emphasises that appropriate statistical techniques must be used; that transparency must be ensured; that measures should be in place to correct inaccuracies and risks of errors; and that security must be ensured and discriminatory effects prevented. Recital 71 also notes that such measures should not concern children.

Authorisation by law

In the second case (authorisation by law) the law itself must contain suitable measures to safeguard the individual’s interests. Recital 71 mentions profiling to ensure security and reliability of services or in connection with monitoring of fraud and tax evasion as types of automated decisions which could be justified based on Union or Member State law.

Sensitive data

Automated decision-taking based on sensitive data is further restricted. Decisions based on these types of data may only take place:

- with explicit consent; or
- where the processing is necessary for substantial public interest reasons and on the basis of Union or Member State law – which must include measures to protect the interests of the data subjects.



Where can I find this?

Article 4(4) & 22

Recitals 71 & 72