/c law

AUTOMATED DECISION-MAKING AND SAFEGUARDING PRIVACY: A LOOK AT GDPR′S ARTICLE 22 AND ITS ROLE IN THE CONTEXTE OF AI

/c law

1978	French act «informatique & libertés»
1995	Directive 95/46/CE – art. 15
2016	GDPR – art. 22

GDPR: WHAT DOES IT SAY?

RECITAL

(71) The data subject should have the right not to be subject to a decision, which may include a measure, evaluating personal aspects relating to him or her which is based solely on automated processing and which produces legal effects concerning him or her or similarly significantly affects him or her, such as automatic refusal of an online credit application or e-recruiting practices without any human intervention. Such processing includes 'profiling' that consists of any form of automated processing of personal data evaluating the personal aspects relating to a natural person, in particular to analyse or predict aspects concerning the data subject's performance at work, economic situation, health, personal preferences or interests, reliability or behaviour, location or movements, where it produces legal effects concerning him or her or similarly significantly affects him or her. However, decision-making based on such processing, including profiling, should be allowed where expressly authorised by Union or Member State law to which the controller is subject, including for fraud and tax-evasion monitoring and prevention purposes conducted in accordance with the regulations, standards and recommendations of Union institutions or national oversight bodies and to ensure the security and reliability of a service provided by the controller, or necessary for the entering or performance of a contract between the data subject and a controller, or when the data subject has given his or her explicit consent. In any case, such processing should be subject to suitable safeguards, which should include specific information to the data subject and the right to obtain human intervention, to express his or her point of view, to obtain an explanation of the decision reached after such assessment and to challenge the decision. Such measure should not concern a child.

