

Artykuły RODO, które będą przedmiotem dyskusji w dniu 9 kwietnia 2013 r.:

Obecne brzmienie	Proponowana zmiana	Komentarze
<p>Article 4 (12a) <u>'profiling' means an automated processing technique that consists of applying a 'profile' to an individual, particularly in order to take decisions concerning her or him or for analysing or predicting her or his personal preferences, behaviours and attitudes characterising a category of individual;</u></p>	<p>Article 4 (12a) 'profiling' means <u>any form of (...) processing intended to analyse personal aspects relating to an individual, or to analyse or predict in particular his or her performance at work, reliability, economic situation, location, health, personal preferences, behaviours and attitudes, or to take decisions concerning her or him, or to single out the individual with a view to taking decisions concerning him or her.</u></p>	<p>(1) Zaproponowane zmiany w definicji profilowania zmierzają do jej doprecyzowania oraz poszerzenia o możliwe aspekty i rodzaje tego sposobu przetwarzania danych.</p> <p>(2) W szczególności, idąc za opinią Grupy Roboczej Art. 29, proponujemy poszerzenie tej definicji o procesy, które nie opierają się wyłącznie na automatycznym przetwarzaniu danych.</p> <p>(3) Bardziej szczegółowa definicja profilowania (jako nowego pojęcia w doktrynie ochrony danych osobowych) niesie ze sobą korzyści interpretacyjne.</p> <p>(4) Proponujemy rezygnację z definicji</p>

		<p>profilu, ponieważ nie jest ona konieczna, a może generować dodatkowe wątpliwości interpretacyjne (Jak się ma definicja ‘profilu’ do definicji ‘profilowania’? Czy w skład profilu wchodzi tylko dane osobowe? Czy należy rozróżniać profil osoby od profilu kategorii osób? etc.).</p>
<p>Article 4 (3) 'processing' means any operation or set of operations which is performed upon personal data or sets of personal data, whether or not by automated means, such as collection, recording, organization, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, or erasure;</p>		<p>Nie zgłaszamy uwag</p>

<p><u>Article 4 (3a) 'restriction of processing' means limiting the processing of personal data to their storage;</u></p>		<p>Nie zgłaszamy uwag</p>
<p>Article 4 (7) 'recipient' means a natural or legal person, public authority, agency or any other body to which the personal data are disclosed [<u>; however, authorities which may receive data in the framework of a particular inquiry shall not be regarded as recipients</u>];</p>		<p>Nie zgłaszamy uwag</p>
<p>Article 4 (13) 'main establishment' means</p> <p>- as regards the controller, the place of its establishment in the Union where the main decisions as to the purposes, conditions and means of the processing of personal data are taken; if no decisions as to the purposes, conditions and means of the processing of personal data are taken in the Union, <u>(...)</u> the place where the main processing activities in</p>	<p>Article 4 (13) 'main establishment' means</p> <p>- as regards the controller, the place of its establishment in the Union where the main decisions as to the purposes, conditions and means of the processing of personal data are taken <u>or the place of its establishment which exercises dominant influence over other establishments of the controller;</u> if no decisions as to the purposes, conditions and</p>	<p>(1) We welcome the definition of „main establishment“, as proposed in the draft regulation. This definition can prevent confusion about which party must be considered data controller, especially when a group of undertakings process personal data in different locations both within the EU and in third countries.</p> <p>(2) We agree that the establishment that exercises real control over the data</p>

