

The Consumer Voice in Europe

BEUC COMMENTS ON THE ARTICLE 29 WORKING PARTY GUIDELINES ON AUTOMATED INDIVIDUAL DECISION-MAKING AND PROFILING UNDER THE GDPR



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Why it matters to consumers

Profiling and automated decision making are used in an increasing number of business sectors (banking and finance, healthcare, insurance, marketing and advertising, etc). Consumer's activities are tracked and analysed to create very detailed profiles which are often sold to the highest bidder and used to assess and influence consumers' behaviour. Measures based on profiling and automated decision making can be very opaque and result in different sorts of discrimination (racial, ethnic, economic, etc.). It is essential that consumers are strongly protected against these risks.

Summary

BEUC welcomes the Guidelines and the effort made by the Working Party to bring further clarity on how the GDPR addresses profiling and automated decision making.

As the WP29 rightly notes, profiling and automated decision making are used by an increasing number of sectors, both private and public. More and more companies rely on big data analytics, profiling and automated decision making for their core business: banking and finance, healthcare, insurance and marketing and advertising just to name a few.

While profiling and automated decision making can be useful for individuals under certain circumstances (for example from the point of view of personalisation of services provided that consumers are aware of such situation), it also generates substantial risks for their rights and freedoms which require appropriate safeguards. Profiling and automated decision making increase the unbalance of power between consumers and businesses, already tilted in favour of the latter. These practices can be very opaque, difficult to grasp and can lead to bias and discrimination.

The GDPR contains several provisions to address the risks posed by profiling and automated decision making. It is essential that the scope and reach of these provisions is clear and that they are thoroughly applied by the enforcement authorities if companies do not respect data subjects' rights. These guidelines are a very good starting point to ensure this. However, we would welcome and see a need to further guidance on profiling and automated decision making in specific sectors such as fintech and online advertising, as well as in relation to the use of profiling for price discrimination. This additional guidance could be provided either as an addition to these guidelines or as part of dedicated guidelines on the application of the GDPR in those areas.

1. Definitions

BEUC welcomes that the Guidelines explains the definition of profiling under the GDPR, including the elements of which profiling is composed and the different stages of profiling (data collection, automated analysis of correlations and applying the correlation to an individual), all of which are covered by the GDPR.

We also welcome the explanation of the distinction between profiling and automated decision making, which can be made with or without profiling. In the same way, profiling can take place without making automated decisions and decisions that are not wholly automated might also include profiling.

It is essential that all these different situations and combinations duly fall under the rules of the GDPR.

2. Specific provisions on automated decision-making, as defined in Article 22

We welcome the Working Party's approach to the different elements of Article 22. In particular, we welcome the clarification that the fact that Article 22(1) refers to decisions "based solely" on automated processing does not mean that all automated decisions where there is any human involvement whatsoever are excluded from the scope. Otherwise, this provision would be rendered inapplicable to most situations and current practices of profiling.

As the Working Party points out, data controllers shall not be able to circumvent Article 22 by 'fabricating human involvement'. The automated processing shall form the foundation for a decision but the decision-making process itself does not necessarily have to be fully automated. To qualify as 'human intervention', such intervention must be meaningful and carried out by someone who has the authority and competence to change the decision.

We also welcome the clarification of what constitutes "legal" or "similarly significant" effects. It is particularly important to underline that even where no legal rights or obligations are specifically affected, data subjects could still be impacted sufficiently to require the protection provided by the GDPR.

The guidelines indicate the importance of considering the context and specific elements in each situation. For example, the Working Party points out that targeted advertising based on a simple demographic profile such as 'women in the Brussels region' might a priori not have a significant effect on an individual. But, that it is also possible that it might do depending on elements such as the intrusiveness of the profiling process, the way the ad is delivered, and the vulnerabilities of the data subjects targeted. Also, the Working Party points out that processing that might have little impact on individuals generally may in fact have significant effects on certain groups of society such as minority groups or vulnerable adults. Children are particularly vulnerable as well.

One important element seems missing from the guidelines though, the interpretation of what is considered a 'decision'. Taking Recital 71 as a basis, 'decisions' shall be interpreted broadly and includes 'measures'.

