



MATTER Automated decision-making in Kela

1 COMMENCEMENT OF THE MATTER

The complaint [OKV/868/1/2018](#) investigated by the Office of the Chancellor of Justice criticised the procedure applied by the Social Insurance Institution of Finland (Kela), because the decision made by Kela on labour market subsidy did not in all respects meet the requirements of the Administrative Procedure Act. The complaint concerned the execution of the activation model for unemployment security, in effect at the time, and upon investigation into the matter it was discovered that the execution of the activation model was partially automated in Kela.

Regulation (EU) 2016/679 of the European Parliament and of the Council on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (hereinafter, the General Data Protection Regulation) lays down the processing of personal data and the requirements set for processing. The Regulation must be generally applied in automated decision-making and profiling, and, moreover, Article 22 of the Regulation lays down decision-making based solely on automated processing, including profiling. The Article lays down the person's right not to be subjected to a decision based solely on automated processing, the legal basis required for such decision-making, the suitable measures to safeguard the data subject's rights and freedoms and legitimate interests, as well as using special categories of personal data in automated individual decision-making.

In its opinions, the Constitutional Law Committee has stated that regulations concerning good governance and customers' rights and protection under the law, as well as considerations regarding the realisation of liability for acts in office must be taken into consideration in the context of automated decision-making. In automated decision-making, regulations governing the administrative procedure cannot thus be bypassed and the realisation of liability for acts in office cannot be blurred so that it is impossible to establish the party responsible for the processing of the matter and the preparation and making of the decision.

According to information available on Kela's website, Kela has the right based on law to make automated benefit decisions. The website does not provide more detailed information about such decision-making or

about, for example, which decisions Kela makes automatically and whether decision-making is fully or partially automated, or whether decision-making is supported by automated procedures.

The information available to me concerning Kela's automated and automation-supported decision-making raised the question about the realisation of the rights laid down in section 21 of the Finnish Constitution and the liability for acts in office laid down in article 118 of the Constitution in Kela's decision-making concerning social security and, subsequently, the execution of article 19 of the Constitution.

According to the Constitution, the Chancellor of Justice shall, among other things, ensure that the courts of law, the other authorities and the civil servants, public employees and other persons, when the latter are performing a public task, obey the law and fulfil

their obligations. In the performance of his duties, the Chancellor of Justice monitors the realisation of basic rights and freedoms and human rights.

According to section 3, subsection 1 of the Act on the Chancellor of Justice of the Government, the Chancellor of Justice can initiate the processing of a matter on his own initiative. In his supervisory duty, the Chancellor of Justice pays attention to such factors in the structures of service systems, for example, that may jeopardise the implementation of a person's rights and freedoms.

Due to the aforementioned, I commenced on my own initiative within the meaning of section 3, subsection 1 of the Act on the Chancellor of Justice of the Government, an investigation into Kela's automated decision-making concerning social security.

2 KELA'S REPORT

I asked Kela to provide a report on the following to clarify the matter:

- 1) the social security benefits in which Kela uses automated decision-making or decision-making supported by automated procedures,
- 2) whether Kela makes automated individual decisions (including profiling) referred to in Article 22 of the General Data Protection Regulation,
- 3) the legal basis behind making the said decisions,
- 4) how the application of regulations concerning good governance and the administrative procedure and, in particular, related to the protection under the law of the persons concerned are ensured when making the aforementioned decisions, and
- 5) whether, in the aforementioned decision-making, it is possible to realise liability for acts in office based on section 118 of the Constitution in practice and how the liability is divided between management, parties responsible for the development and use of automated decision-making systems and individual benefit administrators.

I also asked Kela to provide its opinion on how it considers the automated decision-making and the automated support systems of decision-making to improve the implementation of consideration without delay, the correctness of decisions, and other good governance requirements, and how this has been taken into consideration in the development and maintenance of the systems. Furthermore, I asked Kela to describe the development plans concerning automated decision-making from the viewpoint of what kind of decision-making within Kela's sphere of competence such decision-making can, in Kela's view, be used in future.

I also requested information about how the customer's right to know the method by which a decision was made as well as their possibility to receive information about the operating principles of the algorithms used in automated decision-making or about the content of the programmed decision-making rules are realised. Moreover, I requested information about how the applications used in automated decision-making have been assessed in the documents concerning the controller's accountability laid down in the General Data Protection Regulation.

Kela provided the following report dated on 19 December 2019:

2.1 General description of automation in Kela

Kela has stated that computers are used extensively in the management of processes in all of Kela's work concerning benefits. The benefit administrator's work proceeds in accordance with the process provided by the computer, and the information in the benefit systems is updated automatically. The benefit administrators base their decisions on information that exists in the register and is updated automatically, and the process includes automated controls. According to the report, this automation is called administration automation or base automation.

For Kela to carry out its duties, some of the duties need to be automated, and automation has been added to different functions as the duties have increased and efficiency and productivity have been required of Kela. Automation has been pursued and the objective has been included in the plans guiding Kela's operations.

According to the report, automation is applied in routine tasks that do not involve discretion. Automation has made it possible to accelerate the processing of applications, and the quality of processing has improved as human errors have been eliminated. Over the years, automation has been established as a normal aspect of benefits implementation.

The payout of Kela's benefits has been automated for most benefits, and as a rule, automated payout is used in the payments. The payment information is formed based on decisions, and batch runs are used to pay the benefits to customers in accordance with the decisions.

The index adjustments of benefits and other changes to the level of benefits based on legislative amendments are usually implemented through batch runs, which adjust all benefits being paid starting from the date of the change. According to most benefit laws, no decision is, as a rule, issued on these changes unless separately requested by the customer.

The majority of Kela's automatically generated decisions are partially automated, meaning that a benefit administrator is involved in the process to observe and consider factors that affect the final decision. The partially automated decisions are not based solely on automated processing.

2.2 Automated decisions

According to the report, a small portion of decisions involve decision-making based solely on automated processing of personal data.

A fully automated decision can be generated for study benefits in a situation where the benefit can be granted based on the application of the person concerned or where the customer has cancelled the benefit for a specific period of time. In addition, a fully automated decision can also be generated in study benefits if a decision proposal approved by the person concerned is the basis of the decision.

In many benefits, a fully automated termination decision can be generated based on information available in the register (e.g. age, death) or on other clear and undisputed obstacles to benefit payment. A fully automated termination decision is also made in connection with periodic reviews of some benefits if the person concerned, after receiving a request for information, fails to submit the information requested by the set deadline.

The changes to the level of benefit based on amendments to legislation are fully automated in all benefits. When a decision is issued in such situations, it is fully automated.

2.3 Decisions referred to in Article 22 of the General Data Protection Regulation

According to the report, Kela makes fully automated decisions to some extent, but the extent to which they fall within the scope of the prohibition in Article 22 of the General Data Protection Regulation is open to interpretation. The automated decisions issued by Kela do not involve discretion concerning the grounds for granting or denying benefits.

In accordance with paragraph 2 of Article 22, the automated processing referred to in paragraph 1 is authorised by Member State law, among other things. In the case of Kela, the use of automation is stated in the Government Decree on the Social Insurance Institution. Article 2 of the Regulation lays down the automated signing of a decision made in automatic processing of data.

The report refers to the Government Proposal ([HE 52/2018 vp](#)) on amending the social security and insurance legislation as a result of the EU's General Data Protection Regulation. The proposal suggested that new section 63 a be included in the National Pensions Act. According to the new section, Kela could make automated decisions referred to in Article 22, paragraph 1, under certain conditions. Due to the statement issued by the Constitutional Law Committee, the proposal did not move forward and national legislation therefore does not include unambiguous and sufficient provisions concerning automatic processing in the implementation of Kela's benefits.

Despite the lack of regulation, Kela implements automation in such a way that the rights and freedoms of data subjects are realised. The opportunities of the person concerned to influence the decision made and have it processed by a person, as well as the processing of personal data otherwise from the perspective of Article 5 of the General Data Protection Regulation are similar, irrespective of whether the processing is automated or not.

The right to the protection of personal data is not absolute but must be viewed in relation to its purpose in society and, in accordance with the principle of proportionality, it must be proportionate to the other basic rights. Kela's automated decisions secure the customer's right to receive accurate social security without delay.

Automated decisions are issued only in situations in which the circumstances are clear and in which no case-by-case discretion is involved. Such situations also do not involve greater than usual risks to the person concerned, because manual processing also applies information included in registers and systems on the circumstances of the person concerned as such.

In addition, the automated process has been defined so that the case is forwarded to a natural person for processing if other documents or contacts related to the case have been entered in the system. The natural person assesses the impact of these documents and contacts and, when needed, hears the parties concerned.

2.4 Financial impacts

According to Kela, the financial impacts achieved through automation are considerable. No exact calculations are available for base automation, but without it, the basic information that is retrieved automatically for benefit processing systems (such as personal data) would need to be retrieved and entered manually. If the processing system did not guide the benefits administrator, the impacts would also be qualitative, and the lack of the impact of guidance provided by the base automation would likely slow down the processing of applications. It is possible that the scale of all base automation corresponds to the advantages now gained through decision-making automation.

The advantages related to decision-making can be measured, and the overall advantages are approximately 2,000 person-years, equalling annual savings of EUR 132 million.

2.5 Good governance and protection under the law

Kela's automation is based on simple rules (rule-based automation), and is suitable for administrative matters that are processed in bulk and are non-discretionary. The automation rules, or algorithms, are defined by people, and through liability for acts in office, people are responsible for the definitions they make.

Kela does not apply artificial intelligence technology in its decision-making activities, since decisions made through artificial intelligence involve a number of issues related to good governance and customer's protection under the law. Artificial intelligence is software that performs functions requiring deduction and observation skills and experience similar to those of a person. The operating principles and decision paths of a data-intensive artificial intelligence system have not been defined in advance, but the system uses machine learning and statistical probabilities and is thus able to learn based on the observations and conclusions it makes. After making a sufficient number of decisions, artificial intelligence may also assess the decisions it has made.

The key difference between the rule-based automation used by Kela and artificial intelligence applications is the increasing autonomy of the AI applications, which may also mean that decision-making is separated from direct human control. Artificial intelligence applications cannot replace decision-making processes involving people, and therefore, AI applications are not used in Kela's benefit decisions.

The rule-based automation used by Kela is predictable and the inference chain of the outcome produced by automation can be traced. The decision-making process is transparent, meaning that the customer can be informed of the processing of data. A simple rule-based decision-making process functions as intended, and therefore, the risk of data processing that discriminates people is not greater than usual.

Rule-based automation does not endanger the requirements of good governance or the protection under the law of the person concerned. Decision-making based on this automation does not differ considerably from non-automated decision-making and the base automation used as early as the 1960s.

Rule-based automation is used, for example, in situations in which the system detects a factor in Kela's register that terminates the payment of a benefit directly based on law. Based on the register data, the system issues a terminating benefit decision, which includes justification phrases in a standard format. The situation will not change even if rule-based automation was replaced by a natural person. The natural person would also make the decision based on the register data and would use justification phrases in a standard format when issuing their decision. In resolving the matter, the natural person could not be held liable for acts in office for such errors in the data contained in the system that would potentially result in an erroneous decision.

The matters to be selected for the automated decision-making process have been limited so that decisions can be made in a solely automated procedure when the matter can be resolved in accordance with section 34, section 2, subsection 5 of the Administrative Procedure Act without hearing the person concerned. Deviating from the hearing or resolving the matter without an application in some cases is laid down in benefit legislation.

Since there is no uncertainty about the existence of information on which a change in the circumstances or another decision is based, the decision-making also implements the adequate examination duty referred to in section 31 of the Administrative Procedure Act and its underlying pursuit of substantive truth. In rule-based automation, software has been configured to return to manual processing all matters that include other documents or contacts. In such cases, the matter is resolved by a natural person.

