

# Towards CoE NEW recommendations on profiling?

**Council of Europe**

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# Profiling - Why new recommendations? - Legal environment's modifications

- ▶ **Recommendation CM:Rec/(2010)/13**
- ▶ **New legal provisions and documents**
  - ▶ **Council of Europe:**
    - ▶ Convention 108+ : No explicit reference but art. 9.1. a) on automated decision making and art. 10. 1 and 2 (accountability principle and importance of the risk approach)
    - ▶ The Guidelines on Big Data (Jan. 23, 2017): « Since the use of Big Data may affect not only individual privacy and data protection, but also the collective dimension of these rights, preventive policies and risk-assessment shall consider the legal, social and ethical impacts of the use of Big Data, including with regard to the right to equal treatment and to non-discrimination.”
    - ▶ The Guidelines on AI (Jan. 25, 2019) :
  - ▶ **UE:**
    - ▶ GDPR: Towards a more complete regulation of automated decision systems’ - Art. 13, 15, 22 and 35 (PIA)
    - ▶ The Guidelines on automated decision making and Profiling (Oct. 3, 2017)

# Main characteristics of modern profiling

- AI as new opportunities and challenges

- ▶ **Profiling is not a purpose, it is a tool** for achieving multiple purposes at the disposal of administrations, companies and organizations.
- ▶ Optimization and security... either for defining a policy or for applying it.
- ▶ All sectors (research, marketing, insurance, ...)
- ▶ Artificial neural networks are not used for all tasks (and maybe *they should not...*), there exist many other machine learning tools

# Artificial intelligence has substantially modified the functioning, the actors and the risks of Profiling.

- ▶ Modern profiling is no more necessarily linked with **profiles**... in machine learning, many models do not explicitly manipulate profiles.
- ▶ Modern profiling are using **'big data' and complex algorithms** including 'deep learning systems' with multiple risks of bias and errors
- ▶ Modern profiling implies multiple actors whose liability must be precised
- ▶ Modern profiling is based on **statistical aggregation** of vast amount of data and no more on **logic causation** -
- ▶ Modern profiling is functioning apart from complex and unpredictable interactions of neural networks : Non transparency of their functioning
- ▶ Modern profiling amplifies the risks faced by individuals due in particular to its predictive capacities
- ▶ ... but beyond that creates **collective risks and in particular risks of discrimination (group's privacy) according to unforeseeable criteria.**

# New regulatory avenues

- ▶ Enlargement of the objectives
- ▶ Need for a multidisciplinary and multistakeholders risk assessment
- ▶ Reinforcement of the DS Rights
  - ▶ No manipulation
  - ▶ Autonomy - Yes but...
  - ▶ Right not to be subject to automated decisions and right to have explanation

# Main findings (1)

## ► Enlargement of the objectives

The respect for fundamental rights and freedoms, notably the right to privacy and the principle of non-discrimination, but also the **imperatives of social justice, cultural diversity and democracy, shall be guaranteed during the processing of personal data subject to this recommendation. Profiling must contribute both to the well-being of individuals and to the development of an inclusive, democratic and sustainable society.** (2.1)

- In the implementation of this recommendation, supervisory authorities should cooperate as far as possible with **consumer and competition protection authorities as well as with institutions responsible for equal opportunities or for the promotion of democracy.** ...
- When analysing profiling operations, the supervisory authorities should make sure to extend their competence to the analysis of collective risks and risks to the society and its democratic functioning and to ensure the respect of principle 2.1. ...

# Main findings (2): MP systems must be regulated and controlled

## ► The need for an ‘*a priori*’ evaluation of the risks

“For the purposes of a continuous assessment of both individual and collective risks, and in any case when it comes to **high-risk profiling operations (1.4)**, controllers and, where appropriate, processors should **surround themselves with a multidisciplinary assessment team and consult representatives of the interests involved in profiling, including profiled people**. Such an evaluation process should be conducted by qualified and adequately knowledgeable professionals who would assess the various impacts, including their legal, social, ethical and technical dimensions.” (8.10)

“The use of artificial intelligence technologies known as ‘**deep learning**’ for profiling purposes poses an additional risk due to possible errors, biases and the difficulty of making the justifications for decisions taken or proposed transparent, and consequently to the full exercise of the rights of the data subjects. Their design, development and implementation require special and continuous attention with regard to the risks created and their assessment by multidisciplinary, independent teams.” (2.9)

“Member states and supervisory authorities should encourage the **setting up of independent and qualified certification mechanisms** for AI and data protection systems and related labels and marks to demonstrate that processing operations carried out by controllers and processors comply with this recommendation. The specific needs of both micro, small and medium-sized enterprises and different sectors should be taken into account “(10.1)

- ▶ (as regards sensors): The **distribution and use, without the data subject's knowledge, of software aimed at the observation or the monitoring** in the context of profiling of the use being made of a given terminal or electronic communication network should be permitted only if they are expressly provided for by domestic law and accompanied by appropriate safeguards.(3.9)



# Main findings (3): Reinforcement of the DS Rights

## ► Autonomy of the DS must be reinforced:

- Profiling should not be carried out for the purpose of **manipulating** data subjects (2.4).
- As far as possible and at least when the data subject's consent is required, service providers and, in particular, **intermediary services** should give data subjects the possibility to opt in as regards the profiling and the choice between the different profiling purposes or degrees.” (2.6)
- In order to ensure free, specific and informed consent to profiling, providers of information society services should ensure, **by default, non-profiled access** to information about their services
- Unless explicitly consented to, the data subject must be able to object by an **easy means to the transfer or sharing of data**, either for profiling purposes by third parties or of the results of profiling (5.7)

# Main findings (3): Reinforcement of the DS Rights

- ▶ Obligation to inform (by icon) about the use of profiling systems and their characteristics (5.1)
- ▶ “When the profiling system issues a decision or a draft decision, it is recommended that:
  - ▶ the controller considers all the particularities of the data and not only rely on decontextualized information or results of the processing;
  - ▶ in the event of high-risk processing, the controller sets up a service where a person will inform the data subject of the algorithmic operations underlying the data processing, including the consequences of these operations for him/her. In that case, the information should be such as to enable the data subject to understand the justification for the decisions or proposals for decisions regarding him/her. This requirement is highly dependent on the consequences of the impact of the output for the data subject (principle of explicability) ;
  - ▶ in that case, the person appointed by the controller must be able, on the basis of reasonable arguments, to decide not to rely on the results of the recommendations resulting from the use of profiling;
  - ▶ where there are indications of direct or indirect discrimination based on the functioning of the profiling operation, controllers and processors shall provide evidence of the absence of discrimination.
- ▶ Persons affected by a decision based on profiling have the **right to receive useful explanation of the decision and to challenge it in front of a competent authority having access to all the information about the profiling and its functioning** (5.8).

# Conclusions: A keyword: TRUST

- ▶ Regulation must be proportionate: Profiling includes a lot of operations with different purposes and each of them must be regulated specifically according to the risks linked with each kind of profiling. Profiling activities might join together different actors , liable according with the role and the contribution of each of them
- ▶ We need an interdisciplinary and continuous (since the IS conception) approach as regards the risks linked to a profiling activity taking into account not only DP concerns in the strict sense but also the liberties affected and the ethical and social impacts
- ▶ This interdisciplinary approach human centered (Human 'in the loop', 'on the loop' and associated to the operation) must be developed internally but will find an adequate complement in the existence of an independant organism in charge of the continuous control of the quality at the largest sense, that means no bias, security and appropriateness of the algorithms.