Targeted advertising, individual scoring and ranking systems, as well as automated personalisation of content and services are all measures that can have a significant effect

on consumers. For example, behaviourally targeted advertising which relies on extensive profiling and micro-targeting can be used to manipulate a consumer into buying something he did not intend to buy. Personalised pricing can result in discrimination when a consumer ends up paying higher prices than others just because of his online activity. If this practice gets spread across online companies, consumers will lose trust on the online environment as a whole. We would welcome further analysis as to the application of the GDPR provisions to prevent discriminatory pricing practices.

2.1. Exceptions

Article 22(2) formulates the exceptions under which solely automated decision-making that has legal or similarly significant effects can take place: when it is necessary for the performance of a contract, when it is authorised by Union or Member State law, when the data subject gives explicit consent.

We particularly welcome and underline that, in what concerns the exception related to the performance of a contract, the Working Party points out that 'necessity' should be interpreted narrowly and that the controller must be able to demonstrate such necessity, considering whether a less privacy-intrusive method could be adopted. It is essential that the exception for the performance of a contract cannot be widely invoked and thus ends up becoming a loophole.

In terms of the explicit consent of the data subject, we look forward to the upcoming guidelines on consent, in particular in relation to Article 7(4) and profiling practices.

2.2. Rights of the data subject

Right to be informed

Transparency is particularly important in relation to profiling and automated decision making. As stated in the guidelines, information about profiling must be not only easily accessible for data subjects but brought to their attention.

The data controller must inform the data subject about the existence of automated decision making, including profiling, provide him/her with meaningful information about the logic involved and explain the significance and envisaged consequences.

We fully share the Working Party's assessment that all this must be done in a way that it is simple and easy to understand for the data subject. Controllers should explain the rationale or the criteria used in the decision-making, as well as the data used, without getting into complex explanations regarding algorithms or disclose the algorithms themselves. They should also explain how the automated decision-making might affect the data subject, giving real, tangible examples to illustrate the possible effects.

Right of access

Data subjects also have the right to access the information about the existence of automated decision making, the logic involved and the significance and envisaged consequences.

Right not to be subject to a decision based solely on automated decision-making

We welcome the clear explanation that Article 22(1) acts as a general prohibition on solely automated individual decision-making, including profiling, with legal or similarly significant effects. Therefore, the data subject does not have to actively object to the processing, as

it can only take place if it falls under one of the three exceptions envisaged in Article 22(2). Moreover, even if one of the exception applies, Article 22(3) brings additional safeguards for the data subject, such as the right to obtain human intervention and contest the decision.

As the Working Party underlines, the controller must provide a simple way for the data subject to exercise his/her rights.

2.3. Profiling and automated decision making based on special categories of data

Special categories of data such as health data require additional protection. The use of such data for automated decision making and profiling must be strictly limited. As the guidelines explain, the GDPR envisages two cases where automated decision making that involves special categories of data is allowed. The first one is when the data subject has given explicit consent. The second one is when processing is necessary for reasons of substantial public interest, on the basis of Union or Member State law. We would have welcomed further clarification from the Working Party in relation to which situations could fall under this second scenario. The article refers to "substantial" public interest, which implies that the threshold should be even higher than what is normally considered as a public interest.

2.4. Establishing appropriate safeguards

We share the Working Party's view on how important transparency is. Data subjects can only challenge decisions meaningfully if they are fully aware and fully understand how and on the basis of what a decision has been made.

We also welcome that the Working Party underlines that safeguards must be provided in any case, as stated in Recital 71 of the GDPR, and that the guidelines provide several examples of appropriate safeguards beyond those mentioned in the GDPR. Particularly important from our perspective are the checks to detect any possible bias, discriminations or errors, to review the accuracy and relevance of the automated decision making, including via algorithmic auditing. It's also essential to provide easy ways for data subjects to express their points of view and contest the decisions.

3. General provisions on profiling and automated decision-making

The guidelines provide a very good overview of how all the different provisions regarding data protection principles, legal bases for processing and data subject rights apply to profiling and automated decision making.

Data protection principles

Any processing of personal data for profiling and automated decision making must be lawful, fair and transparent. It must be done in full respect of the purpose limitation principle and the data used must be accurate. Also, controllers should not collect more personal data than they need, and they must not keep the data for longer than necessary.

Lawful basis for processing

BEUC welcomes that the Working Party clearly points out that when profiling is based on consent controllers, need to be able to demonstrate that the data subject understands exactly what they are consenting to. Also, in situations where to give consent is the only choice, such consent would not be valid and therefore it is not an appropriate basis for processing. This is for example the case, explicitly mentioned in the guidelines, where consent to profiling is a pre-condition of accessing the controller's services.