Automated decisions are normally subject to the procedural provisions laid down in the Administrative Procedure Act and the provisions concerning protection under the law included in the Administrative Judicial Procedure Act (repealed and new). The automatically issued decisions include the information required in section 44 of the Administrative Procedure Act; in other words, the authority that made the decision and the date when it was made; the parties whom the decision directly concerns; the reasons for the decision

and specific information about what a party is entitled or obliged to do or how the matter was otherwise decided; and the name and contact details of the person from whom a party may request further information on the decision, if necessary.

The reasons for automatic decisions in standard format comply with the requirements laid down in section 45 of the Administrative Procedure Act. They apply to Kela's decisions regardless of automation.

Automatic decisions include instructions for requesting an administrative review in accordance with section 46 of the Administrative Procedure Act and they are subject to the Administrative Procedure Act's provisions on the procedure for requesting an administrative review, correcting an error, and service. Decisions include instructions for requesting a judicial review, and an appeal can be made against them, as is the case with decisions made in manual processing as well.

2.6 Benefits and supervision of automation

The benefits of automation include repeatability, stricter quality management, reduction of waste, integration with several different systems, increased production and reduced need for labour. Automation accelerates the payout of benefits and improves the quality of work as risks related to human oversight are reduced. For example, the error rate in automated decisions issued for online applications of student financial aid is 0.0654%, whereas in manual decisions on student financial aid it is 3%. According to a survey, the figures are not fully comparable because manual processing includes cases that are more demanding and require more research. The view based on supervision and risk analyses is that when targeted appropriately, rule-based automation reduces the risk of error involved in human activity.

Automation enables fast, flexible and streamlined use of the services and offers cost savings in accordance with the service principle laid down in the Administrative Procedure Act. Automation also improves the quality of reporting, because monitoring and reporting on the tasks, workloads and leadtimes of software robots and the quantity of deviating situations are easy. The resources that are freed through the use of automation can be better allocated to guidance and customer support.

Kela acknowledges annual benefit-related risks, their underlying reasons and the worst-case consequences if risks materialise. A quality management plan is prepared for benefits based on the benefit risks, supervision results and statistical analyses. The plan is implemented during the following year.

The plan includes supervision and surveys of different levels, prepared through various methods, which determine the correctness of benefit decisions as well as the functioning of the benefit processes and shared processes. The targets selected for supervision annually are subject to either individual supervision or continuous supervision spanning the entire year. Kela's units also have their own plans related to quality control, implemented annually.

Automated decisions are subject to the same risk-based supervision measures as manual decisions. The need for supervision is indicated in the benefit risk survey. Due to the limited scope of application of automated decisions, the correctness of the functionalities is, in practice, always established at the system definition and testing phase. The ranking of automation functionalities in future-oriented risk analyses is not high in risk assessment. Supervision usually targets the risk of human error related to manual decisions. There is no such risk in automated decisions, which is why the quality of these decisions is consistent.

A system is being planned which would systematically supervise the correctness of all benefit decisions on a larger scale than is currently the case. The system would select a predetermined portion of decisions for supervision and detect erroneous decisions in real time, before the decision is sent to the customer. It would also identify decisions in which it is impossible to know, based on the information Kela has, whether the decision is correct or incorrect. The errors would be corrected before the decision is issued. A portion of automated decisions could be picked for supervision afterwards, within two weeks of the decisions. The system is scheduled for implementation in 2021.

2.7 Realisation of liability for acts in office

Kela's duties and sphere of competence are defined for an authority, not individual officials, in legislation. This is necessary in an organisation like Kela, where routine administrative decisions are made in information systems.

The liability of an individual official for the incorrectness of administrative decisions cannot be resolved solely on the basis of the official having signed the decision, but the question of liability must be assessed within the framework of the statutory duties and the internal organisation of the operations of the authority overall. Although the official who made the decision is liable for their decision, the attribution of liability is also affected by the instructions given concerning the matter and whether the reason for an error is beyond the control of the person who made the decision (for example, a fault in the information system).

Kela's duties are laid down in the Act on the Social Insurance Institution of Finland and in benefit legislation. The Act on the Social Insurance Institution of Finland describes and delimits Kela's possibilities to organise its operations. The duties of Kela's administrative units are specified in the rules of procedure. The duties of the units and the responsibilities of the officials working in the units become more specified vertically from top down, and the duties and responsibilities of individual officials are defined by the tasks and the access rights necessary to perform such tasks, assigned to them by their immediate supervisors. The access rights are assigned in the electronic HR management system. In the decision-making work, the access rights are related to the use of benefits systems and, in planning tasks, to the use of various software and test environments.

The chain of responsibility in a decision made manually can always be traced on the level of the individual to the official who made the decision. In automated decisions, there is no individual official who confirms the decision. However, the persons responsible can be traced all the way to the decision concerning the implementation of the system or its change by means of the gradual progress of the information systems and the related documents, as well as documents concerning the progress.

Information systems that partially or fully automate decisions are implemented through the "information systems development method" in Kela. The method shows the stages into which the information system development is divided and what is done in any given stage and by whom.

The liability for acts in office in accordance with section 118 of the Constitution is realised in both manually issued and automated decisions. The unit responsible for an error and, ultimately, the official responsible can always be traced based on the specifications concerning the division of tasks, authority and operating models. There can be several officials responsible in a multi-tier line organisation, because the unit's supervisors are also responsible for the performance of their unit and subordinates. The responsibility may also be assigned and divided based on the type of the error. How the responsibility for the error is assigned depends on the affected unit's area of responsibility.

For example, the official responsible for the error in the content of the decision may be the person designated as responsible and performing a task in the Insurance District and/or their supervisor. The responsibility for a decision made in accordance with Kela's administrative guidelines may fall on the unit responsible for guidance activities that has provided incorrect instructions, which the person making the decision has followed in accordance with the internal regulations. In the case of a technical error, the responsibility may fall on the unit in charge of the functioning of the system and on an official in the unit.

Automatic decisions do not have an official who would confirm the decisions, and due to the nature of the decisions, the units and officials that would normally make manual decisions in Kela's Insurance Districts are not responsible for those decisions. The correctness of automatic decisions is confirmed when the system is set up and through risk and quality management measures. The policies in question and the system implementation are carried out in other units of Kela. The responsibility always lies with the unit in which the decision was made. The view that the official responsible for an error would, in all situations, be the person who signed the decision, is artificial.

2.8 Accountability referred to in the General Data Protection Regulation

On a general level, the processing of personal data in Kela is described in Kela's information security and data protection policy, which defines the principles and objectives concerning information security and data protection. The policy forms the foundation for Kela's more specific guidelines on information security and data protection, which apply the principles in practice.

Kela demonstrates its compliance with data protection legislation through accountability. In practice, accountability means that Kela has documented the implementation of all technical and organisational safeguards that ensure the realisation of the data protection requirements.

Using automation in Kela and the automated decisions do not differ from other processing of personal data and decision-making activities in a manner that would warrant referring to them separately in all contexts related to accountability.

The description of the processing of personal data required by the General Data Protection Regulation, or a record of processing activities, is provided on a document template similar to an Excel spreadsheet. The record of processing activities refers to Kela's privacy statements available on Kela's website. The objective is to maintain the record of processing activities on a medium that allows for keeping the record up-to-date and linking it to a more specific level in Kela's information pools and their meta data.

The privacy statements include all privacy statements related to customer service and benefits processing. Kela's website ("Data protection and handling of personal data at Kela") contains information on the processing of personal data and instructs and guides customers on exercising the rights of data subjects. The section in question also states that automated decisions are made in Kela and that they are always made on the basis of the same information and principles as other decisions, and that they are subject to the same administrative review and appeal procedures as other decisions.

The content of the programmed decision-making rules, or algorithms, has been made available to customers because the rules correspond to public instructions on benefits. Kela actively communicates factors affecting the right to receive benefits.

At the time of submitting the report, no information about individual benefit decisions having been made in automated processing was included in such decisions. According to the report, the decision text about automated decision-making will be added to decisions generated automatically.

The report states that Kela has procedures in place for conducting an impact assessment, required by the General Data Protection Regulation, related to data protection. The impact assessment is a tool that serves accountability and helps assess risks related to the processing of personal data and the required methods to prepare for risks. Kela applies a threshold analysis in which the risk involved in the processing of personal data is assessed to determine whether an actual impact assessment should be carried out on the processing. Based on the threshold analysis, when an actual impact assessment is not performed, the correctness of the processing of personal data can be verified by means of a checklist (the data protection checklist). This is a lighter procedure compared to an impact assessment.

The implementation of new technology is among the risk factors, and some individual development targets have been dropped after determining that the risks detected could not be controlled with certainty. The automated decision-making in use primarily dates back to the period before the General Data Protection Regulation, when impact assessments in their current form were not conducted. The resources have been prioritised so that extensive impact assessments can be made on new activities and development. Very few assessments have been conducted on previous personal data processing activities and systems that are already in use. However, Kela has carried out risk assessment and management measures in the development and maintenance of systems. These procedures implement data protection by design and by default.

Kela has procedures and guidelines in place for handling and documenting data protection incidents. Personnel are encouraged to report data protection incidents with a low threshold, also in situations where incidents are only suspected. No data protection incidents related to automated processing have been reported. As a rule, the incidents are caused by human error.

2.9 Trends in automated decision-making

Kela pursues rule-based automation based on the extensive use of registers in situations that do not require case-specific discretion. Kela uses tens of registers in its benefit work. Since the impact of income on Kela benefits has almost always been exhaustively defined in benefit legislation, a significant portion of decisions in which the benefit is granted on application could be made with automation. The decision to be issued to the customer would combine the information provided in the application and the pre-existing information in Kela's register.

Customer profiling or using AI technologies in the decision-making activities are not included in the development plans concerning automation unless their role is an assistive one.

2.10 Summary

According to Kela's view, its activities do not involve constitutional problems indicated by the Constitutional Law Committee and referred to in the request for a statement, other than concerning inadequate legislation. The progress of draft proposals concerning the matter has been blocked due to reasons not associated with Kela.

Inadequate legislation and the resulting uncertainty prevent the advancement of development projects related to automation. The development projects pursue service to customers which is of higher quality and faster, and considerable savings in society. Kela's benefits secure customers' basic needs, which should be addressed without delay. Rule-based automation makes this possible in situations that do not involve case-specific discretion. At the same time, personnel resources can be allocated to work where discretion is required or to situations where customers need personalised support.

The experiences gained from automation have been positive, and customer satisfaction has been good. The advancement of rule-based automation is in the interests of all parties and not a threat to the realisation of basic rights. When implemented correctly, it promotes the objectives of legislation.

According to Kela's view, a general law should be enacted to lay down the general framework of the use of automation. In addition, Kela needs special legislation that regulates its operations.

3 STATEMENT OF THE MINISTRY OF SOCIAL AFFAIRS AND HEALTH

I requested the Ministry of Social Affairs and Health to provide a report to indicate their view of how the requirements for the realisation of good governance and protection under the law, laid down in the Constitution and the Administrative Procedure Act, are supposed to be implemented in practice and taken into consideration in decision-making that is automated or supported by automated procedures in social security matters. I also requested the Ministry's view of which matters and categories the Ministry considers suitable for decision-making that is automated or supported by automated procedures and the grounds for such decision-making. Furthermore, I requested the Ministry to provide its view of what kind of supervision and legislation ensures that decision-making that is automated or supported by automated procedures meets the requirements set by the Constitution and the Administrative Procedure Act for the administrative procedure, decision-making and decisions.