In order to ensure fair and transparent processing in respect of the data subject, taking into account the specific circumstances and context in which the personal data are processed, the controller should use appropriate mathematical or statistical procedures for the profiling, implement technical and organisational measures appropriate to ensure, in particular, that factors which result in inaccuracies in personal data are corrected and the risk of errors is minimised, secure personal data in a manner that takes account of the potential risks involved for the interests and rights of the data subject and that prevents, inter alia, discriminatory effects on natural persons on the basis of racial or ethnic origin, political opinion, religion or beliefs, trade union membership, genetic or health status or sexual orientation, or that result in measures having such an effect. Automated decision-making and profiling based on special categories of personal data should be allowed only under specific conditions.
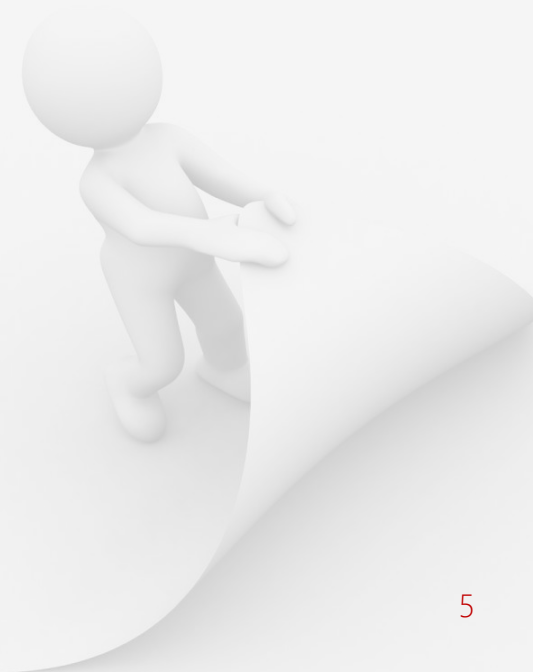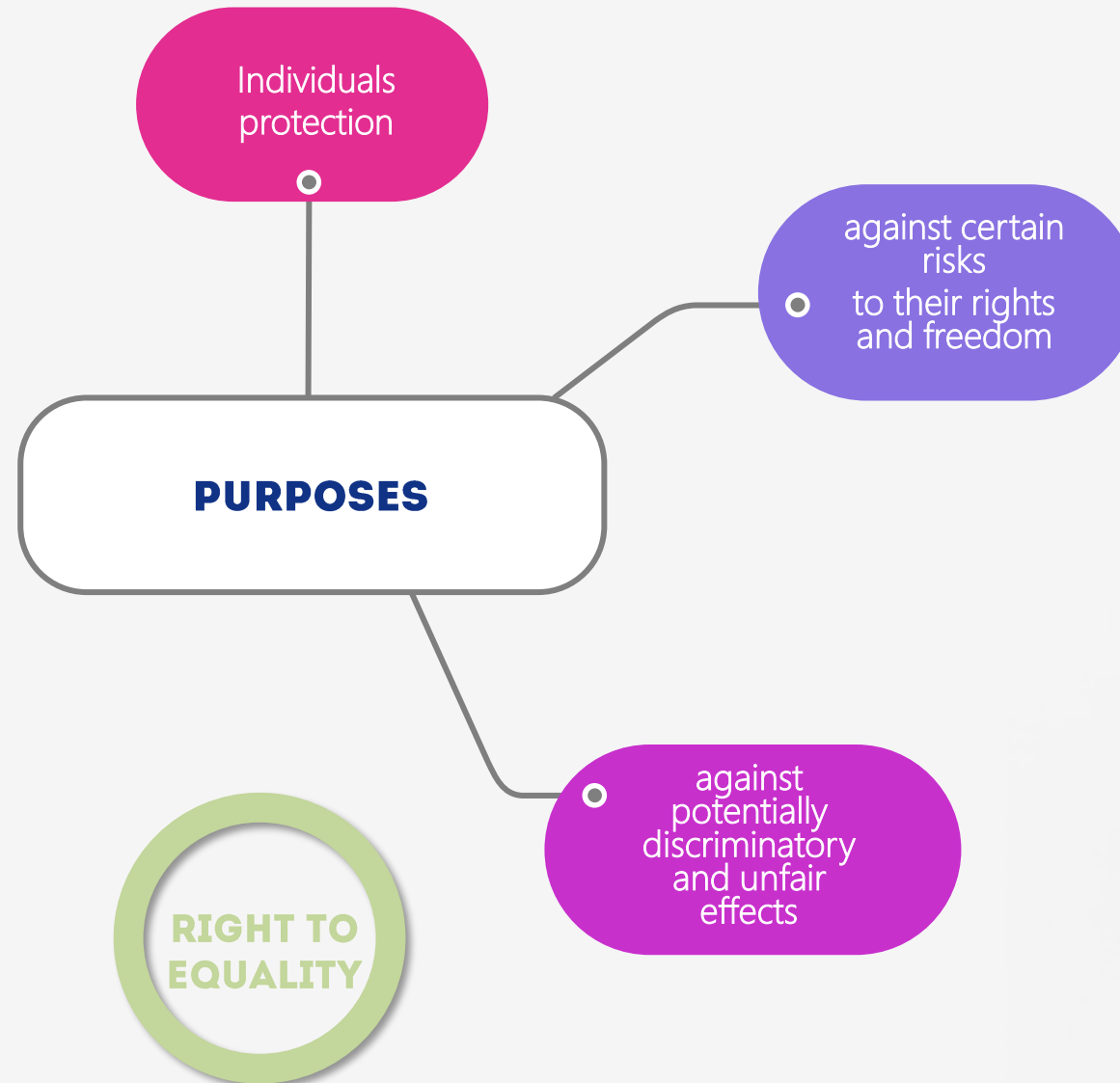
GDPR: WHAT DOES IT SAY?

ARTICLE

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.

Individuals protection

against certain risks to their rights and freedom

PURPOSES

against potentially discriminatory and unfair effects

RIGHT TO EQUALITY

/c law

Mainly: risks of perpetuating and amplifying biais and prejudices

/ Initial biais
- at the system level
- at the data / input level

/ AI systems trained to replicate
- decision making patterns learn from training (biased) data set
- past patterns of (biased) human DM

/ **AI: no capabilities to change moral perspective** over time unlike human decision-decision makers

/ **Other issue**: impact of error rates

How does biais play out in AI?

