

Statement from the Danish Data Protection Authority: Municipal authorities' authority for the AI profiling tool Asta

Date: 18-05-2022

Decision

Public authorities

Reply to inquiry

Basis of treatment

On 4 May 2022, the Swedish Agency for Labor Market and Recruitment (STAR) requested an assessment of the issue of the municipalities' authority to use the AI profiling tool Asta.

Journal number: 2022-212-3676

Summary

On 4 May 2022, the Swedish Agency for Labor Market and Recruitment (STAR) requested an assessment of the issue of the municipalities' authority to use the AI profiling tool Asta.

Asta is a tool that aims to carry out a machine analysis of what a newly unemployed unemployment benefit recipient's risk is that the person in question's contact process with the job center will be prolonged. In other words, the Asta tool performs a statistically based analysis of the citizen in order to estimate the duration of the unemployment benefit case and the contact process.

The Norwegian Data Protection Authority assesses that the citizen's consent cannot form the basis for processing according to the data protection regulation (GDPR), since the citizen's consent in the relevant context cannot be considered voluntary.

The Danish Data Protection Authority therefore assesses that the municipalities' authority to process personal data – when they use the Asta tool – is the data protection regulation's provision on the exercise of authority, which requires implementation in national legislation, in which connection more detailed rules can be laid down that it must be voluntary for the citizen, if the tool is to be used.

If special categories of personal data are processed, the ban on the processing of such data will only not apply if there are significant public interests, which also presupposes that the processing is authorized by national law.

1. On 4 May 2022, the Swedish Agency for Labor Market and Recruitment - prompted by a question from SF - requested the Danish Data Protection Authority for an assessment of the issue of the municipalities' authority to use the Asta tool.

2. The Danish Data Protection Authority's assessment

The Danish Data Protection Authority assesses that the municipalities' authority to process personal data in connection with the use of the Asta tool is the data protection regulation's article 6, subsection 1, letter e, which requires implementation in national legislation.

If special categories of personal data are processed, the ban on the processing of such data can only be lifted in accordance with Article 9, paragraph 1 of the Data Protection Regulation. 2, letter g, which also presupposes that the processing is authorized by national law and that the processing is proportionate to the objective pursued, respects the essential content of the right to data protection and ensures appropriate and specific measures to protect the data subject fundamental rights and interests.

This assessment is explained in more detail below.

3. The Asta Tool

From the attached product description from Schultz, which offers the Asta tool to a number of municipalities, it appears that the purpose of Asta is to carry out a machine analysis of what a newly unemployed unemployment benefit recipient's risk is that the person in question's contact process with the job center will be long-term. The Asta tool performs a statistically based analysis of the duration of the unemployment benefit case and the contact process.

When a newly unemployed unemployment benefit recipient registers, Asta will carry out the aforementioned statistically based analysis. The analysis will result in the individual citizen's risk of a long contact process receiving a score that can be low, medium or high. Asta will present this information to the case manager in, for example, a work list, so that this information can be used as a filtering criterion.

The function is thus intended as an aid to the jobcentre's planning of the citizen's very initial contact process – e.g. when and for whom the job center could consider an extra effort in planning interview lengths and frequencies.

In the professional application Fasit, which Schultz supplies to 58 Danish jobcentres, the jobcentre has historical data on unemployment benefit cases in recent years. The job center thus has historical information on which unemployment benefit recipients ended up having a long contact process and which did not.

Asta is given access to this information in anonymised form.

On the basis of the anonymised data, a large number of different person types are constructed, each of which has its own

characteristics in the form of a special combination of values. It is Schultz's subject specialists and data experts who uncover the various data elements that must be included in the assessment of the risk. Schultz has found that there is up to 50 relevant information about a citizen in Fasit, which contributes to drawing characteristics of unemployment benefit recipients in relation to whether their contact course with the job center ended up being short or long. Overall, this is the following information: Information from the citizen's CV plays a significant role. The focus here is particularly on the highest level of education, language skills and number of driving licences, but also on connections between education, experience and job goals ("I'm looking for a job as").

The citizen's job blog also plays an important role, as there are, among other things, look at how many geographical regions the citizen has applied for a job in, as well as how often an application has led to a job interview.

Finally, information about the citizen's previous contact history also plays a role. This includes information about e.g. the number of calls, absences and case handler changes.

Master data about the citizen, e.g. age, gender and need for interpreters are also included.

Asta thus only makes use of the information that is already available to users in Fasit. There is thus no linking of data from different municipal registers.

Asta carries out the statistically based analysis by comparing the information (values) of a specific unemployment benefit recipient with the values of the different types of person. The risk of ending up with a long contact course is then estimated based on the extent to which the particular citizen's values are most similar to person types who ended up with a short or long contact course.

4. The legal basis

The Data Protection Regulation[1] Article 6, subsection 1, contains the legal basis for processing personal data. It follows from this that processing is only lawful if and to the extent that at least one of the following conditions applies:

The data subject has given consent to the processing of his personal data for one or more specific purposes.