In its statement, the Ministry concluded that the possibility to make automated decisions is highly important with regard to the digitalisation of society and that it is necessary to examine the need for general legislation

concerning automated decision-making. Because the Constitutional Law Committee has emphasised the need for an examination and considered it necessary to refrain from new regulation proposals concerning automated decision-making that are administrative domain-specific, the Ministry's view is that there are no grounds for preparing any administrative domain-specific proposals concerning automated decisions until the Ministry of Justice has completed its examination.

4 DECISION

4.1 Legislation

Provisions that were applied in the matter or affected the decision are listed in the following and discussed in greater detail below. In addition to the provision listed here, other provisions stated below have also been applied to the decision.

4.1.1 Constitution

In accordance with section 1, subsection 2 of the Constitution, the constitution shall guarantee the inviolability of human dignity and the freedom and rights of the individual, among other things.

In accordance with section 2, subsection 3 of the Constitution, the exercise of public powers shall be based on an Act. In all public activity, the law shall be strictly observed.

According to the detailed justifications concerning section 1 of the Government Proposal on the Constitution ([HE 1/1998 vp](#)), section 1, subsection 2, together with section 2, conveys the central value basis of the Constitution (in the proposal referred to as the system of government), and it should be taken into consideration when interpreting other provisions. According to the detailed justifications concerning section 1 of the Constitution (in the proposal referred to as the system of government) in the Government Proposal on the amendment of basic rights ([HE 309/1993 vp](#)), the requirement of the inviolability of human dignity would provide a universal human foundation of fundamental rights, which would have effect on the interpretation when applying actual basic rights provisions, for example.

According to the section 6, subsection 1 of the Constitution of Finland, people are equal before the law.

According to section 8 of the Constitution, no one shall be found guilty of a criminal offence or be sentenced to a punishment on the basis of a deed, which has not been determined punishable by an Act at the time of its commission. The penalty imposed for an offence shall not be more severe than that provided by an Act at the time of commission of the offence.

Section 10, subsection 1 of the Constitution guarantees everyone's private life, honour and the sanctity of the home. More detailed provisions on the protection of personal data are laid down by an Act.

According to section 14, subsection 4 of the Constitution, the public authorities shall promote the opportunities for the individual to participate in societal activity and to influence the decisions that concern him or her.

Section 19 of the Constitution lays down the right to social security. Subsection 1 of the section states that those who cannot obtain the means necessary for a life of dignity have the right to receive indispensable subsistence and care. According to subsection 2 of the section, everyone shall be guaranteed by an Act the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.

According to section 21, subsection 1 of the Constitution of Finland, everyone has the right to have his or her case dealt with appropriately and without undue delay by a legally competent court of law or other authority, as well as to have a decision pertaining to his or her rights or obligations reviewed by a court of

law or other independent organ for the administration of justice. According to subsection 2 of the section, everyone has the right to be heard, the right to receive a reasoned decision and the right of appeal, as well as the other guarantees of good governance, shall be laid down by an Act.

Section 22 of the Constitution of Finland stipulates that the public authorities must safeguard basic and human rights.

According to section 80, subsection 1 of the Constitution, the President of the Republic, the Government and a Ministry may issue decrees on the basis of authorisation given to them in this Constitution or in another Act. However, the principles governing the rights and obligations of private individuals and the other matters that under this Constitution are of a legislative nature shall be governed by Acts.

According to the detailed justifications in the Government Proposal on the Constitution ([HE 1/1998 vp](#)), section 80, subsection 1 would require that all central provisions affecting the legal status of an individual should be laid down by an Act. According to the Proposal, the issuer of the decree could, however, be authorised by an Act to issue more detailed provisions on minor details concerning an individual's rights and obligations. According to the Proposal, other matters governed by law should also be laid down in an Act. By this, the Proposal refers to constitutional provisions concerning basic rights, among other things, but the reference also covers all other matters that according to a provision in the proposed system of government must be laid down by an Act. As a limitation to the statutory power, the clause would mean that a decree may not include provisions on the principles governing the rights and obligations of private individuals or based in the system of government, other matters governed by law.

Section 118 of the Constitution lays down official accountability. According to subsection 1 of the section, a civil servant is responsible for the lawfulness of his or her official actions. Civil servants are also responsible for a decision made by a multi-member body that the civil servant has supported as one of its members. According to subsection 2 of the section, a rapporteur shall be responsible for a decision made upon his or her presentation, unless he or she has filed an objection to the decision. Subsection 3 lays down the right of a person who has suffered a violation of his or her rights or sustained loss to request that the civil servant or other person in charge of a public task be sentenced to a punishment and the right to claim damages.

4.1.2 Administrative Procedure Act and Administrative Judicial Procedure Act

Section 2 of the Administrative Procedure Act lays down the principles of good governance. Section 6 of the Act lays down the legal principles of administration. In accordance with the section, the authorities must treat their customers equally and exercise their competence only for purposes that are acceptable under the law. The actions of civil servants must be impartial and proportionate to their objective. They must safeguard legitimate interests based on the judicial system.¹ The principles of good governance also include the service principle and appropriateness of services (section 7), the obligation to provide advice (section 8) as well as the requirement of appropriate language (section 9).

Chapters 5–7 and 9–10 of the Administrative Procedure Act lay down the consideration and examining of a matter and hearing the views of parties, deciding a matter and informing the parties. According to the Administrative Procedure Act section 44, subsection 1, paragraph 3, a written decision must clearly indicate the reasons for the decision and specific information about what a party is entitled or obliged to do or how the matter was otherwise decided, and according to paragraph 4, the name and contact details of the person from whom a party may request further information on the decision, if necessary. According to section 45, subsection 1 of the Act, the reasons for a decision must be stated. The reasons must indicate the circumstances and evidence that influenced the decision and specify the provisions applied. No reasons need to be stated for a decision in situations laid down in subsection 2 of the section.

¹ The legal principles of administration include equality, acceptable purpose, impartiality, proportionality and legitimate expectations.

The procedure for requesting an administrative review and correcting an error in a decision are laid down in chapters 7a and 8, respectively, of the Administrative Procedure Act.

Chapter 2 of the Administrative Judicial Procedure Act lays down the appeal against an administrative decision and chapter 3 covers filing an appeal.

4.1.3 Criminal Code of Finland

Chapter 40 of the Criminal Code lays down offences in public office, including acceptance of a bribe, aggravated acceptance of a bribe, bribery violation, breach and negligent breach of official secrecy, abuse of public office, aggravated abuse of public office, violation of official duty and negligent violation of official duty. Section 14 of the chapter covers confiscation.

The Criminal Code chapter 40, section 11 includes the definitions of, among other things, a public official, and employee of a public sector entity and a person exercising public authority in the Code. According to subsections 1 and 2 of section 12 included in the chapter, the provisions of the chapter concerning public officials also apply to persons holding a public position of trust and to persons exercising public authority. Sections 1–3, 5 and 14 of the chapter also apply, with the exception of removal from office, to employees of public sector entities.

4.1.4 Act on the Social Security Institution

Section 2, subsection 1 of the Act on the Social Security Institution lays down the duty of Kela as the enforcer of social security governed by specific legislation.

The administration of the Social Security Institution is covered in chapter 2 of the Act. According to section 11, subsection 1 included in the chapter, the employment of the Director General and Director of Kela is, as applicable, governed by the provisions of the Act on Public Officials in Central Government (750/1994) on the accountability, grounds for dismissal and the conditions of employment of the highest ranking state officials. According to subsection 2 of the section, the Employment Contracts Act (55/2001) applies to the employment of the officials of the Social Security Institution.

4.1.5 Charter of Fundamental Rights of the European Union

According to Article 7 of the Charter, everyone has the right to respect for his or her private and family life, home and communications.

According to Article 8 of the Charter, everyone has the right to the protection of personal data concerning him or her. Paragraph 2 of the Article states that such data must be processed fairly for specified purposes and on the basis of the consent of the person concerned or some other legitimate basis laid down by law. Everyone has the right of access to data which has been collected concerning him or her, and the right to have it rectified.

4.1.6 European Union's General Data Protection Regulation

The General Data Protection Regulation lays down the processing of personal data.

Article 22 of the Regulation lays down automated individual decision-making, including profiling. According to paragraph 1 of the Article, 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. Paragraph 2, point b of the Article states that decision-making referred to in the Article is possible if a decision 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.

According to Article 4, paragraph 4 of the General Data Protection Act, 'profiling' means any form of automated processing of personal data consisting of the use of personal data to evaluate certain personal aspects relating to a natural person, in particular to analyse or predict aspects concerning that natural person's performance at work, economic situation, health, personal preferences, interests, reliability, behaviour, location or movements.

According to the preamble (Recital 71) of the General Data Protection Regulation, 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. According to the Recital, 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.

Article 25 of the Regulation lays down data protection by design and by default. According to the Regulation preamble (Recital 78) concerning the provision, the protection of the rights and freedoms of natural persons with regard to the processing of personal data require that appropriate technical and organisational measures be taken to ensure that the requirements of the Regulation are met. In order to be able to demonstrate compliance with the Regulation, the controller should adopt internal policies and implement measures which meet in particular the principles of data protection by design and data protection by default. Such measures could consist, inter alia, of minimising the processing of personal data, pseudonymising personal data as soon as possible, transparency with regard to the functions and processing of personal data, enabling the data subject to monitor the data processing, enabling the controller to create and improve security features. When developing, designing, selecting and using applications, services and products that are based on the processing of personal data or process personal data to fulfil their task, producers of the products, services and applications should be encouraged to take into account the right to data protection when developing and designing such products, services and applications and, with due regard to the state of the art, to make sure that controllers and processors are able to fulfil their data protection obligations.

4.2 Phrasing of the question

Kela's task is to enforce benefit legislation concerning social security. At the same time, it enforces the right to social security, which is a central basic right in a life of dignity, in accordance with section 19 of the Constitution. The core of the enforcement task is related to the basic rights and sets special requirements for the performance of the task concerning safeguarding customers' rights and based on their needs. The decision, decision-making procedures and processes concerning social security benefits should, irrespective of the decision-making method, be lawful and secure the rights of customers as required by section 21 of the Constitution. High-quality administrative activities and decision-making build trust in the activities of the authorities and strengthen the acceptability of such activities especially when operating procedures and methods change.

The Administrative Procedure Act governing the administrative procedure regulates in greater detail the basic right to protection under the law and good governance, laid down in section 21 of the Constitution. As a rule, the said basic right is secured in the processing of administrative matters when the Administrative Procedure Act and provisions concerning the administrative procedure laid down in special legislation are applied as intended.

However, the expanding digitalisation and developing automation and the applications enabled by it have generally brought up the issue of the realisation of the rights laid down in section 21 of the Constitution when automation is used in administration and decision-making. Fundamentally, the realisation of the procedural rights concerning protection under the law refers to the protection of substantive rights, in other words, that people access their rights and that their cases are resolved lawfully. The provisions concerning the procedure secure the implementation of the other rights in question. Ultimately, the matter is about the inviolability of human dignity and standing as well as securing the factually meaningful influencing opportunities in the digital operating environment where matters meaningful to individuals are increasingly processed through automation. In that case, the implementation of basic rights related to good governance and data protection requires that legislation concerning automation and the information systems applying automation as well as the use of these in administration comply with Article 25 of the General Data Protection Regulation in securing data protection by default and by design as well as, correspondingly, good governance and the realisation of the rights of an individual by default and by design. For their part, section 1, subsection 2 and section 14, subsection 4 of the Constitution direct the interpretation of the obligation of the public authorities in the implementation of people-centric good governance that emphasises the agency of people.

In my decision, I examine automation in Kela's decision-making concerning social security from the aforementioned perspective. My examination focuses on decision-making based on the processing of personal data, referred to in Article 22 of the General Data Protection Regulation. I assess it specifically within the regulatory framework of section 21 of the Constitution, the Administrative Procedure Act, and the General Data Protection Regulation. To some extent, I also assess questions related to the realisation of liability for acts in office, laid down in section 118 of the Constitution, in automated decision-making.