At system level

- Developpers (unintentionally) build their own personal biases into the parameters
  - Allowing systems to conflate correlation with causation
  - Including parameters that are proxies for known biais

At the data / input level

- Data = biased historical data
- Data = not representative of the target population
- Data = poorly selected
- Data = incomplete, incorrect or outdated

/c law

Principle **PROHIBITION**

3 CONDITIONS:

- Existence of a decision
- Based solely on automated processing (including processing)
- Legal significant effect or similarly significant effect

BUT 3 EXCEPTIONS

/c law

#1 « Decision »

- Broadly interpreted
- Number of acts which may affect the data subject in many ways
- Ex1. result of calculating a person's creditworthiness
- Ex2. SHA: information provided / anwsers to questions?

#2 « Based solely on automated processing (incl. profiling) »

- Use of AI makes it more likely that the decision is based « solely »
- (human may not have access to all information used)
- (human may not have the ability to analyse how the information is used

#3 legal signifiant effect

- When affects someone's legal rights (ex. freedom to associate, to vote).
- When affects someone's legal status (ex. denial of citizenship or social benefit).
- When affects someone's righs under a contract (ex. cancellation of a contract).

#3 similarily signifiant effect

- Also applies when the results are transmitted to a third and the action of this third is strongly guided by the results (EUCJ C-634/21 7 Dec 23).
- Ex1: refusal to conclude a contract.
- Ex2: impact on the right to receive information or the freedom to form opinions without undue influence (ex. SHA)?
- Ex3: targeted advertising?

/c law

#3 similarily signifiant effect : some criteria

- the categories of personal data;
- the immediate consequence the decisions have on data subjects;
- the temporary or definitive effect of the decisions;
- whether the decisions affect conduct or choices of the data subjects;
- whether the decisions limit opportunity for income or are followed by a quantifiable financial loss for data subjects;
- whether the decisions affect someone's
    - financial circumstances;
    - access to health services;
    - employment opportunities;
    - access to education; etc.

ARTIFICIAL INTELLIGENCE & HUMAN RIGHTS

/c law

Criminal Justice:
Risk Scoring
2 3 7 9 10 11
12

Access to the Financial System:
Credit Scores
2 7 12 19 20 23
25 26

Healthcare:
Diagnostics
3 12 23 25 26

1 Right to Equality
2 Freedom from Discrimination
3 Right to Life, Liberty, Personal Security
4 Freedom from Slavery
5 Freedom from Torture and Degrading Treatment
6 Right to Recognition as a Person before the Law
7 Right to Equality before the Law
8 Right to Remedy by Competent Tribunal
9 Freedom from Arbitrary Arrest and Exile
10 Right to a Fair Public Hearing
11 Right to be Considered Innocent until Proven Guilty
12 Freedom from Interference with Privacy, Family, Home and Correspondence
13 Right to Free Movement in and out of the Country
14 Right to Asylum in other Countries from Persecution
15 Right to a Nationality and the Freedom to Change it