<p>the context of the activities of an establishment of a controller in the Union take place;</p> <p>- as regards the processor, <u>the place of its central administration in the European Union, and, if it has no central administration in the European Union, the place where the main processing activities take place;</u></p>	<p>means of the processing of personal data are taken in the Union, the place where the main processing activities in the context of the activities of an establishment of a controller in the Union take place.</p> <p>- as regards the processor, the place of its central administration in the European Union and, if it has no central administration in the European Union, the place where the main processing activities take place;</p>	<p>processing must be considered data controller. The location of the main establishment will also determine which data protection authority will act as lead authority (see article 51(2)).</p> <p>(3) However, the proposal leaves corporate groups of undertakings a lot of room to choose which one of their establishments will be considered the main establishment. A group of undertakings can for example assign the power to implement data protection rules to a certain establishment by power of attorney. In practice this is likely to lead to ‘forum shopping’ by companies.</p> <p>(4) Also, as pointed by the European Data Protection Supervisor, the proposal does not address the situation of groups of undertakings, where several legal entities and their establishments in different countries may have a role in determining purposes, conditions and means of a processing activity, independently of the location of the</p>
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		<p>central administration.</p> <p>(5) Having these issues in mind, we suggest to add respective clarification.</p>
<p>Article 4 (14) 'representative' means any natural or legal person established in the Union who, explicitly designated by the controller, <u>represents</u> the controller, with regard to the obligations of the controller under this Regulation <u>and may be addressed, in addition to or instead of the controller, by the supervisory authorities for the purposes of ensuring compliance with this Regulation;</u></p>		<p>Nie zgłaszamy uwag</p>
<p>Article 4 (15) 'enterprise' means any <u>natural or legal person</u> engaged in an economic activity, irrespective of its legal form, <u>(...)</u> including (...) partnerships or associations regularly engaged in an economic activity;</p>		

<p>Article 4 (20) <u>'Information Society service'</u> means any service as defined by Article 1 (2) of <u>Directive 98/34/EC of the European Parliament and of the Council of 22 June 1998 laying down a procedure for the provision of information in the field of technical standards and regulations and of rules on Information Society services.</u></p>	<p><i>no amendment proposed</i></p>	
<p>Article 5</p> <p>Personal data must be:</p> <p>(a) processed lawfully, fairly and in a transparent manner in relation to the data subject;</p> <p>(b) collected for specified, explicit and legitimate purposes and not further processed in a way incompatible with those purposes; <u>further processing of data</u></p>		<p>(1) Zasadniczo nie zgłaszamy uwag do zaproponowanego brzmienia Art. 5.</p> <p>(2) Widzimy jednak poważne ryzyko wynikające z zastrzeżenia dodanego w punkcie (b), w przypadku, gdy „historical, statistical or scientific purposes“ pozostaną niezdefiniowane. To faktyczne wyłączenie zasady celowości może być nadużywane przez podmioty, które opierają swoje modele biznesowe na analizie dużych zestawów danych (np. w</p>

for historical, statistical or scientific purposes shall not be considered as incompatible subject to the conditions and safeguards referred to in Article 83;

(c) adequate, relevant, and limited to the minimum necessary in relation to the purposes for which they are processed (...);

(d) accurate and, where necessary, kept up to date; every reasonable step must be taken to ensure that personal data that are inaccurate, having regard to the purposes for which they are processed, are erased or rectified without delay;

(e) kept in a form which permits identification of data subjects for no longer than is necessary for the purposes for which the personal data are processed; personal data may be stored for longer periods insofar as the data will be processed (...) for

celu wykrywania określonych trendów). Dlatego **sugerujemy dodanie definicji (w samym Artykule 5 lub innym miejscu), które doprecyzuje cel i zakres tego wyłączenia.**