The sections Assessment, Conclusions and measures of the decision use the concept of automated decision-making to refer to decision-making based solely on automatic processing and the concept of an automated decision to refer to a decision made in automated decision-making. In other respects, the decision-making is partially automated (automation-assisted) or manual decision-making.

4.3 Assessment

4.3.1 Level of the automation used by Kela

According to its report, Kela uses automation to varying degrees in all benefit processing. When using the base automation, benefit administrators apply the information included and updated in the benefit system in the operating procedure that progresses in accordance with a computerised process. According to Kela, the majority of decisions produced automatically are partially automated. Benefit administrators participate in this decision-making by reviewing and considering factors affecting the decision.

According to Kela, a small portion of the decisions it makes is based solely on automated processing of personal data (rule-based automation). Such decisions are made by Kela in study benefits when decision-making does not involve discretion but the benefit is granted based on an application or the customer has cancelled the benefit for a specific period of time or approved the proposed decision. Changes to the level of benefits based on legislative amendments are usually implemented through batch runs, and the change is applied automatically, in which case the decision, when one is granted, is also fully automated. In addition, according to the report, in many benefits a termination decision based on register information and in some benefits, a termination decision based on periodic inspections can also be fully automated, for example.

Based on the report, Kela's decision-making is largely partially automated, but Kela also makes decisions based on automated processing of personal data.

4.3.2 Decisions referred to in Article 22 of the General Data Protection Regulation

In Kela's view, it is open to interpretation whether the fully automated decisions made by Kela are within the scope of application of Article 22 of the General Data Protection Regulation. According to its report, Kela does not make automated decisions that involve discretion concerning the grounds for granting or denying benefits.

According to paragraph 1 of Article 22 of the General Data Protection Regulation, 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.

According to Article 4, paragraph 1 of the General Data Protection Regulation, 'personal data' means any information relating to an identified or identifiable natural person; an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person.

According to Article 4, paragraph 2 of the Regulation, the processing of personal data referred to in the Regulation means any operation or set of operations which is performed on personal data or on sets of personal data, whether or not by automated means, such as collection, recording, organisation, structuring, storage, adaptation or alteration, retrieval, consultation, use, disclosure by transmission, dissemination or otherwise making available, alignment or combination, restriction, erasure or destruction.

In accordance with the guidelines issued by the EU's Data Protection Working Party (hereinafter the Data Protection Working Party, currently the European Data Protection Board), automated decision-making has a different scope and may partially overlap with or result from profiling. Solely automated decision-making is the ability to make decisions by technological means without human involvement. Automated decisions can be based on any type of data, for example, data provided directly by the individuals concerned, data observed about the individuals (such as location data collected via an application), or derived or inferred data such as a profile of the individual that has already been created (e.g. a credit score). According to the guidelines, automated decisions can be made with or without profiling, and are not necessarily separate activities. The guidelines state that something that starts off as a simple automated decision-making process could become one based on profiling, depending upon how the data is used.²

Based on Article 22 of the General Data Protection Act, the preamble (Recital 71) concerning it, and the guidelines stated above, the individual decisions referred to in the Article are not required to involve discretion in individual cases or that they should include profiling, although they also may. Automated decisions may be based on data provided directly by the individual concerned or data observed about the individual otherwise, among other things.

According to its report, Kela makes decisions solely based on automated processing of personal data in situations in which the benefit is granted based on an application or the customer has cancelled the benefit for a specific period of time or approved the proposed decision. This decision-making is based on the information provided by the customer to Kela.

According to Kela's report, when it issues an automated decision concerning the termination of a benefit, the decision can be based on information concerning clear and undisputed obstacles to payment included

²Guidelines on Automated individual decision-making and Profiling

for the purposes of General Data Protection Regulation [WP251rev.01](#), (p. 8). According to an example provided in the guidelines, imposing speeding fines purely on the basis of evidence from speed cameras is an automated decision-making process that does not necessarily involve profiling. It would, however, become a decision based on profiling if the driving habits of the individual were monitored over time, and, for example, the amount of fine imposed is the outcome of an assessment involving other factors, such as whether the speeding is a repeat offence or whether the driver has had other recent traffic violations.

and updated in the register. Kela's automated decisions may also be based on the benefit recipient being passive, in other words, them not providing information about themselves or their situation.

How the personal data is received for processing is irrelevant in terms of the applicability of Article 22 of the General Data Protection Regulation as such, since decisions in accordance with it may be based on any type of information.

Decisions concerning the granting, revoking and terminating benefits brought up by Kela in its report have legal impact on the customer of Kela, or the data subject.³

The Government Proposal ([HE 52/2018 vp](#)) referred to in the report by Kela would have made possible the issuance of automated decisions referred to in Article 22, paragraph 1 of the General Data Protection Regulation in the implementation of the statutory social security provided by Kela under certain conditions. The goal of the proposal was to harmonise the national social security and insurance legislation with the General Data Protection Regulation. The grounds for the proposal stated that insurance institutions currently issue decisions based solely on automated decision-making in certain categories of matters. According to the proposal, automated decision-making could make decision-making activities more efficient and allocate personnel resources from routine tasks to discretionary decision-making and customer service. The proposal states that in matters that are clear and uncomplicated, automated decision-making could be more efficient and precise than the processing of matters by employees. According to the proposal, for insurance institutions to continue to apply and develop their decision-making processes, the issuance of automated decisions should have been allowed by an Act. In addition, the proposal stated that legislation should have taken into consideration that with the advancement of information technology, automated decision-making can be increasingly applied in insurance operations and the implementation of social security.⁴ The processing of the proposal was later dropped in the Parliament.

It is my view that the decisions referred to in the Government Proposal and currently made by insurance institutions mean fully automated decisions mentioned by Kela in its report, among other things. Based on the proposal, Kela, among others, was considered to make decisions referred to in Article 22 of the General Data Protection Regulation.

The Office of the Data Protection Ombudsman is a national supervisory organisation, referred to in the General Data Protection Regulation, that oversees compliance with data protection legislation. The question whether automated decisions made by Kela are decisions based solely on automated processing of personal data, referred to in Article 22 of the General Data Protection Regulation, could be assessed by the Data Protection Ombudsman.

It is my view that automated decisions by Kela, in which the decision is made based on an application or the customer has cancelled the benefit for a specific period of time or approved the proposed decision or is passive, would appear to be decision-making referred to in Article 22, paragraph 1 of the General Data Protection Regulation, which is based solely on automated processing of personal data and produces legal effects concerning the data subject or similarly significantly affects them. Based on the said provision, data subjects have, as a rule, the right to not be subject to such a decision, which is why the said decision-making is prohibited, unless it is allowed based on grounds stated in paragraph 2 of the Article.

However, the situation is more open to interpretation in situations in which a change in the level of benefit is based on amendments in legislation and Kela does not issue an actual decision on the matter, unless requested by the customer. Decision-making concerning a change in the level of benefit in such situations actually already takes place when legislation affecting the level of benefit has been approved and becomes effective. These situations are not about the right of the benefit recipient to the benefit but about a change in the level of benefit, which is not determined on an individual basis. Kela implements the change required

³ According to the Guidelines [WP251rev.01](#) (p. 22–23), decisions which have legal impact include granting or denying a statutory social benefit, such as a child benefit or housing allowance.

⁴ [HE 52/2018 vp](#) (pp. 14 and 17)

by legislation. From the perspective of benefit recipients, in that situation it is also significant that the change is implemented lawfully in an automated system taking the rights of the benefit recipients into consideration.

4.3.3 Legal basis of automated decision-making

A general prohibition of decisions based solely on automatic processing of data is confirmed in Article 22, paragraph 1 of the General Data Protection Regulation in accordance with the Guidelines on Automated individual decision-making and Profiling for the purposes of the General Data Protection Regulation.⁵

However, individual decisions based solely on automated processing can be made under the conditions provided in Article 2. Paragraph 1 of the Article is not applied in accordance with paragraph 2, point b) of the Article if a decision 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 (hereinafter referred to as safeguards).

According to the preamble (Recital 71) of the General Data Protection Regulation, decision-making based on data processing referred to in Article 22 should be allowed where expressly authorised by Union or Member State law to which the controller is subject.

According to Kela's report, its use of automation is based on section 2 of the Government Decree on the Social Insurance Institution. According to subsection 1 of the section, a decision made by the Social Insurance Institution must be signed. The decision issued as a document produced by automated processing of data can be signed electronically. In its report, Kela has referred to the Government Proposal ([HE 52/2018 vp](#)) and stated that after the said Government Proposal was dropped, there are no unambiguous and adequate provisions on fully automated processing in the implementation of benefits in national legislation.

The Government Decree on the Social Insurance Institution has been enacted, among other things, on the basis of section 25 of the Act on the Social Security Institution. According to the said section of the Act, provisions on the Social Security Institution's authorisation to sign and on other enforcement of this Act are laid down in a Government Decree. The said authority to issue decrees does not include competence to regulate automated decision-making.

Section 31 of the Personal Data Act that was repealed and in effect until the beginning of 2019 included provisions on automated decisions. According to subsection 1 of the section, the making of a decision on the basis of certain characteristics of a data subject, where involving solely automatised data processing and having legal consequences to the data subject or otherwise significantly affecting him/her, is permitted only if so provided in an Act. At the time when the Government Decree on the Social Security Institution was issued, the Personal Data Act required that the making of a decision based solely on automated processing of personal data was to be provided in an Act. However, the concept of automated decision appears to have required in the Personal Data Act that the said decisions included an assessment of certain characteristics of the data subject.⁶

Automated decision-making involves questions concerning the realisation of the protection of basic rights, good governance, protection under the law and liability for acts in office in a manner described later in this decision. Such decision-making concerns the rights and obligations of individuals, the principles of which must be provided in an Act, in accordance with section 80, subsection 1 of the Constitution. According to the Constitution, such decisions on the principles of decision-making, including authority, cannot be provided in a Decree.

⁵ Guidelines [WP251rev.01](#) (p. 21)

⁶ According to the Government Proposal on the Personal Data Act ([HE 96/1998 vp](#), p. 65) the purpose of an automated decision was to assess the data subject's characteristics, such as professional performance, credit rating, reliability or behaviour.

The need to enact an Act on automated decision-making is also included in the aforementioned Government Proposal ([HE 52/2018 vp](#)) to the Parliament on amending the social security and insurance legislation due to the EU's General Data Protection Regulation.

Automated decision-making implemented by Kela does not, in the manner provided above, have a legal basis required by the Constitution, and it has therefore not been expressly allowed in national legislation in the manner referred to in Article 22, paragraph 2, subsection b of the General Data Protection Legislation.

It should also be noted that in its reports ([PeVL 78/2018 vp](#), [PeVL 70/2018 vp](#), [PeVL 62/2018 vp](#)) on Government Proposals concerning the regulation of automated individual decisions, the Parliament's Constitutional Law Committee has concluded that it was necessary to specify the said proposals insofar as decisions related to certain situations or categories could have been processed fully automatically. The legal basis presented by Kela in its report for automated decision-making also does not fulfil the view concerning the level of detail of regulation adopted by the Constitutional Law Committee in the said statement practice.

To the extent that Kela's decision-making is partially automated, the report by Kela leaves it somewhat unclear what the impact of benefit administrators is on decision-making. In accordance with the Guidelines on Automated individual decision-making and Profiling

for the purposes of General Data Protection Regulation, there should be actual human involvement, so that decision-making is not based solely on automated processing. According to the Guidelines, there is human involvement when the supervision of the decision makes a difference and is not just an empty gesture. The person carrying out the supervision should have the authority and competence to change the decision.⁷

Inasmuch as partially automated decision-making by Kela fulfils the said requirement of human involvement, it would not appear to concern the processing of personal data referred to Article 22, paragraph 1 of the General Data Protection Regulation, and meeting the requirements provided in paragraph 2 of the Article is not a prerequisite of implementation.