Processing is necessary for the performance of a contract to which the data subject is a party, or for the implementation of measures taken at the data subject's request prior to entering into a contract.

Processing is necessary to comply with a legal obligation owed to the data controller.

Processing is necessary to protect the vital interests of the data subject or another natural person.

Processing is necessary for the performance of a task in the interest of society or which falls under the exercise of public authority, which the data controller has been tasked with.

Processing is necessary for the controller or a third party to pursue a legitimate interest, unless the data subject's interests or fundamental rights and freedoms requiring the protection of personal data take precedence, in particular if the data subject is a child.

The first paragraph, letter f) does not apply to processing carried out by public authorities as part of the performance of their tasks.

The definition of a consent can be found in the Data Protection Regulation, Article 6, subsection 1, letter a. It follows from this that consent is understood as any voluntary, specific, informed and unequivocal expression of will from the data subject whereby the data subject, by declaration or clear confirmation, consents to personal data relating to the person concerned being made the subject of treatment.

It is thus a condition for the data controller – in this case a municipality – to use consent in accordance with Article 6, paragraph 1 of the Data Protection Regulation. 1, letter a, as a basis for processing, that the consent is i.a. voluntarily.

The assessment of whether a consent from the data subject can be considered voluntary includes whether there is an unequal relationship between the data controller and the data subject. A consent is normally not considered to have been given voluntarily if there is a clear bias between the data subject and the data controller.

When processing information about the registered person in the context that is being asked about here, where it is a public authority and where the public authority has control over the registered person's means of support, consent will rarely be considered voluntary in the opinion of the Data Protection Authority and thus constitute a valid basis for treatment.

This also applies, even if in practice it is possible for the data subject to opt out of the processing, i.e. avoid profiling without this having a negative impact on the person concerned, e.g. stop of service, as there will be a not inconsiderable risk that the data subject - regardless of this possibility - will be able to feel pressured to consent to the processing, e.g. to avoid appearing troublesome or similar.

Since consent according to Article 6, subsection 1, letter a, cannot be used as a basis for processing, and since the provision's letters b, c, d and f are not relevant in the present situation, it will only be letter e on the exercise of public authority that could potentially form the basis for the processing.

The application of Article 6, subsection 1, letter e, requires in accordance with Article 6, paragraph 2 and 3, that the processing is provided for in EU law or national law, but not necessarily that there is national implementing legislation on the processing itself. Article 6, subsection 2 and 3, also allows the Member States to set requirements for the processing which must be met in order for the processing to be legal.

Which requirements are placed on the clarity of this national legal basis depends on how intrusive the processing in question is for the data subject. If it is a completely harmless treatment, the requirements will not be particularly high. If, on the other hand, it is an intrusive treatment, as is the case in the situation that is being asked about here, greater demands are placed on the clarity of the legal basis.

It is against this background that the Danish Data Protection Authority is of the opinion that – in order for the Asta tool to be used by the municipalities – there will have to be authority for this in national legislation, such as, for example is known from § 8, subsection 2, in the Act on an active employment effort.

The fact that national legislation will have to be made in the area does not in itself mean that the municipalities will therefore be able to carry out profiling of the registered person without their consent, as it will be possible to set requirements for the processing in a national legal basis, which must be fulfilled for the processing to be legal, i.e. under which conditions the municipalities can use the tool.

The Danish Data Protection Authority can also refer to the Danish Data Protection Authority's (supplementary) consultation response of 5 July 2019 on proposals for an Act on active employment efforts and proposals to amend the Act on the organization and support of employment efforts, etc., Act on active social policy, Act on sickness benefits, the Integration Act and various other laws (consequential bills), which can be found on the authority's website here:

<https://www.datatilsynet.dk/media/7758/fornyet-uttalelse-til-star.pdf>.

It is also not clear to the Data Protection Authority whether the Asta tool will include special categories of personal data, e.g. health information, which is basically prohibited to process, cf. the data protection regulation, article 9, subsection 1.

If this is the case, in the opinion of the Danish Data Protection Authority, the ban can only be lifted in accordance with Article 9, paragraph 1 of the Data Protection Regulation. 2, letter g, from which it follows that the prohibition according to subsection 1, does not apply if processing is necessary for reasons of significant public interest on the basis of EU law or the national law of the Member States and is proportionate to the objective pursued, respects the essential content of the right to data protection

and ensures appropriate and specific measures to protect the fundamental rights and interests of the data subject.

The application of the data protection regulation's article 9, subsection 2, letter g, presupposes, as is the case with article 6, paragraph 1, letter e, that the processing is authorized by national law and that the processing is proportionate to the objective pursued, respects the essential content of the right to data protection and ensures appropriate and specific measures to protect the fundamental rights and interests of the data subject .

[1] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons in connection with the processing of personal data and on the free exchange of such data and on the repeal of Directive 95/46/EC (general regulation on data protection).