<p>historical, statistical or scientific (...) purposes pursuant to Article 83 (...);</p> <p><u>(ee) processed in a manner that ensures appropriate security of the personal data and confidentiality of the processing;</u></p> <p>(f) processed under the responsibility (...) of the controller (...).</p>		
<p>Article 20 <u>Decisions based on profiling</u></p> <p>1. Every <u>data subject</u> shall have the right not to be subject <u>to a decision based on profiling concerning him or her</u> which produces legal effects (...) or <u>adversely affects</u> (...) <u>him or her unless such</u> processing:</p> <p>(a) is carried out in the course of the entering into, or performance of, a contract</p>	<p>Article 20 Decisions based on profiling</p> <p>1. Every data subject shall have the right, both off-line and online, not to be subject to a decision based on profiling concerning him or her which produces legal effects or <u>(...)</u> affects him or her unless such processing:</p> <p>(a) <u>is necessary for</u> the entering into, or performance of, a contract between the data subject and a data controller and suitable</p>	<p>(1) Prawo do niepodlegania środkom opartym na profilowaniu powinno dotyczyć wszelkich jego rodzajów, zarówno online, jak i offline. Ta gwarancja ma duże znaczenie w kontekście rosnącej popularności tej metody analizy danych.</p> <p>(2) W kontekście powszechnego wykorzystywania profilowania w różnych sektorach, trzeba mieć na uwadze poważne zagrożenia i ryzyka z nim</p>

<p><u>between the data subject and a data controller</u> (...) and suitable measures to safeguard the data subject's legitimate interests have been adduced, such as the rights <u>of the data subject to obtain human intervention on the part of the controller to express his or her point of view and to contest the decision;</u> or</p> <p>(b) is (...) authorized by Union or Member State law <u>to which the controller is subject and which also lays down suitable measures to safeguard the data subject's legitimate interests;</u> or</p> <p>(c) is based on the data subject's consent, subject to the conditions laid down in Article 7 (...).</p> <p>2. (...)</p> <p>3. <u>Profiling shall not be carried out:</u></p> <p>(a) <u>for direct marketing purposes unless pseudonymous data are processed and the data subject has not objected to the processing pursuant Article 19(2);</u></p> <p>(b) <u>on special categories of personal data referred to in Article 9(1), unless Article 9(2) applies and subject to suitable</u></p>	<p>measures to safeguard the data subject's legitimate interests have been adduced, such as the right of the data subject to obtain human intervention on the part of the controller to express his or her point of view and to contest the decision, <u>including an explanation of the decision reached after such intervention, and the right to be provided with meaningful information about the logic used in the profiling;</u> or</p> <p>(b) is (...) authorized 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 legitimate interests <u>and which protects the data subjects against possible discrimination resulting from measures described in paragraph 1;</u> or</p> <p>(c) is based on the data subject's consent, subject to the conditions laid down in Article 7 <u>and to suitable safeguards, including effective protection against possible discrimination resulting from measures described in paragraph 1.</u></p> <p>2. (...)</p>	<p>związane. Profilowanie opiera się na korelacjach statystycznych, a zatem z zasady jest obarczone istotnym marginesem błędu. Z perspektywy podmiotu przetwarzającego dane ten margines może być nieznaczący, jednak z perspektywy osoby, która się w nim mieści, taki błąd ma zasadnicze znaczenie – może np. prowadzić do dyskryminacji na tle rasowym, wykluczenia z dostępu do istotnej usługi, dyskryminacji cenowej, naruszenia prywatności i innych negatywnych skutków.</p> <p>(3) Jak pokazują prowadzone badania, profilowanie często opiera się na stereotypach, tym samym zwiększając ich siłę rażenia i dyskryminacyjny potencjał. Trzeba mieć również na uwadze, że profilowanie staje się bezużytecznym narzędziem w odniesieniu do tworzenia rzadkich charakterystyk, ze względu na niski stopień ich wiarygodności. W związku z tym rodzi się poważne ryzyko stosowania niewiarygodnych (i w</p>
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<p><u>measures to safeguard the data subject's legitimate interests.</u></p> <p>4. (...) The information to be provided by the controller under Articles 14 and 14a shall include information as to the existence of <u>profiling referred to in paragraphs 1 and 3 and information concerning the logic involved in the profiling, as well as the significance and the envisaged consequences</u> of such <u>profiling</u> of the data subject.</p> <p>5. (...)</p>	<p>Profiling shall not <u>include or generate any data that fall under the</u> special categories of personal data referred to in Article 9, unless Article 9(2) applies and subject to suitable measures to safeguard the data subject's legitimate interests.</p> <p>3a. Profiling that (whether intentionally or otherwise) has the effect of discriminating against individuals on the basis of race or ethnic origin, political opinions, religion or beliefs, trade union membership, or sexual orientation, or that (whether intentionally or otherwise) result in measures which have such effect, shall be prohibited.</p> <p>4. The information to be provided by the controller under Articles 14 and 14a shall include information as to the existence of profiling referred to in paragraphs 1 and 3 and information concerning the logic involved in the profiling, as well as the significance and the envisaged consequences of such profiling of the data subject.</p>	<p>efekcie dyskryminacyjnych) profilów, w odniesieniu do sytuacji mających duże znaczenie zarówno dla grup, jak i indywidualnych osób. Dlatego proponujemy zmiany, które mają na celu ochronę podmiotów danych przed dyskryminacją. W związku z tym, powinno się również ograniczyć możliwość wykorzystywania danych wrażliwych przy generowaniu profilów oraz profilowania generującego takie dane.</p> <p>(4) Utworzone profile mogą być trudne lub wręcz niemożliwe do zweryfikowania, ponieważ opierają się na złożonych, dynamicznych algorytmach, które stale ewoluują. Często algorytmy wykorzystywane w tym procesie są kwalifikowane jako tajemnica handlowa, wobec czego osoby, których dane dotyczą, nie otrzymują na ich temat informacji. W tym kontekście bardzo duże znaczenie mają gwarancje zwiększające transparentność tego procesu z</p>
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5. Within six months of the coming into force of this Regulation, the Commission shall adopt delegated acts in accordance with Article 86 for the purpose of further specifying the criteria and conditions for suitable measures to safeguard the data subjects' legitimate interests referred to in paragraph 2. The Commission shall consult representatives of data subjects and the Data Protection Board on its proposals before issuing them.