I would also like to state that insofar as decision-making referred to in Article 22 of the General Data Protection Regulation applies the special categories of personal data referred to in Article 9 of the Regulation, the processing must also meet the special requirements stated in Article 22, paragraph 4.

4.3.4 Realisation of good governance, protection under the law and safeguards in automated decision-making

In accordance with the aforementioned, Kela's decision-making based solely on automated processing of personal data is not regulated as required by Article 22 paragraph 2 point b of the General Data Protection Regulation or the Constitution.

In its report, Kela has stated that regardless of the inadequate regulation, it implements automation so that the rights of the data subjects are realised.

4.3.4.1 Good governance and protection under the law

Chapter 2, sections 6–9 of the Administrative Procedure Act lay down the principles of good governance, and chapters 5–7 and 9–10 of the Administrative Procedure Act lay down the consideration of and examining a matter, hearing the views of parties, deciding a matter and informing the parties. The complementary provisions on the rationale of and the obligation to provide reasons for administrative decisions are also included in the benefit legislation concerning social security. Requesting an administrative review and cor-

⁷ Guidelines [WP251rev.01](#) (p. 22)

recting an error in a decision are laid down in chapter 7 a and 8, respectively, of the Administrative Procedure Act. The appeal against an administrative decision and filing an appeal are laid down in the Administrative Judicial Procedure Act. The said provisions implement the basic right to protection under the law laid down in section 21 of the Constitution.

The grounds of good governance and the principles thereof, as well as the procedural provisions concerning the processing of administrative matters and the provisions of the Administrative Judicial Procedure Act must, in accordance with their respective scope of application, applied to decision-making provided by means of varying levels of automation in the same manner as they are applied to manual decision-making. Kela's report describes the application of the aforementioned provisions in automated decision-making, stating that the provisions are adhered to in the same manner as in manual decision-making. According to the report, the use of automation improves the appropriate processing of benefit matters by, among other things, accelerating the processing and payment of benefits and improving the quality of decisions as human errors due to oversight are reduced. The report states that automation makes it possible to implement the use of the services in accordance with the service principle of the Administrative Procedure Act and allocate more resources to customer guidance and support.

The memorandum of the Ministry of Justice on the needs for general legislation related to automated decision-making in administration examined, among other things, whether the central provisions of the Administrative Procedure Act can be implemented in an automated decision-making procedure and whether they involve regulation needs. The report stated that no regulation needs arise from the legal principles of administration, the service and guidance principle or the requirement to use good language. According to the memorandum, the authorities must still take these principles into consideration in the arrangement of automated administrative activities.

According to the memorandum, automated decision-making does not result in regulation needs concerning the commencement, disclosure, obligation to investigate or hearing of an administrative matter. However, the report refers to section 8 (advice) and section 44 (contents of decision), subsection 1, paragraph 4 (indicating additional information) and states that these provisions do not prevent administrative matters from being resolved in an automated procedure if the authorities arrange the provision of additional information so that the contact is directed to a person who has sufficient competence related to the said automated processing. The report also indicated that disqualification matters did not give rise to a need for new regulation, but according to the memorandum, the authorities planning an automated decision-making system should assess disqualification matters arising in connection with the use of the system and, as necessary, implement measures to address these situations.⁸

According to the memorandum, the obligation to provide reasons, laid down in section 45 of the Administrative Procedure Act, does not give rise to regulation needs concerning automated decision-making, but the publicity of the program code used in automated decision-making may have significance concerning supervision and the prerequisites of the party concerned to assess, among other things, the correctness of the decision and the need for filing an appeal. The report makes reference to the safeguards required by the General Data Protection Regulation and states that general legislation concerning automated decision-making should correspondingly require that the authorities provide a description of the decision-making rules applied in automated decision-making. According to the report, the content of the obligation should be specified in further preparation and the obligation would complement the provisions of section 45 of the Administrative Procedure Act.⁹ The Ministry of Justice has since established a working group to prepare a Government Proposal on general legislation concerning automated decision-making.

⁸ [Publications of the Ministry of Justice, Reports and guidelines, 2020:14](#) (p. 32–40). In the statement [OKV/1348/21/2020](#) I issued to the Ministry of Justice on the said memorandum, I stated that automated decision-making is a changing area that is difficult to conceptualise, which is why it would be necessary to thoroughly survey the emergence of various disqualification situations in the further processing of the matter.

⁹ [Publications of the Ministry of Justice Reports and guidelines, 2020:14](#), (pp. 40–41 and 45–46)

Based on the report provided by Kela, there is no reason to suspect that Kela's automated decision-making would not comply with the provisions of the Administrative Procedure Act and the Administrative Judicial Procedure Act¹⁰.

However, the stated decision-making involves specific questions related to securing the rights and protection under the law of the parties concerned in the said decision-making method, which have been examined in the aforementioned memorandum by the Ministry of Justice and which are being processed in the aforementioned Ministry of Justice working group. Therefore, I do not find it justified to cover these questions extensively in my decision. However, I will hereinafter in this decision (section 4.3.4.3) present certain views concerning information to be given on automated decisions, touching on the obligation to provide reasons included in the Administrative Procedure Act.

4.3.4.2 Safeguards

Article 22, paragraph 1 of the General Data Protection Regulation lays down the principles of the processing of personal data and paragraph 2 of the Article covers the controller's accountability. In decision-making based on Member State law referred to in paragraph 2 point b) of the Article, the said legislation should confirm the appropriate measures to protect the rights and freedoms as well as legitimate interests of the data subject. Legislation concerning the said automated decision-making in the manner described above does not yet exist. In the following, I will assess the implementation of the safeguards with regard to specific aspects in the current situation.

In accordance with the preamble (Recital 71) of the General Data Protection Act, in order to protect the rights, freedoms and legitimate interests of the data subject, processing referred to in Article 22 should always be subject to suitable safeguards, which should include specific information for the data subject and the right to 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. The list is not intended to be exhaustive.

The provisions of the Administrative Procedure Act concerning the processing of an administrative matter (including hearing the views of parties and examining a matter, deciding a matter, providing a decision, the procedure for requesting an administrative review, and correcting an error) as well as the provisions of the Administrative Judicial Procedure Acts in certain respects (making an appeal and filing an appeal) appear to be regulating the factors that are required in the aforementioned Article of the General Data Protection Regulation concerning the protection of the rights, freedoms and legitimate interests of the data subject (the right to express their point of view, obtaining an explanation of a decision and challenging a decision). Insofar as the same objects of legal protection are concerned, as a rule it can be considered that implementing the said national provisions will also implement the safeguards referred to in the said General Data Protection Regulation.

Next, I will discuss the safeguards insofar as they require the provision of information on decisions based on automated processing of personal data and the right to demand human involvement in the processing of the data.

The safeguards referred to in Article 22, paragraph 2, point b) of the General Data Protection Regulation require that the data subject is provided with an explanation of the decision made. What this explanation means remains somewhat unclear based on the paragraph of the Article and the preamble of the General Data Protection Regulation.

Article 13, paragraph 1 of the General Data Protection Regulation lays down the information to be provided to the data subject where personal data relating to a data subject are collected from them. According to paragraph 2, point f) of the Article, in addition to the information referred to in paragraph 1, the controller

¹⁰ However, let it be stated that the substitute for the Deputy Chancellor of Justice in their statement [OKV/868/1/2018](#) drew Kela's attention to section 44, subsection 1, point 4 of the Administrative Procedure Act, according to which an administrative decision must clearly indicate the name and contact details of the person from whom a party may request further information on the decision. The said information was not indicated in the partially automated decision issued to the complainant.

shall, at the time when personal data are obtained, provide the data subject with the following further information necessary to ensure fair and transparent processing, including the existence of automated decision-making, including profiling, referred to in Article 22, paragraphs 1 and 4, and at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

Article 14, paragraph 2, point g) of the General Data Protection Regulation similarly lays down the obligation of the controller to provide the said information where personal data have not been obtained from the data subject. According to paragraph 5, point c) of the Article, paragraphs 1 and 2 shall not apply if and insofar as obtaining or disclosure of information is expressly laid down by Union or Member State law to which the controller is subject and which provides appropriate measures to protect the data subject's legitimate interests¹¹.

Furthermore, Article 15 of the Regulation lays down the right of access by the data subject. According to paragraph 1, point h) of the Article, in addition to the information referred to in paragraph 1, the controller shall provide the data subject with information on the existence of automated decision-making, including profiling, referred to in Article 22(1) and (4) and, at least in those cases, meaningful information about the logic involved, as well as the significance and the envisaged consequences of such processing for the data subject.

Based on the provisions mentioned, the data subject has the right to, among other things, receive an explanation of the decision made, the existence of automated decision-making and significant information on the logic involved in the processing of their personal data.

According to Article 12 (1) of the General Data Protection Regulation, the controller shall take appropriate measures to provide any information referred to in Articles 13 and 14 and any communication under Articles 15 to 22 relating to processing to the data subject in a concise, transparent, intelligible and easily accessible form, using clear and plain language, in particular for any information addressed specifically to a child.

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for the purposes of General Data Protection Regulation, the controller shall provide the data subject with a simple method to use the safeguards referred to in Article 22, paragraph 2, point b) of the General Data Protection Regulation. The said highlights the need for transparency in processing. According to the guidelines, the data subject can contest the decision or express their point of view on in only if they fully understand how and on which grounds the decision was made.¹²

The transparency principle of the General Data Protection Regulation is laid down in Article 5, paragraph 1, point a) of the General Data Protection Regulation. The processing of personal data must be transparent, or open to the data subject, which according to the preamble (Recital 39) of the General Data Protection Regulation means, among other things, providing information on the rules and safeguards related to the processing of personal data. The principle of transparency is also indicated, among other things, in the aforementioned Articles 13 to 15 of the Regulation, which require the provision of information on decision-making referred to in Article 22, paragraph 1. In addition, the principle of transparency of processing is indicated by the safeguards required by Article 22, paragraph 2, point b).

According to the Guidelines on Automated individual decision-making and Profiling for the purposes of the General Data Protection Regulation, controllers should explain clearly and simply to individuals how

¹¹ According to the guidelines [WP260 rev.01](#) (p. 32) issued by the Data Protection Working Party concerning transparency under Regulation 2016/679, the said legislation must apply to the controller directly and the collection or disclosure of personal data must be mandatory for the controller.

¹² Guidelines [WP251 rev.01](#) (p. 29)

the profiling or automated decision-making process works.¹³ In its Guidelines, the Data Protection Working Party has defined practical instructions on and provided assistance on interpreting the obligation concerning the transparency of the processing of personal data. Through adherence to the principle of transparency, data subjects can hold controllers and processors of personal data accountable and control the processing of their personal data and use the rights that belong to them. According to the Guidelines, the information and communication directed to data subjects in accordance with Article 12, paragraph 1 of the General Data Protection Regulation should be effective and concise, and the data subjects should not be burdened with excessive information. According to the Guidelines, an average member of the target audience should be able to understand what the information means. According to the Guidelines, understandability is closely related to the requirement for the use of clear and simple language.¹⁴

Based on the aforementioned, the explanation to be given as a safeguard referred to in Article 22, paragraph 2, point b) of the General Data Protection Regulation would appear to mean an explanation of the decision-making process, in other words, an explanation of how the decision was reached. The information enables the data subject to assess the need to contest the decision, which with an administrative decision means an evaluation of the need for filing an appeal.

From the data subject's perspective, the central starting point of the General Data Protection Regulation in the processing of personal data is transparency (openness), which, among other things, applies to automated decision-making and the decision-making process. According to the Regulation, transparency must be implemented so that it is understandable for the data subject.

