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***Protection of natural persons with regard to automated individual  
decision-making in the General Data Protection Regulation***

Summary

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The evolution and expansion of the internet as well as the advancement of other information and communication technologies (ICT) have resulted in processing of various types of personal data on an unprecedented scale. This data is extensively used to optimize processes in an increasing number of sectors, both private and public. New business models, particularly online, tend to offer services seemingly for free, leaving monetisation to come from the personal data collected at a large scale along the way, what is referred to as surveillance capitalism. Obviously, the more transparent and predictable individuals are, the better for those who have insights into this knowledge.

Nowadays, important decisions, previously left to humans, are delegated to algorithms, which may advise, if not decide, how personal data should be interpreted and what actions should be taken as a result. Business models driven by personal data or at least supported by processing of such data have become the rule and not the exception. The automation of individual decision-making processes becomes an everyday reality in banking and finance, insurance, employment, healthcare, taxation, as well as broadly understood marketing and advertising. This is because it allows to considerably improve efficiency and accuracy of decisions, especially when it is necessary to analyse large amounts of data in a limited time, while also reducing their cost. In short, increasingly, algorithms regulate our lives.

Nonetheless, in recent years, society's deferential attitude toward algorithmic objectivity has weakened. The shift from more subjective and less structured human decision-making processes to automated ones has provoked a large and diverse critical literature concerned with the risks of such a black box society. Scholars have identified range of problems that complete lack of or limited human involvement in the decision-making process can introduce or exacerbate. Meanwhile, for individuals, crucial opportunities are on the line, including the ability to get credit, insurance, a job or even receive medical treatment. Those issues can significantly affect the rights and freedoms of natural persons, which means that appropriate safeguards must be provided.

To the extent that automated individual decision-making is based on personal data, in the European Union it is subject to the General Data Protection Regulation (hereinafter "GDPR"). However, it is still unclear whether and how the numerous challenges can be addressed within the existing framework of data protection law, or even if it is even the best candidate to tackle them. At first glance, it seems to defer

control to the data subjects with regard to automated individual decision-making, as it contains dedicated provisions in this regard. Nevertheless, the analysis carried out in this doctoral dissertation demonstrates that such protection is in fact curtailed. Thus, supplementarily, general provisions of the regulation relevant to such processing are examined as well. It is shown that they play a major role with regard to automated individual decision-making.

The purpose of this doctoral dissertation is to describe and analyse the GDPR framework aimed at protecting natural persons with regard to automated individual decision-making. Its objective is to examine whether this legislative act affords sufficient protection of natural persons with regard to such processing. In addition to that, the focus of the thesis is to identify the loopholes that hinder or prevent the above. Above all, this doctoral dissertation is aimed at identifying *de lege lata* rules and *de lege ferenda* postulates that could provide individuals with effective protection in relation to automated individual decision-making. Therefore, this thesis contributes to the existing discussion concerning algorithmic accountability.

To achieve the above objectives, various sources and research methods are required. To describe the relevant legal framework, the research applies classical doctrinal legal methods, including the formal-dogmatic, logical-linguistic and judicial interpretation. They are applied to identify, analyse and synthesise the content of the law. To interpret the rules of the GDPR, this thesis refers, principally, to the preamble to the regulation, its *travaux préparatoires*, case law of the Court of Justice of the European Union and national courts that concerns the previous Data Protection Directive, guidelines and opinions of the Article 29 Working Party and its successor from 25 May 2018, the European Data Protection Board, various reports and recommendations along with numerous academic writings.

In view of its goal, the doctoral dissertation is structured as follows. The first chapter describes the legal framework of the GDPR, *videlicet* its background, terminology, as well as its material and territorial scope of application. In addition to that, it outlines the key concerns with regard to automated individual decision-making, that is inaccurate personal data, inconclusive personal data, discriminatory algorithms and lack of transparency, which serve as a background to the legal analysis in this doctoral dissertation. It is shown that most databases contain inaccurate or incomplete data, which may be blindly applied to individuals in the process of automated individual decision-making. The use of profiling in automated

individual decision-making unavoidably involves a margin of error and it may lead to inaccurate predictions about individuals. In addition, algorithms are designed by humans so they are unavoidably value-laden and may contain latent bias. This in turn may lead to discrimination. Even self-learning algorithms are likely to recreate or even intensify discrimination present in the past decision-making, because they are trained on historical data. Above all, automated individual decision-making is oftentimes non-transparent making the capacity of individuals to examine and understand such processes and their results largely subdued.