perspektywy podmiotu danych. Projekt rozporządzenia powinien gwarantować podmiotom danych **prawo do informacji na temat tego, czy podlegają profilowaniu, logiki stojącej za zastosowanym mechanizmem oraz kategorii, do których ich dane zostały zakwalifikowane, jak również do wyjaśnienia ostatecznej decyzji.** Pomoże to ograniczyć brak przejrzystości, który mógłby podważyć zaufanie do przetwarzania danych, zwłaszcza w kontekście usług online.

(5) Z perspektywy interesów podmiotów danych, **fundamentalne znaczenie ma szczelna regulacja, która – nie zakazując takich praktyk – podda kontroli i odpowiednim gwarancjom każdy przypadek zastosowania środków opartych o profilowanie, które wywierają wpływ na podmioty danych.** Uzależnienie samego zastosowania projektowanych przepisów od tego, jaki skutek wywiera środek oparty na

		<p>profilowaniu, tworzy istotny wyłom w regulacji i <i>de facto</i> uzależnia standard ochrony podmiotów danych od oceny i dobrej woli administratora danych. W związku z tym proponujemy odpowiednie zmiany w punkcie 1 art. 20.</p> <p>(6) Podobne zastrzeżenia i uwagi zgłaszała także Grupa Robocza Art. 29 w swojej opinii do projektu rozporządzenia:</p> <p>„The Working Party supports the provision in the Regulation dealing with profiling. However, it has doubts whether the approach taken is sufficient to reflect the issues of creating and using profiles, particularly in the online environment. In addition, the Working Party notes that the term “significantly affects” in Article 20(1) is imprecise. It should be clarified that it also covers the application of, for example, web analysing tools, tracking for assessing user behaviour, the creation of motion profiles by mobile applications, or the creation of personal profiles by social</p>
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		<p>networks. (...) In the Working Party's view, an approach should be taken that clearly defines the purposes for which profiles may be created and used, including specific obligations on controllers to inform the data subject, in particular on his or her right to object to the creation and the use of profiles.“</p>
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