4.3.4.3 Summary

The provisions concerning the resolution of a matter laid down in chapter 7 of the Administrative Procedure Act not only protect the rights of the parties concerned but also implement the transparency of the administrative activities. A central provision on the protection under the law and transparency is the Administrative Procedure Act section 45 concerning the obligation to provide reasons. Based on it, an administrative decision must indicate how the resolution was reached through the assessment of the factors and reports related to the matter and the application of legal rules. Based on the service principle and appropriateness of service laid down in section 7 of the Administrative Procedure Act, the activities of the authorities must pay attention to the customer's perspective¹⁵. Among other things, the said perspective requires that administrative decisions must have a clear and coherent structure and also use language that is factual, clear and understandable, as required in section 9 of the Administrative Procedure Act.¹⁶

As a safeguard in accordance with Article 22, paragraph 2, point b) of the General Data Protection Regulation, the party concerned shall have the right to receive information on the decision-making process of their matter in decision-making that is based solely on automated processing of personal data. The principle of transparency referred to in the General Data Protection Regulation requires that information and communication are easily available and understandable and that the language used is clear and simple.

In Government Proposal ([HE 224/2018 vp](#)) to the Parliament on the act on migration authorities' processing of personal data and on certain related acts it was proposed that Finnish Immigration Service be granted the authority to make decisions based solely on automated processing under certain conditions and that the data

¹³ Guidelines [WP251rev.01](#) (pp. 17 and 27)

¹⁴ Guidelines [WP260 rev.01](#) (pp. 5–7)

¹⁵ The justifications concerning section 7 of the Administrative Procedure Act in the Government Proposal on the Administrative Procedure Act ([HE 72/2002 vp](#)) state that the service principle and the effective performance of their duties by the authorities mean that the use of the services should be as quick, flexible and simple as possible for both those using the services and the authorities, as well as save costs. According to the proposal, efforts should be made to promote, as much as possible, the service users' right of self-determination and ability to use the administrative services.

¹⁶ Insufficiencies concerning the quality of administrative decisions are a recurring topic in the legality oversight by the Government's Chancellor of Justice and Deputy Chancellor of Justice. The issue of the quality of administrative decisions has been covered, among others, in the decision issued by the Deputy Chancellor of Justice [OKV/26/70/2020](#) concerning the quality of basic social assistance decisions.

subject have the right to receive an explanation of an individual decision made for them in automated processing. The proposal discussed the meaning of receiving an explanation, as referred to in the General Data Protection Regulation. According to the justifications (p. 76), receiving information would be considered a safeguard referred to in the General Data Protection Regulation. The justifications stated that the text of the General Data Protection Regulation does not indicate whether this right refers to the right to receive an explanation on an individual decision made expressly on the data subject or the right to generally receive information about the logic of the processing and the significance and consequences of the processing. According to the proposal, the wording also left it unclear at what stage of decision-making the said explanation should be given. According to the proposal, the Finnish Immigration Service's explanation should have presented to the data subject the justifications and reasons why an automated decision was made for the data subject. According to the proposal, in practice it would have meant an explanation of why the data subject's decision was not processed by a natural person. According to the proposal, the said explanation would also have ensured transparency in accordance with Article 5 of the General Data Protection Regulation.

In its statement on the proposal ([PeVL 62/2018 vp](#)), the Constitutional Law Committee stated that since the purpose of the proposal was not to regulate the provision of reasons for an administrative decision in deviation of what has been laid down in section 45 of the Administrative Procedure Act, the wording of the provision should be corrected in accordance with the justifications. In addition, the Constitutional Law Committee paid attention in the said statement and the second ([PeVL 7/2019 vp](#)) statement to the publicity of the algorithms and the realisation of publicity in a format that is understandable to private persons.

The aforementioned memorandum of the Ministry of Justice also states that the service and guidance principle and the requirement of the use of good language may result in an obligation to the authority to describe and clarify the automated procedure and the underlying rules and principles.¹⁷

At the time the report was issued, Kela did not mention in its benefit decisions that the decision was made in automated processing, but according to its report, Kela was going to add the information to automated decisions. According to the report, the decision-making process in the rule-based automation used by Kela is transparent, the inference chain of the outcome produced by automation can be traced and the customer can be informed of the processing of their data.

The General Data Protection Regulation governs the processing of personal data. The provisions of the Administrative Procedure Act and the Administrative Judicial Procedure Acts regulate good governance, the procedure for processing administrative matters, and protection under the law in administrative matters. Although the General Data Protection Regulation does not govern the administrative procedure, it sets procedural requirements on the processing of and decision-making in administrative matters where the processing of personal data and, in particular, automated decision-making are concerned. The Administrative Procedure Act and the General Data Protection Regulation share the starting point of openness and transparency: open information presented in an understandable manner and stemming from the needs of the customer / data subject about the processing of personal data impacting the person's rights and obligations.

Regardless of what the General Data Processing Regulation means by information concerning the decision-making process, the information does not appear to be the same as the reasons for the decision, referred to in the Administrative Procedure Act. However, both are intertwined in the question about how a decision made by processing personal data was reached. The decision-making rules, algorithms and, overall, information about the inference chain that led to the resolution are significant for the assessment of the correctness of the decision and thus for the rights and protection under the law of the party concerned. Therefore, information about the existence of automated decision-making as well as the decision-making rules applied in automated decision-making, should be part of a coherent set of decisions so that the decision would implement transparency as required by the General Data Protection Regulation concerning safeguards,

¹⁷ [Publications of the Ministry of Justice, Reports and guidelines, 2020:14](#) (p. 34)

among other things, and would also be a linguistically and structurally clear, understandable and justified administrative decision as required by the Administrative Procedure Act¹⁸.

In my view, the aforementioned would also serve the fulfilment of the obligation to provide advice and additional information referred to in the Administrative Procedure Act. However, I pay attention to the fact that the question about the obligation to indicate the name and contact details of the person from whom a party may request further information on the decision, laid down in section 44, subsection 1, paragraph 4 of the Administrative Procedure Act, must be assessed separately for automated decisions, taking into consideration potential special requirements arising from the decision-making method. The memorandum of the Ministry of Justice on the needs for general legislation related to automated decision-making in administration examined the question (see p. 18 above).

Regarding safeguards, I further state that they also require that the data subject have the right to demand human involvement in the processing of their matters.

According to Kela's report, rule-based automation will not solve the issue if other clarifications on the matter have been submitted to Kela or if the customer has contacted Kela. According to the report, in rule-based automation software has been configured to return to manual processing all matters that include other documents or contacts. In those situations, the benefit case is resolved by a natural person, who assesses the significance of the clarifications and/or contacts and, as needed, hears the customer in accordance with the Administrative Procedure Act.

In accordance with the Guidelines on Automated individual decision-making and Profiling

for the purposes of the General Data Protection Regulation, a central appropriate safeguard is human involvement. The person performing the reassessment must have appropriate authority and preparedness to change decisions, and they must assess all significant information thoroughly, including the additional information provided by the data subject.¹⁹

Based on Kela's report, in practice, the party concerned also has an opportunity to have their matter processed by a person in decision-making that is based solely on automated processing of personal data during the decision-making process. In that case, a natural person assesses the matter and makes a decision. However, the report does not indicate that Kela would inform its customers of their right to demand human involvement in the processing of their personal data, in other words, in practice in making a decision. The benefit administrator participates in the decision-making as a result of potential action taken by the customer, and thus apparently quite randomly.

In accordance with the aforementioned guidelines, the right to demand human involvement in the decision-making, offered as a safeguard, could mean a link to the process for requesting an administrative review when an automated decision is delivered to the data subject, as well as agreed deadlines for reassessment and a designated contact for enquiries.²⁰ Based on the aforementioned, the possibility to request a judicial review and appeal procedures on the decision would, at least in part, appear to meet the said requirement, nevertheless taking into consideration what has been laid down on the provision of safeguards free of charge in Article 12, paragraph 5 of the General Data Protection Regulation. However, it could be considered whether the possibility for human involvement should be available already before decision-making.

¹⁸ In my statement [OKV/1348/21/2020](#) to the Ministry of Justice on its memorandum ([Publications of the Ministry of Justice, Reports and guidelines, 2020:14](#)), I proposed for consideration the need for provisions on clear and understandable use of language in automated decisions in general legislation concerning automated decision-making.

¹⁹ Guidelines [WP251rev.01](#) (p. 29)

²⁰ Guidelines [WP251rev.01](#) (p. 34–35)

4.3.5 Liability for acts in office

Section 2, subsection 3 of the Constitution lays down the principle of rule of law. According to the section, the exercise of public powers shall be based on an Act. The section 118 of the Constitution on liability for acts in office complements the said provision. According to the section, everyone who has suffered a violation of his or her rights or sustained loss through an unlawful act or omission by a civil servant or other person performing a public task shall have the right to request that the civil servant or other person in charge of a public task be sentenced to a punishment and be held liable for damages. The said provisions indicate the principle of administration composed of civil servants. Official duty refers to the obligation to comply with the provisions and regulations concerning the performance of one's official duties.

Criminal and tort liability constitute a method of ensuring the lawfulness of the public powers. First of all, it aims to direct behaviour, or apply the deterrent of punishment and damages to prevent negligence and unlawful activity and, on the other hand, to create in public powers internal ethics of respect for lawfulness (a preventive effect). In addition, the aim of the obligation to pay damages is also to compensate for loss. The ultimate aim of liability for acts in office is to provide protection under the law to individuals, in other words, to protect individuals from the exercise of public powers and to protect their basic rights.

Chapter 40 of the Criminal Code lays down offences in public office, and provisions on public organisations' and civil servants' liability for damages are laid down in the Tort Liability Act. Criminal liability for acts in office and ultimately tort liability is realised in individual situations when a court enforces provisions concerning criminal and tort liability. The realisation of criminal liability in practice requires that a court establishes that an act meeting the characteristics of a crime has been committed and that the act can be imputed to a specific offender. Tort liability requires a causal connection between an act or event and a loss event. The tort liability of a public organisation may, however, arise even without being able to specify the party causing the loss on the level of a person (anonymous negligence).

The realisation of liability for acts in office requires a party to which liability can be attributed as well as a causal connection between an act or a violation of rights and/or a loss. For the purpose of liability for acts in office to materialise, liability for acts in office should target the correct party responsible for the act and the realisation of it should be factual, not just a theoretical possibility.

Kela exercises a public duty when implementing statutory social security. The officials of Kela are not in a public-service relationship but they perform public administrative duties and exercise public power in their duties of implementing benefit legislation. In these duties, they are under liability for acts in office regardless of the type of their employment relationship.

In its report, Kela stated that the liability of an individual official for the incorrectness of an administrative decision should be assessed by taking into consideration the internal organisation of the authority's statutory duties. The performance of Kela's duties is subject to rules of procedure, in which the tasks and responsibilities are defined for different levels of management, and the tasks and responsibilities of individual officials are defined on the basis of the tasks assigned to them by their immediate supervisors and the access rights granted to them in the HR system for the performance of their duties. In the resolution work, the authority is associated with the use of benefits systems and in planning tasks, with the use of various software and test environments. According to Kela, the allocation of responsibility by official is affected by the related instructions provided in Kela as well as whether a reason beyond the decision-maker's control contributed to the error.

Manual decisions and automated decisions differ from each other, as described by Kela in its report, in such a way that in a manual decision, the party who made the decision can be identified directly based on the decision, whereas in automated decisions, determining an individual official is carried out by means of tracing the gradual progress of the matter in information systems and of the related documents as well as progress-related materials up to the decision concerning the implementation of the system or its change.

