



# ADM Case Law under the GDPR: key takeaways



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## Article 22

### **Automated individual decision-making, including profiling**

- 1. 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 her or similarly significantly affects him or her.*
- 2. Paragraph 1 shall not apply if the decision:*
  - (a) is necessary for entering into, or performance of, a contract between the data subject and a data controller;*
  - (b) is authorised by Union or Member State law to which the controller is subject and which also lays down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests; or*
  - (c) is based on the data subject's explicit consent.*
- 3. In the cases referred to in points (a) and (c) of paragraph 2, the data controller shall implement suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, at least the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.*
- 4. Decisions referred to in paragraph 2 shall not be based on special categories of personal data referred to in Article 9(1), unless point (a) or (g) of Article 9(2) applies and suitable measures to safeguard the data subject's rights and freedoms and legitimate interests are in place.*

# BACKGROUND AND CONTEXT

- GDPR as an evolution from French data protection law and DPD
- Automated decision-making under the GDPR: beyond Article 22
- High number of court and DPA decisions since 2018 related to ADM. These cover, among others:
  - The concept of “solely automated processing” and “legal or similarly significant effects”
  - Exceptions to the ADM prohibition stemming from Article 22(2)
  - Suitable protective measures under Article 22(3)
  - Lawful grounds and data protection principles for ADM falling outside of Article 22’s scope
  - Transparency and access rights regarding ADM and profiling



# “Solely automated processing”

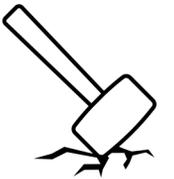
- EDPB: mere token gestures by humans are not enough to set Article 22’s ADM prohibition aside
- What are Courts and DPAs looking at in this respect?
  - The controller’s organizational structure, reporting lines and chain of approval (e.g., does the human have authority + competence to reverse/change an outcome?)
  - Internal policies and procedures
  - Effective training of staff (e.g., on elements they should consider beyond algorithmic recommendations)



→ *An example: the Portuguese DPA (CNPD) decision on the use of an online proctoring software by a university*

# “Legal or similarly significant effects”

- “Legal effects” seem quite clear, unlike “similarly significant ones”
- EDPB: affecting individuals’ behavior or choices, prolonged or permanent impacts, exclusion or discrimination of data subjects
- Enforcers take a case-by-case and multi-dimensional approach:
  - Data points used: are there sensitive data and inferences?
  - Immediate consequences for data subjects?
  - Are the effects temporary or long-lasting?
  - Do the decisions affect individuals’ income-making opportunities or lead to other quantifiable financial losses?



*Examples from the Netherlands: the Uber and Ola cases*

# Exceptions to the ADM prohibition – Article 22(2)

- **Contract** or pre-contractual steps: ADM in recruitment processes?
- **Legally-authorized ADM** with suitable measures: beyond para. (3)
- **Explicit consent**: a higher bar than “normal” consent
  - Needs to be expressed in a more formal way (e.g., signed written statement, as per EDPB guidance)
  - Only valid if adequately informed (Italian Supreme of Court of Cassation, Associazione Mevalute Onlus case)



# Suitable measures: “at least” the ones listed in Article 22(3)

- Ensuring individuals’ rights to obtain human intervention, express their point of view and contest automated decisions
- EDPB: other suitable measures include:
  - Right to obtain an explanation of the decision reached (upon the request for a human review)
  - Regularly checking datasets for bias
  - Introducing procedures to prevent errors, inaccuracies and discrimination



*Italian DPA (Garante) in Deliveroo and Foodinho cases: failure to verify the accuracy of their rider-management decisions*

# General principles and lawful grounds for all types of ADM

- Article 5 GDPR principles like data minimization, accuracy and fairness apply to qualifying and non-qualifying ADM (e.g., automated grading)
- ADM falling outside of Article 22 needs a **lawful ground**, plus an additional condition when it involves special categories of data
  - Automated screening of gun license applications is legally required in the Netherlands, as per Article 6(1)(c) GDPR
  - Automated assessment of jobseekers' employment chances by public body in Austria was justified by public interest tasks
  - Processing of biometric data by Clearview AI's facial recognition system is unlawful for a lack of a valid legal ground



# Broad transparency and access rights for ADM and profiling

- Specific transparency obligations require controllers to disclose in their notices the fact that qualifying ADM and profiling are occurring
- Is meaningful information about the ADM's logic, significance and envisaged consequences only required for qualifying ADM?
  - EDPB, Courts and DPAs agree and say "yes" (e.g., Uber termination of accounts case). **But**
  - Austrian DPA ruling as an important outlier: a right to know how a marketing score was calculated (GDPR: "at least in those cases")



→ *February 2022 preliminary ruling request: what is 'meaningful information' about the logic behind credit score calculation? Can the controller invoke trade secrets to avoid sharing information?*

# CONCLUSIONS

- The GDPR covers ADM processes and systems in a **comprehensive manner**, beyond the specific safeguards offered by Article 22
- The **threshold for automated processing to classify as qualifying ADM is high**, but Courts and DPAs have often found such instances
- All ADM relying on personal data processing always require a GDPR **lawful ground** and must comply with **general principles**
- Where **consent** is relied on for ADM, it needs to be **properly informed**, i.e., individuals need to understand the underlying processes
- Transparency and data access is mandated for both qualifying and non-qualifying ADM, but more detailed information is due regarding the former





# Questions?

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