In relation to the use of 'legitimate interests' as the legal basis for profiling, we welcome the guidance in terms of the elements that are particularly relevant to carry out the mandatory balancing exercise. Perhaps the inclusion of some practical examples to illustrate certain situations would have been desirable as well. In our opinion, given the risks that profiling practices generate, for example in terms of the intrusiveness of certain practices and the potential to create discrimination, the use 'legitimate interests' for profiling should be de facto strictly limited.

Special categories of data

The guidelines rightly stress a fundamental point when underlining that profiling can generate special category data by inference from other data which is not special category of data but becomes so in its own right when combined with other data. Therefore, special attention needs to be paid when inferring or correlating data. In addition, controllers should not try to disguise special category data as 'normal' personal data, for example by categorising the data using proxy categories that describe sensitive attributes without mentioning them explicitly.

Also, as the Working Party points out, it is particularly important to keep the user informed about what is going on in the case of inferences about sensitive preferences and characteristics.

Rights of the data subject

The guidelines provide a good overview of the application of the different rights of the data subject, including the right to be informed about how the profiling or automated decision-making process and about what are his/her rights, the right to obtain details of the data used for profiling, the right to rectify inaccurate data (both in terms of the 'input' personal data and any 'output' personal data generated by the profiling process), the right to get the data erased, the right to restrict processing and the right to object to the processing.

Particularly interesting is the example of how these provisions would apply in the case of profiling carried out by a data broker. In fact, we would suggest that Working Party looks more in depth at the application of the GDPR in the data broker industry and in the programmatic online advertising ecosystem.

In relation to the right to object, the GDPR states that the data subject can object to processing on grounds relating to his or her particular situation. We would welcome further guidance in terms of what grounds can be brought forward by the data subject and how detailed those should be. We should avoid placing excessive burden on the data subjects and limit their ability to exercise their rights by obliging them to come up with very detailed explanations as to why they object to the processing.

The controller is obliged to interrupt the profiling process unless it can demonstrate compelling legitimate grounds that override the data subject's interests or rights and freedoms. We welcome that the Working Party underlines that burden of proof is on the

controller and that it provides some guidance on what can be considered a compelling legitimate ground and what the controller needs to prove.

It is also important to underline that, as the Working Party points out, for profiling done for direct marketing purposes, the right to object is an unconditional right, meaning that there is no need for any balancing of interests and the controller cannot question the reasons for the data subject's objection.

4. Children and profiling

Even if the articles of the GDPR do not contain an explicit prohibition on automated decision making and profiling of children for commercial purposes, it is clear from reading recitals 38 and 71 that the intention of the lawmakers was to give children special protection against these practices. In this sense, BEUC welcomes the Working Party's recommendation that organisations should refrain from profiling children for marketing purposes and, generally, from applying solely automated decision making, including profiling, with legal or similar significant effects to children.

However, we consider that the Working Party should have taken an even stricter interpretation, given that children are a primary target for marketers and are particularly influenceable and vulnerable to manipulation. In particular, we consider that the application of the 'fairness' principle to the processing of children's data should also play a special role in this case. In our view, the use of personal data of children for marketing and profiling children for commercial purposes should generally be considered unfair processing of data and thus not allowed, at least for the youngest children. We would welcome the Working Party's view on this assessment.

We would also welcome guidance from the Working Party in terms who is to be considered a child under the GDPR, as the Regulation does not contain any indications on this. The UN Convention for the Rights of the Child defines a child as someone under the age of 18. It would be very helpful if the Working Party confirms whether that is also how "children" should be understood under the GDPR, especially because national legislations have different thresholds.

5. Data Protection Impact Assessments (DPIA)

The guidelines imply that not all profiling activities will require a DPIA. We would welcome that the Working Party provides some practical examples to illustrate which profiling activities would warrant a DPAI and which would not. Given the potentially adverse effects that profiling can have on individuals, we consider that the cases where a DPIA would not be required should be very limited.

6. Annexes

BEUC particularly welcomes the good practice recommendations provided by the Working Party in Annex I of the guidelines. They should help controllers comply with their obligations and could also serve as guidance for users to assess whether their rights are being respected.



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