The unit and, ultimately, the official responsible for an error can always be traced based on the specifications concerning the division of tasks, authority and operating models. Based on the report, in automated resolutions the units and individuals that normally make manual decisions are not responsible for the resolutions but the correctness of automated decisions is ensured when the system is configured and by means of risk management and quality management methods. According to Kela's report, the said policies and system implementation are carried out in its other units, and the responsibility lies with the unit in which the decision was made.

The Constitutional Law Committee has discussed automated decision-making and liability for acts in office in some of its opinions. In its statement ([PeVL 78/2018 vp](#)), the Committee referred to the Government Proposal being processed which stated that the automation of decisions may not change the party that is responsible for decision-making. Referring to its established practice according to which when a public administrative task is assigned to a party other than an authority, ensuring that the requirements of protection under the law and good governance are met requires that general administrative legislation is complied with in the processing of the matter and that those processing matters are subject to liability for acts in office, the Committee stated that the said regulation needed to be specified with regard to liability for acts in office.

The Committee had already stated in an earlier report ([PeVL 62/2018 vp](#)) that an indirect liability for acts in office concerning a decision is not sufficient with regard to section 118 of the Constitution. The key question in the proposal was that in accordance with the proposal, automated decision-making would be the responsibility of specialists under liability for acts in office, who decide on the processing rules of automated decisions and have the actual authority and competence to change a rule that led to a certain decision.

In its report ([PeVL 7/2019 vp](#)), the Committee also did not consider an arrangement in which the director general of the agency in question held liability for acts in office in decisions made in automatic decision-making to be sufficient with regard to the practical realisation of liability for acts in office. According to the Committee, the proposal would, in violation of section 118 of the Constitution, have strengthened the view that people other than the director general could not hold liability for acts in office. The Committee considered the arrangement ostensible and artificial and stated that transferring decision-making to automated processing may not lead to a situation in which the provisions of the Constitution of Finland concerning liability for acts in office become insignificant. In addition, the Committee took the view that automated decision-making should, for reasons arising from section 118 of the Constitution, be strictly supervised and controllable from the legal standpoint, and ultimately, it should include civil servants' liability for their acts in office.

The starting point of section 118 of the Constitution and the related opinions by the Constitutional Law Committee is that the liability for acts in office should, in practice, be realised also when administrative decisions are made automatically.

As such, Kela's argumentation that regardless of the decision-making method, liability for acts in office does not necessarily target the party making the decision, is justified. In any case, the factors and circumstances affecting the situation must be taken into consideration when determining liability. However, in manual decision-making, it is possible to identify a person who, as a rule, is liable even if liability is split or the responsible party changed when the matter was examined in greater detail. In automated decision-making, the allocation of responsibility in the manner expressed by Kela in its report through documentation based on the information systems development method and the definition of the division of work, authority and operating models can, in my view, blur and distance the causal relation between an act and a consequence required by criminal liability, in particular, and make it such a delicate and/or complex chain that in practice, allocating responsibility is no longer possible or at least, the probability of it happening is very low. Then criminal liability for acts in office would, at worst, be indirect and mostly ostensible as indicated by the Constitutional Law Committee in its statement practice. It would mean that criminal liability for acts in office required by section 118 of the Constitution could not be realised in all situations. At

the same time, it would mean that the key objective of liability for acts in office, or strengthening the civil service ethics that is a requirement for good governance, would weaken.

Although the realisation of tort liability for acts in office in public administration is not prevented by the inability to name the party causing a loss, traditionally tort liability related to the activities of public administration has been understood as an individual civil servant's liability for damages. Tort liability for acts in office is part of protection under the law in administration, and it has been proposed that the requirement of efficient protection under the law calls for viewing liability for damages beyond the liability of an individual civil servant, as the liability of an exerciser of public powers for damage resulting from erroneous action²¹. Viewing tort liability for acts in office only or pointedly as the liability of an organisation and not of an individual civil servant may, as such, promote the basic idea of tort liability for acts in office compensating for damages, but at the same time, it may weaken the impact of liability on civil service ethics.

The realisation of liability for acts in office in automated decision-making can also be assessed from the perspective of a civil servant and administration.

If automated decision-making is used in a manner also described by Kela in its report, or for making routine administrative decisions, in particular, an error in the benefit system rules concerning decision-making may cause damage to a large number of customers. At the same time, automation reduces the need for human labour in the generation of administrative decisions, as a result of which fewer parties will carry liability for acts in office.

The basic right provisions and agreements on human rights as well as the resulting interpretation of law in favour of basic rights and human rights, the provisions regulating the procedure, as well as substantive legislation set increasing obligations on the authorities and individual civil servants while creating for individuals rights the violation of which may incur liability for civil servants.

The general development trend in administration appears to be that automation and automated decision-making will increase and the liability for errors and neglect will accumulate on one hand and be simultaneously fragmented, on the other, as administrative activities become more diverse and decision-making becomes more complex. The distancing of decision-making from the measures of civil servants responsible for it on different levels and stages of the decision-making system may blur their understanding of the generation of criminal and tort liability, which may also become a problem with regard to the legality in criminal cases indicated in section 8 of the Constitution. The question about the realisation of liability for acts in office is thus intertwined with the rights and obligations of parties who are responsible for automated decision-making in its different stages, supervise or monitor it, and, on the other hand, with the general development outlook of administration.

Regardless of the perspective, the realisation of criminal and tort liability laid down in the Constitution should be not only clear and effective but also predictable.²² The realisation of liability for acts in office cannot depend on the decision-making method also because it would treat customers of administration unequally with regard to protection under the law.

The realisation of criminal and tort liability for acts in office in individual situations is resolved by a court. However, unregulated development of administrative activities may not result in the provision of liability for acts in office laid down in the Constitution to be watered down because the generation of liability cannot be verified in individual situations.

²¹ [Liability of public corporations](#), Publications of the Ministry of Justice, 59/2010 (p. 59)

²² In my statement [OKV/1348/21/2020](#) to the Ministry of Justice on its memorandum ([Ministry of Justice, Reports and guidelines, 2020:14](#)), I concluded that several different actors participate in the development and maintenance of information systems and the role and responsibility of each actor should be clearly defined. I supported that liability for acts in office would be laid down in legislation with regard to the approval of decision-making rules, system testing, acceptance, compliance assessment and supervision. Defining positions of responsibility is also important with regard to legality oversight.

4.3.6 Impact assessment and accountability

Article 5, paragraph 1 of the General Data Protection Regulation lays down the principles of the processing of personal data²³. According to paragraph 2 of the Article, the controller shall be responsible for, and be able to demonstrate compliance with, paragraph 1 ('accountability').

Accountability laid down in Article 5 of the General Data Protection Regulation indicates the risk-based approach of the General Data Protection Regulation, according to which the controller is to demonstrate that the measures selected to protect personal data are proportionate with regard to the risks caused by the processing. The impact assessment is the controller's way of securing the processing of personal data in accordance with the Regulation, while it is a central method to determine risks caused to the data subject's rights and freedoms by the processing of personal data. Accountability is an obligation of the controller to verify that the said obligation to verify that the said examination duty obligation is met.

Article 24 of the General Data Protection Regulation lays down the controller's responsibility. According to paragraph 1 of the Article, taking into account the nature, scope, context and purposes of processing as well as the risks of varying likelihood and severity for the rights and freedoms of natural persons, the controller shall implement appropriate technical and organisational measures to ensure and to be able to demonstrate that processing is performed in accordance with this Regulation. Those measures shall be reviewed and updated where necessary. According to paragraph 2 of the Article, where proportionate in relation to processing activities, the measures referred to in paragraph 1 shall include the implementation of appropriate data protection policies by the controller.

Article 35 of the General Data Protection Regulation lays down the data protection impact assessment. According to paragraph 1 of the Article, where a type of processing in particular using new technologies, and taking into account the nature, scope, context and purposes of the processing, is likely to result in a high risk to the rights and freedoms of natural persons, the controller shall, prior to the processing, carry out an assessment of the impact of the envisaged processing operations on the protection of personal data.

According to Article 35, paragraph 3, point a), a data protection impact assessment referred to in paragraph 1 shall in particular be required in the case of a systematic and extensive evaluation of personal aspects relating to natural persons which is based on automated processing, including profiling, and on which decisions are based that produce legal effects concerning the natural person or similarly significantly affect the natural person.

According to the preamble (Recital 76) of the General Data Protection Regulation, the likelihood and severity of the risk to the rights and freedoms of the data subject should be determined by reference to the nature, scope, context and purposes of the processing. Risk should be evaluated on the basis of an objective assessment, by which it is established whether data processing operations involve a risk or a high risk.

According to Kela's report, the automated decision-making it uses primarily pre-dates the General Data Protection Regulation, and very few impact assessments have been conducted on the said old personal data processing measures and systems. According to the report, new activities and development will be subject to extensive impact assessments.

The General Data Protection Regulation took effect on 25 May 2018 and was preceded by a transition period of two years since its approval in 2016. During that period, controllers were to review whether their processing of personal data complies with the requirements of the General Data Protection Regulation. As a rule, the General Data Protection Regulation does not separate the processing of personal data based on whether an information measure or system was implemented before or after the General Data Protection Regulation entered into force. The Regulation should be applied, in accordance with its scope of application

²³ The requirements of the processing of personal data are: lawfulness, fairness and transparency, purpose limitation, data minimisation, accuracy, storage limitation as well as integrity and confidentiality.

and national legislation, to the processing of personal data that takes place after the Regulation entered into force, regardless of when the activity, process or system was implemented. A data protection impact assessment is also required of the processing activities implemented before the Regulation entered into force under certain circumstances. It should also be noted that the data protection impact assessment should be continuously reviewed and regularly re-evaluated; in other words, it is an on-going process.²⁴

According to the General Data Protection Regulation, an impact assessment is not required for all processing activities. According to its report, Kela uses a threshold analysis to determine the risk level of its specific activities and whether an activity falls within high-risk activities referred to in the Regulation and would thus require an impact assessment.

On one hand, the report does not indicate whether Kela has performed the threshold analysis also on the personal data processing measures and systems it implemented before the entry into force of the General Data Protection Regulation and, on the other, whether the impact assessment was performed on the said measures and systems when required by the General Data Protection Regulation. Based on the report, it remains unclear on what potential grounds the impact assessments have not been performed other than those related to the date when the processing measures and systems were implemented. The report also does not indicate whether an approval granted by a supervisory authority before the entry into force of the General Data Protection Legislation exists for Kela's processing measures, in which case an impact assessment would not necessarily be needed.²⁵

According to Article 35, paragraph 10 of the General Data Protection Regulation, where processing pursuant to point (c) or (e)²⁶ of Article 6(1) has a legal basis in Union law or in the law of the Member State to which the controller is subject, that law regulates the specific processing operation or set of operations in question, and a data protection impact assessment has already been carried out as part of a general impact assessment in the context of the adoption of that legal basis, paragraphs 1 to 7 shall not apply unless Member States deem it to be necessary to carry out such an assessment prior to processing activities.

The basis of the processing of personal data related to Kela's implementation of social security is laid down in national legislation. It is unlikely that impact assessment referred to in the General Data Protection Regulation has been performed as part of national legislation, which was largely enacted before the General Data Protection Regulation entered into force.

In my view, based on the General Data Protection Regulation, Kela should determine, if it has not already done so, the necessity of impact assessments from its processing activities concerning decision-making and perform the said assessment, if needed. It would be possible to render the situation concerning the impact assessment to a state required by the General Data Protection Regulation in connection with the regulation concerning automated decision-making by Kela, as stated by Kela in its report. Irrespective of the implementation method, the matter should be rendered to a state required by the General Data Protection Regulation for the purpose of meeting the accountability required by the General Data Protection Regulation and otherwise.

