

The Legal Risks of Big Data and Automated Decisions

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TOPICS

1. Applicability of data protection law to Big Data
2. Big (Personal) Data security requirements
3. Challenges by changing processing purposes
4. Legal prohibitions of automated decisions

Applicability of Data Protection Law to Big Data

- “Data protection is irrelevant because all data has been anonymized anyhow”
- Difficulty of anonymization
 - If an individual is identifiable, data protection law applies!
 - True anonymization is very difficult with large data sets (e.g., Netflix database)

Big (Personal) Data Security

- Legal requirement to implement “appropriate” security controls (Article 17 DPD / Article 27 GDPR)
 - Risk depends in particular on data categories → most sensitive data category determines minimum of security requirements
 - Security challenges of Big Data
 - Putting all eggs into one basket
 - Big Data creates new information flows
 - Big Data requires access to all data to find yet-unknown correlations + data often unstructured and very dynamic
 - least privilege still realistic?
- Big Data requires compensating security controls

Changing Processing Purposes vs. Data Protection Principles – 1/3

- Old model: delete data when no longer needed
 - In order to save storage space and to eliminate security risks
 - Unused data is a burden
- New model: keep data
 - Additional storage space costs practically nothing
 - Possibly, there will be new uses for old data
 - Unused data is “Treasure trove of data”

Changing Processing Purposes vs. Data Protection Principles – 2/3

- Conflict #1: Purpose limitation
 - Personal data may only be collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes.
 - Storing data “just in case” for undefined purposes is impermissible
 - Any change in the processing purposes requires new consent from data subjects
- Conflict #2: Data minimization
 - Data must be relevant & not excessive for defined purpose
 - Treasure trove of data to be recovered with Big Data often has to be deleted under data protection law

Changing Processing Purposes vs. Data Protection Principles – 3/3

- Possible compliance solutions for corporations
 - Forward-looking specification of processing purposes
 - Not: For what do we have to use the data now?
 - Rather: For what will we want to use the data in 3 years?
 - Considering changing purposes when drafting consent declaration
 - Full transparency

Big Data and Automated Individual Decisions – 1/2

- Fully automated decisions without human plausibility check
 - High requirements for
 - Quality and completeness of data
 - Integrity of data
 - What are the data sources?
 - What security controls were applied to the sources?
 - If data sources are not suitable for automated decision
 - Violation of data protection law (data quality principle)
 - Potential civil liability in particular vis-à-vis contracting parties

Big Data and Automated Individual Decisions – 2/2

- General prohibition of automated individual decisions if (Article 15 DPD / Article 9 GDPR)
 - it produces legal effects concerning the data subject or significantly affects him and
 - is based on an automated evaluation of certain personal aspects relating to him, such as his performance at work, creditworthiness, reliability, conduct, etc.
- Exceptions
 - If decision concerning contract conclusion or performance and (1) data subject's request to conclude contract has been satisfied or (2) it is possible for data subject to put his point of view
 - Additional requirements in many Member States: e.g., transparency of decision process

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