General Data Protection Regulation

# *Profiling*

## *"He who controls the past controls the future. He who controls the present controls the past."*

George Orwell, 1984

Article 20 of the GDPR considers the issue of profiling:

***"The data subject shall have the right not to be subject to a decision based solely on automated processing, including profiling, which produces legal effects concerning him or similarly significantly affect him."***

For this purpose, the term 'profile' means a set of data characterising a category of individuals that is intended to be applied to a natural person.

### *The new rules regarding profiling*

The provision sets out that individuals have the right not to be subject to a decision based solely on profiling, which produces legal effects concerning him or similarly significantly affects him or her. However, decisions based on profiling may be allowed if:

- The decision is necessary for entering into a contract: (i) which was requested by the individual; or, (ii) where adequate steps have been introduced to protect the individual's legitimate interests; or
- The measures have been expressly authorised by an EU or Member State law. This law also has to set the appropriate tools to protect the individual's legitimate interests; or
- The measures are based on individual's explicit consent – consent which has to comply with the general provisions of the GDPR – and the organisation has implemented appropriate measures to protect the individual's legitimate interests.

### *Sensitive personal data*

Profiling based on the special categories of data are only allowed when the individual has given explicit consent or the processing is necessary for reasons of substantial public interest. In such circumstances, the data controller must ensure that suitable measures are in place to safeguard the individual's rights and freedoms and legitimate interests.

### *Why profiling is a concern*

Profiling has been generally viewed as having a considerable effect with regards to individuals' fundamental rights. Notably, the Council of Europe considers that "profiling an individual may result in unjustifiably depriving her or him from accessing certain goods or services and thereby violate the principle of non-discrimination".

There is however recognised benefits, both to the organisation and the individuals, from profiling and basing decisions on such profiling techniques, as long as these operations are surrounded by sufficient transparency and measures are implemented to protect individuals' legitimate interests. Such measures may include ensuring human intervention before the decisions are taken so that organisations are not relying solely on profiling.

### *How the GDPR rules are different from the current framework*

The GDPR provisions on profiling are not substantially different from those of Directive 95/46/EC. In fact, whilst the Directive also contains a general prohibition of measures based solely on profiling, it actually does not expressly allow for such measures to be legitimised by consent, as the GDPR does.

### *Why organisations should be concerned*

With the development of data processing technologies that allow for the collection and processing of data 'en masse' for very reduced costs, and the parallel development of data monetising offerings, organisations have significant incentives to create detailed profiles of their customers and capitalising on such profiles. Doing that, however, without implementing appropriate operational adequacy mechanisms, including appropriate visible and explicit consent, may put them at risk of very hefty fines.

pwc

PricewaterhouseCoopers Legal LLP (London)

Even if the profiling to be undertaken will not lead to any decisions that affect individuals, consent is still likely to be its legal basis par excellence. This is because of the detailed image that profiling techniques allow organisations to have about their customers or employees, which in certain jurisdictions has been considered sensitive personal data processing. In relation to employees' profiling, it will likely be more difficult to do it in a fully compliant manner, as consent is not expected to be a valid basis for processing personal data when there is a significant imbalance between the individual and the controller.

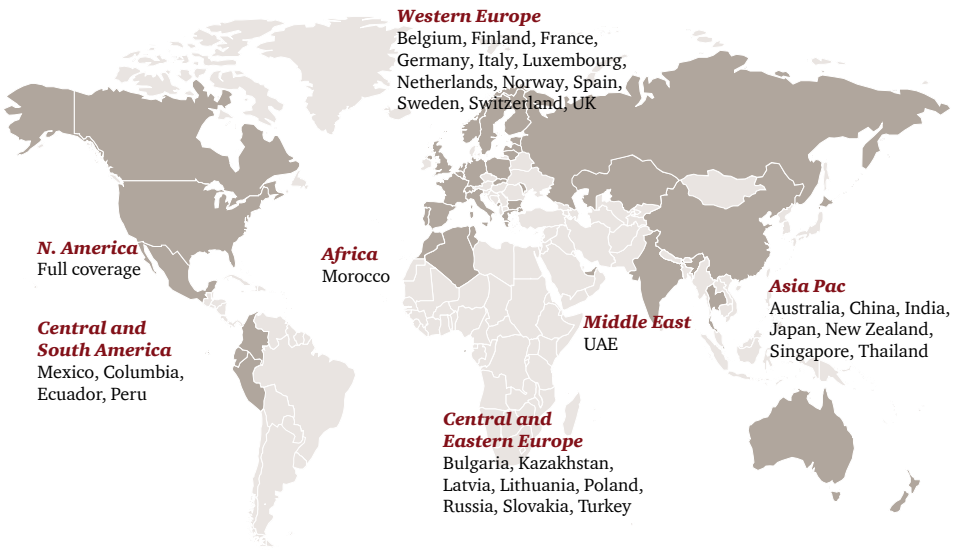
### *What organisations should do*

The GDPR contains an in-built compliance road map, which should be followed by all businesses trying to reach a readiness position, in whatever operation. The beginning of the journey is an analysis of data types, processing purposes and processing operations.

However, every journey entails some preliminary work. The temptation to immediately progress a compliance activity is always significant where the compliance regime imposes a significant burden, but it is our belief that entities should focus first on their Vision, Strategy and Structures for compliance before starting work. Activity that is conducted without a strong Vision, Strategy and Structures can be meaningless, not purposeful.

With profiling and its restrictions, the journey must begin understanding what the organisation's Data Vision, Strategy and Structures are, how does it fit with the profiling that the organisation is engaging in or intends to carry on, and how that Data Vision, Strategy and Structure is achieved in a compliant manner.

## *PwC's global privacy practice*




## *PwC Luxembourg Contacts*


***Vincent Villers***
Partner
2367
vincent.villers@lu.pwc.com

***Frédéric Vonner***
Partner
4173
frederic.vonner@lu.pwc.com

***Cédric Nédélec***
Data Protection Officer
2186
cedric.nedelec@lu.pwc.com