²⁴ According to the preamble (Recital 171) of the General Data Protection Regulation, processing already under way on the date of application of this Regulation should be brought into conformity with this Regulation within the period of two years after which this Regulation enters into force. The Data Protection Working Party's Guidelines [WP 248 rev.01](#) (pp. 15–17) have covered situations in which the impact assessment should be performed on the processing activities in use when the Regulation entered into force.

²⁵ In accordance with the preamble (Recital 171) of the General Data Protection Regulation, Commission decisions adopted and authorisations by supervisory authorities based on Directive 95/46/EC remain in force until amended, replaced or repealed. See also the Data Protection Working Party's guidelines [WP 248 rev.01](#) (pp. 15–16).

²⁶ The processing of personal data is based on processing being necessary for compliance with a legal obligation to which the controller is subject and/or processing is necessary for the performance of a task carried out in the public interest or in the exercise of official authority vested in the controller.

4.3.7 Selection of matters for automated decision-making and the development outlook of automation

According to its report, Kela makes decisions based solely on automated processing of personal data in situations in which the benefit can be granted based on the application of the party concerned, revoked in accordance with the party's request or the decision is based on the decision proposal approved by the party concerned. In addition, the report states that terminating a benefit on the basis of register information or other clear and undisputed payment obstacles may be based solely on automated processing of personal data. In addition, a termination decision can be fully automated in the periodic reviews of some benefits when the party concerned fails to submit the information requested by the set date.

Based on Kela's report, its decision-making based solely on automatic processing of personal data appears to take place primarily in situations in which the content of decisions is generated either by the application of legal rules that do not involve judicial discretion or in accordance with the will expressed by the party concerned. However, the passivity of the party concerned (their failure to respond to a request for information) as the basis of decision-making is not fully comparable to the other situations presented. When decision-making is based on the passivity of the party concerned in submitting information, there is a risk that the party concerned has not expressed their view due to a reason beyond their control. However, the same risk is also included in manual decision-making in a similar situation.

Kela stated in its report that it pursues rule-based automation based on an extensive use of registers in situations that do not require case-specific discretion. According to its report, Kela could use automated decision-making in a significant portion of its decisions in which a benefit is granted on the basis of an application, because the effect of income in benefits provided by Kela is nearly always exhaustively defined in benefit laws. The decision to be given to the customer would combine the information provided in the application and Kela's pre-existing register information.

The intention of the Government Proposal ([HE 52/2018 vp](#)) was to lay down Kela's right to make automated decisions referred to in Article 22, paragraph 1 of the General Data Protection Regulation. The Proposal aimed to enable automated decision-making only in matters in which the legal preconditions were sufficiently unambiguous and resolving the matter would not require case-specific discretion. The Parliament's Constitutional Law Committee concluded in the statement ([PeVL 78/2018 vp](#)) it issued on the Proposal that as such, it did not have any remarks concerning the objectives of the automation of decision-making described in the Government Proposal (more effective decision-making, allocating personnel resources to decision-making involving discretion, and reducing the risk of human errors), but adopted a view that it is necessary to specify regulation with regard to the grounds on which matters can be selected for automated decision-making.

Based on the information available to me, the benefit matters Kela processes in solely automated decision-making are similar to the matters referred to in the aforementioned Government Proposal. In its report, Kela states that inadequate legislation and the resulting uncertainty prevent the advancement of development projects related to automation. According to Kela, automated decision-making should be subject to general legislation, and Kela also needs special legislation concerning its own operations.

The aforementioned Ministry of Justice memorandum²⁷ covers, among other things, the situation for which automated decision-making would be suitable, and the working group established by the Ministry for the preparation of general legislation concerning automated decision-making will prepare a Government Proposal on the allowed scope of application for automation, among other things.

While the Government proposal on general legislation concerning automated decision-making is being prepared by the aforementioned working group, I do not find it justified in my statement to cover in greater detail what kind of preconditions should be set for matters to be processed in automated decision-making.

According to Kela's view, potential general legislation concerning the matter will not alone be a sufficient foundation for automated decision-making pursued by Kela. I have already stated above that there is no sufficient legal basis for Kela's decision-making based solely on automated processing of personal data. In my view, the need for special legislation that is a precondition for automated decision-making should be assessed swiftly, so that the functioning of the legal framework concerning Kela's automated decision-making could be ensured.

4.4 Conclusions

4.4.1 Legal basis of automated decision-making

Kela's task is to enforce benefit legislation concerning social security, which implements the right to social security laid down in section 19 of the Constitution. Upon enforcing the said legislation, Kela makes administrative decisions during which process it should comply with the procedural provisions concerning good governance and the processing of administrative matters laid down in the Administrative Procedure Act and secure the rights of customers. In part, Kela makes these decisions based solely on the automated processing of personal data. Based on Kela's report, these decisions are, at least in part, decisions referred to in Article 22 of the General Data Protection Regulation. However, Kela does not have a legal basis according to section 80 of the Constitution and Article 22, paragraph 2 of the General Data Protection Regulation required by such decision-making.

In its report, Kela itself has stated that it does not have a sufficient and unambiguous legal basis for automated decision-making, and it has considered that in addition to general legislation on automated decision-making, it will need special legislation concerning the matter. According to Kela's view, insufficient legislation has prevented the advancement of development projects related to automation.

I find the current situation problematic with regard to, among other things, the general development outlook of administration, including the promotion, development and increase of digitalisation. General legislation on automated decision-making that is being prepared by the Ministry of Justice will solve problems related to automated decision-making, but based on the information available to me, in Kela's case, it alone will not be enough to solve issues concerning the use of automation.

Ultimately, automated decision-making is about – as is generally the case in administrative activities – the realisation of the rights of the customers of administration. Based on the report available to me, there is no reason to suspect, as such, that the current automated decision-making by Kela would or could not secure customers' rights and protection under the law. However, the situation is unregulated with regard to both general legislation concerning automated decision-making and special legislation potentially needed. Functioning and adequate legislation is a method of ensuring good governance and customers' protection under the law included by default and by design in automated decision-making and the decision-making systems required by it.

To rectify the aforementioned unregulated situation and to secure the development opportunities of automated decision-making and the rights of customers, I consider it extremely important that the need for regulation concerning automated decision-making be investigated in full. Therefore, according to my view, the need for special legislation concerning automated decision-making by Kela should be determined swiftly.

4.4.2 Openness and understandability in automated decision-making and justifying automated decisions

According to its report, Kela has not indicated in its individual benefit decisions if the decision was made in automated processing, but according to Kela, it will do so in future.

The General Data Protection Regulation does not regulate the administrative procedure, but when decision-making is based on the processing of personal data and, specifically, solely automated processing of personal data, the General Data Protection Regulation also sets requirements for decision-making. The said decision-making is allowed only under the conditions laid down in Article 22, paragraph 2 of the General Data Protection Regulation. Regardless of which of the grounds stated in the paragraph of the Article is the used as a basis for allowing the processing, the condition of the processing is that the controller implements the appropriate measures to protect the rights and freedoms and legitimate interests of data subjects (the safeguards). In part, the said safeguards protect the same objects of legal protection than the provisions on the administrative procedure in the Administrative Procedure Act.

The provisions of the Administrative Procedure Act concerning the obligation to provide reasons and the rationale of administrative decisions, clear and appropriate use of language as well as the service principle of administration emphasise the customer perspective of administrative activities. The reasons provide the person in question an opportunity to assess the legality of the decision they received and the need for an administrative review. From the perspective of the data subject, a central starting point of the General Data Protection Regulation in the processing of personal data is transparency, based on which the data subject has the right to receive information on the processing of their personal data and to assess the legality of the processing. Among other things, transparency concerns automated decision-making and the decision-making process. The decision-making rules and algorithms used in automated decision-making are significant in the assessment of the legality of the decision. According to the Regulation, transparency should be implemented clearly and understandably from the perspective of the data subject, which means paying attention to the language and the mode of expression used, among other things.

The Administrative Procedure Act and the General Data Protection Regulation share the starting point of transparency and openness: open information presented in an understandable manner, stemming from the needs of the customer / data subject, about the processing of personal data that affects the person's rights and obligations, in other words, about decision-making in the matter being processed. For the protection of their rights, the customer should receive information about automated decision-making in a manner required by the General Data Protection Regulation as well as a justified decision based on substantive legislation in accordance with the Administrative Procedure Act. Therefore, information about automated decision-making, as well as the decision-making rules applied in automated decision-making, should be part of a coherent set of decisions so that the decision would realise transparency as required by the General Data Protection Regulation concerning safeguards, among other things, and would also be a linguistically and structurally clear, understandable and justified administrative decision as required by the Administrative Procedure Act.

The transparency and openness of automated decision-making emphasise people-centric good governance based on the agency of people, which will build trust in decision-making and the activities of the authorities overall. Trust is key in the justification and acceptability of using automation in decision-making and in administrative activities overall.

Questions related to automated decision-making and the good governance and procedural provisions included in the Administrative Procedure Act are currently being assessed by the working group established by the Ministry of Justice for the preparation of general legislation concerning automated decision-making.

4.4.3 Liability for acts in office

In automated decision-making by Kela, liability for acts in office referred to in section 118 of the Constitution is, according to Kela's report, realised so that the unit and official responsible can always be determined on the basis of the documentation based on the information systems development method and the definitions concerning the division of work, sphere of competence and operating models. In my view, this kind of determination of responsibility may, depending on the case, blur and distance the causal relation between an act and a consequence required by criminal liability for acts in office, in particular, and make

it into such a complex chain that in practice, assigning responsibility is no longer possible or at least the probability of it happening is very low. Then the liability for acts in office would, at worst, be indirect and mostly ostensible, and it could not be realised in all situations in practice. However, the starting point of section 118 of the Constitution is that the realisation of liability for acts in office should, in practice, be possible also when administrative decisions are made automatically. Therefore, the realisation of liability for acts in office in automated decision-making should be assessed carefully.

Questions concerning the realisation of liability for acts in office are also being assessed by the working group established by the Ministry of Justice for the preparation of general legislation concerning automated decision-making.

4.4.4 Impact assessments

Article 5, paragraph 1 of the General Data Protection Regulation lays down the principles of the processing of personal data, and paragraph 2 covers the controller's accountability. Accountability indicates the risk-based approach of the General Data Protection Regulation, according to which the controller is to demonstrate that the measures selected to protect personal data are proportionate with regard to the risks caused by the processing. Impact assessment is a method for determining risks arising from the processing of personal data to the rights and freedoms of the data subject. By fulfilling their accountability, the controller verifies that they have fulfilled their said examination duty.

According to Kela's report, very few impact assessments have been carried out on automated decision-making used by Kela. In my view, the General Data Protection Regulation requires that Kela should determine, if it has not already done so, the necessity of impact assessments from its processing activities concerning decision-making and perform the said assessment, if needed. It could be possible to render the situation concerning impact assessments to a state required by the General Data Protection Regulation also as part of special legislation concerning automated decision-making by Kela, as brought up by Kela in its report. Irrespective of the implementation method, the matter should be rendered to a state required by the General Data Protection Regulation for the purpose of conducting an impact assessment and meeting the accountability requirement of the Regulation.

4.5 Measures

I am informing Kela of the statements and opinions I present in the decision and request Kela to communicate no later than 29 October 2021 the potential measures for which the opinions presented above in section Conclusions (items 4.4.1, 4.4.2 and 4.4.4) have given grounds.

I am also informing the Ministry of Social Affairs and Health, which bears the primary responsibility for the benefit legislation applicable to and applied by Kela, of my statements and opinions. While doing so, I am also requesting the Ministry to communicate no later than 29 October 2021 the potential measures within the ministry's scope of competence for which the opinions presented on, in particular, the need for special legislation concerning automated decision-making by Kela, in section Conclusions (items 4.4.1 and 4.4.4) have given grounds.

This document was signed electronically.

Chancellor of Justice Tuomas Pöysti

Referendary Counsellor Marjo Mustonen