The second chapter analyses the key provisions of the GDPR aimed at protection of natural persons with regard to automated individual decision-making *videlicet* the right not to be subject to solely automated decision-making set out in Article 22 of the regulation. It is shown that it is narrow, vague and full of potential loopholes, which may be abused by the controllers. In fact, even the legal nature of this right is uncertain, as it may be read either as a right to opt out that the data subject has to actively exercise or as a general prohibition that does not require any action. Besides, it envisages three exceptions, which are so considerable and prone to abuse by the controllers, that they erode the data subject's right not to be subject to solely automated individual decision-making to the point that the exceptions become the rule.

In the third chapter, the thesis further elaborates on the special rights of the data subject which aim to address concerns regarding automated individual decision-making, notably the right to be informed, the right of access, the right to express point of view, the right to human intervention and the right to contest the decision. These special rights are applicable to a very narrow range of cases meeting all of the requirements set out in Article 22 (1) of the GDPR. Additionally, the preeminent safeguards apply only if the processing is conducted under Article 22 (2) (a) or (c) of the GDPR, that is if it is necessary for the formation or performance of a contract or based on the data subject's explicit consent. Thus, if solely automated individual decision-making is authorised by the European Union or Member State law to which the controller is subject, the data subject does not have the said rights. Although the law in question must lay down suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, in these cases the level of protection of the data subject may significantly diverge between the Member States.

The scope of the abovementioned rights is very vague. Not to mention that the data subject may even not be aware of them, as there is no explicit obligation of the controller to inform the data subject about the right not to be subject to solely automated individual decisions and its safeguards, that is the right express point of view, the right to human intervention and the right to contest the decision. Despite much debate, consensus has not yet emerged in the legal doctrine concerning the supposed right to explanation of a particular solely automated individual decision. In addition to that, some of the special rights of the data subject, in particular the right to be informed and the right of access, may be limited by intellectual property rights. Aside from that, these special rights of the data subject are further weakened by technical obstacles to their effective implementation, particularly when applied to complex solely automated individual decision-making systems.

In the fourth chapter, given that the GDPR provisions dedicated to solely automated individual decision-making may not provide sufficient protection for the data subject, supplementarily, general provisions of the regulation relevant to such processing are examined. The provisions in question are: fundamental data protection principles, which are the most relevant to such processing, *videlicet* lawfulness, fairness and transparency, purpose limitation, data minimization, accuracy and storage limitation principles, as well as provisions on data protection by design and by default, data protection impact assessment, certification and codes of conduct.

It is established that these general provisions play a major role with regard to automated individual decision-making and they can aid the controller in deploying better such systems. Strikingly, they apply to all cases of automated individual decision-making and they are not restricted by the narrow scope of Article 22 (1) of the GDPR. Moreover, they do not require any action of individuals, which relieves the latter of an undue burden. These principles may address some of the key concerns with regard to automated individual decision-making, such as discrimination, which are difficult, if not impossible to tackle with the use of specific provisions dedicated to solely automated individual decision-making. While data protection by design and by default, data protection impact assessment, certification and codes of conduct all force the controller to be involved in the design of less privacy-invasive systems.

Whereas in the fifth chapter, general rights of the data subject provided for in the GDPR relevant to automated individual decision-making are discussed and it is shown they could be more useful for individuals than the special rights discussed

above. These are the right to be informed, the right of access, the right to rectification, the right to erasure and the right to object. As underlined above, they do not apply only to solely automated individual decision-making within the meaning of Article 22 (1) of the GDPR, but to all such systems.

Of course, concrete *de lege ferenda* postulates and recommendations that could offer the data subjects greater protection with regard to solely automated individual decision-making are also presented in the above chapters in interim conclusions. Finally, the doctoral dissertation presents the conclusions.

The scope of this doctoral dissertation is confined to the protection of natural persons with regard to automated individual decision-making in the GDPR. This delineation means that it focuses on the specific and general provisions of this legislative act relevant to this type of processing. It does not consider the procedural aspects of the GDPR, in particular relating to its enforcement. Neither does it contain a comprehensive analysis of Member State law implementing the GDPR, which plays a secondary role to the regulation, in particular with regard to the scope of the thesis. Hence, it is only touched upon where necessary. Last but not least, the thesis does not analyse the issue in question from a human rights perspective.

The subject matter of this doctoral dissertation has not been comprehensively analysed in domestic or foreign literature. This is primarily due to the fact that the GDPR is a relatively recent legislative act and automated individual decision-making has so far rarely been the subject of a legal analysis. Nonetheless, the subject matter of the thesis falls within the ambit of current trend of scholarly research at the confluence of law and new technologies. It is considered that these are some of the most controversial issues in the realm of personal data protection, and at the same time one of those whose role in the information society will grow.

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24 February 2020

A handwritten signature in black ink, appearing to read 'A. Drożdż', with a stylized flourish at the end.