Education:
Essay Scoring
12 19 25 26

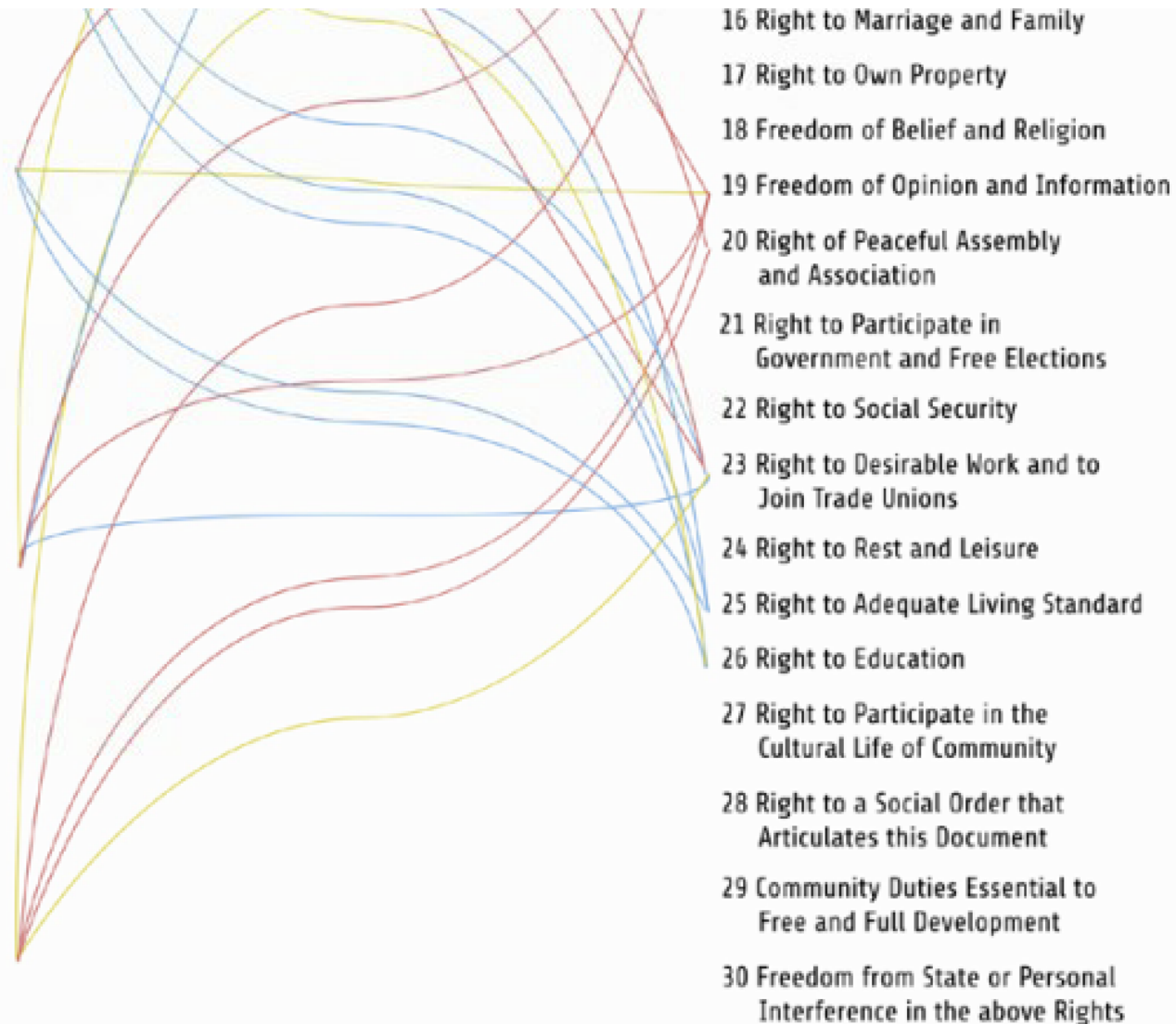**Online Content Moderation:**
Standards Enforcement
2 3 12 19 23

Human Resources:
Recruitment and Hiring
2 23 19 20 12

16 Right to Marriage and Family
17 Right to Own Property
18 Freedom of Belief and Religion
19 Freedom of Opinion and Information
20 Right of Peaceful Assembly and Association
21 Right to Participate in Government and Free Elections
22 Right to Social Security
23 Right to Desirable Work and to Join Trade Unions
24 Right to Rest and Leisure
25 Right to Adequate Living Standard
26 Right to Education
27 Right to Participate in the Cultural Life of Community
28 Right to a Social Order that Articulates this Document
29 Community Duties Essential to Free and Full Development
30 Freedom from State or Personal Interference in the above Rights

● Positive human rights impact ● Human rights impact indeterminate ● Negative human rights impact

ART. 22 GDPR: 3 EXCEPTIONS FROM THE PROHIBITION

#1 necessary for the performance of or entering into a contract

#2 authorised by UE or MS law

#3 data subject consent

But appropriate safeguards

* way to obtain human intervention -> AI: how?

* Right to express his/her point of view.

* Right to contest the decision.

* Right to an explanation of the decision (?)
  -> AI: how?

Elisabeth GUISSART
Avocat à la Cour
elisabeth.guissart@claw.lu

www.claw.lu