

Privacy & Data Protection

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Headlines

- Commissioner sets out thinking on Data Protection Bill, p.18;
- LIBE Committee approves amended e-Privacy Regulation as EDPS makes recommendations, p.19

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Working Party’s guidance on profiling creates uncertainty

A position adopted by the Article 29 Working Party within newly published guidance on automated decision-making under the GDPR has generated concern among legal experts.

The issue relates to the Working Party’s interpretation of Article 22(1), which sets out that “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.”

Argument has arisen over whether the provision should be read as a right available to data subjects or as a straightforward prohibition for controllers. In its guidance, the Working Party takes the latter view.

The result of this interpretation is that any processing activity which is wholly automated, and which leads to decisions that impact on individuals in a sufficiently significant way, is prohibited unless such processing can be justified on one of three bases: performance of a contract, authorised under law, or explicit consent.

Eduardo Ustaran, Partner at Hogan Lovells, said: “This is not an inconsequential legal point. Interpreting Article 22(1) as a prohibition potentially has wide-ranging ramifications. Given this interpretation, what is considered to be a decision that produces ‘legal effects or similarly significantly affects individuals’ becomes really key”.

The guidelines suggest that to qualify, the decision must have the potential to significantly influence the circumstances, behaviour or choices of

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Privacy Shield: verdict is out

The European Commission has published its report on the first annual joint review of the EU-US Privacy Shield framework, which took place in late September this year.

The Report, which reflects input from the US federal government and feedback gathered from relevant stakeholders, found the Privacy Shield to provide an adequate level of protection for the transatlantic transfer of personal data.

But it also makes a number of recommendations for improvements.

The EU Commission points out that companies applying for certification under the Privacy Shield should not be allowed to publicly announce that they are certified under the Privacy Shield before the process is finalised.

Further, the Report prompts the Department

of Commerce to proactively and regularly monitor for false claims to reduce the risks of inaccurate information and help identify possible compliance issues that may require further attention.

The EU Commission calls for increased cooperation between the Department of Commerce and the DPAs to strengthen EU individuals’ awareness of

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