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## ETNO comments on Article 29 Data Protection Working Party's Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679

On 3 October 2017, the Article 29 Working Party (WP29) adopted a set of Guidelines on Automated individual decision-making and Profiling for the purposes of Regulation 2016/679 and invited interested stakeholders to present comments. ETNO welcomes this opportunity to comment on Article 29 Working Party's draft guidelines and would like to stress the importance of Profiling and Automated decision-making for private and public actors and individuals in today's economy and society.

Profiling and Automated decision-making are two different concepts, while very much interrelated. Profiling or Automated decision-making are neither good nor bad, both can deliver benefits and can also have negative aspects. Profiling and Automated decision-making are increasingly used and this trend will be accentuated with the generalised use of artificial intelligence and machine learning.

What is important is to maintain the neutral nature of both Profiling and Automated decision-making. They can be very useful for private and public sectors as well as for individuals and the economy and society as a whole in terms of increased efficiencies, resource saving, market segmentation and relevance, reduction of potential for human error in key areas like healthcare, education, transport, energy, cybersecurity.

The GDPR provides the necessary safeguards and rights for the data subject to avoid any misuse of profiling. By applying the provisions established in the GDPR, organisations need to make sure that Profiling and Automated decision-making do not impact individuals' rights in a negative and opaque manner, resulting in discriminatory decisions, unfair discriminations and economic disadvantages.

In this regard, Transparency and Fairness are key safeguards to ensure that organisations and individuals take full advantage of Profiling and Automated decision-making and that the rights of individuals are guaranteed.

### DEFINITIONS

ETNO believes the guidance paper gives a rather extensive interpretation of the definition of profiling, which encompasses three different stages: collection of data, automated analysis to identify correlations, and application of these correlation to an individual to infer present or future behaviour. According to the guidelines, each of the three stages represents a process that falls under the GDPR definition of profiling.

However, the mere collection of data cannot in our opinion be interpreted as profiling if not directly accompanied by some kind of analysis. As stated in the same paper, "profiling means

gathering information about an individual and analysing their characteristics or behaviour patterns in order to place them into a certain category or group...”

In the same vein, not all decisions that produce legal or similarly significant effects are based on profiling. In that respect, we consider that the example given on page 10 of someone who is “automatically disconnected from their mobile phone service for breach of contract because they forgot to pay their bill before going on holiday” is not relevant in a profiling context. We do not contest that the decision in the example produces legal aspects. That said, this decision is not being based on any profiling, but rather on an objective factor, i.e. whether the customer has paid its bill. For this reason, the example is in our view confusing and should be reviewed.

## SPECIFIC PROVISIONS ON AUTOMATED DECISION-MAKING AS DEFINED IN ARTICLE 22

ETNO would like to express its concern regarding the interpretation of Article 22 presented in the WP29 Guidelines. ETNO regards the presented interpretation to be too restrictive and not in line of the actual wording of the article.

ETNO wants to express the following interpretations regarding Article 22. ETNO regards that: Article 22 (1)

- generally allows decisions based solely on automated processing, including profiling, which produce legal effects concerning data subjects or similarly significantly affects them;
- generally allows data subjects a right to object such processing.

The reason for ETNO having this interpretation is the concrete working of the article, which is identical to the wording of Article 17. The fact that a data subject shall have the right to avoid something, as outlined in this article shall not be read as a blunt prohibition which is only excepted if Article 22(2) is fulfilled. Rather the first part of Article 22 simply provides a clarification that automated processing including profiling shall always be for the data subject to have control over.

Article 22 (2)

- excludes data subject’s right to object such processing in the following situations:
- If the decision is:
  - o necessary for entering into, or performance of, a contract between the data subject and a data controller;
  - o 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; or
  - o based on the data subject's explicit consent.

Article 22 (3)

- provides suitable measures to safeguard the data subject's rights and freedoms and legitimate interest in those cases, when the mentioned processing is carried out (based

on performance of contract and on explicit consent) and the data subject does not therefore have a possibility to object to such processing, namely the right to obtain human intervention on the part of the controller, to express his or her point of view and to contest the decision.

In addition, ETNO would like further clarifications on the exceptions listed in Article 22(2). More specifically, we would like to better understand to what extent operators may proceed with profiling for legitimate marketing reasons (e.g. marketing their own similar products), under the exception for processing carried out in the course of the entering into, or performance of, a contract. We believe that the wording “performance of a contract” should aim to cover a client-operator contracts for the provision of services and any related marketing.

This is even more important as the exceptions in Art. 22(2) need to read in combination with Art. 22(1) and the “right not to be subject” to a decision based solely on Automated processing, including profiling, which produces legal effects concerning the data subject or similarly significantly affects the data subject.

WP29 considers that Art. 22 establishes a general prohibition against any Automated decision-making, including Profiling, unless an exception under Art. 22(2) applies. ETNO believes this interpretation is too restrictive and is not aligned with a Risk-Based Approach, whereby organisations conducting Automated decision-making will in any case have taken all measures necessary to avoid that such processing has a negative impact on the data subject.

Interpreting Art. 22(1) as a direct prohibition would force organisations to obtain specific and explicit consent of the data subject or demonstrate that such processing is necessary within the context of a contract or it is authorised by law. Consent is not a better ground for processing than e.g. legitimate interest. GDPR does not have a gradation of legal grounds, but an enumeration of them, which shall apply in one or another case of processing depending on its concrete circumstances. For that, the data controller will be accountable and will have taken the adequate decisions and necessary legal, technical, organisational measures. Overreliance on consent in this context as in many others will only lead to consent fatigue.

Therefore, ETNO believes that Art. 22(1) should be interpreted narrowly, allowing possible Automated decision-making for fraud prevention purposes, market segmentation or other legitimate grounds that strictly speaking would not be covered by the limited number of exceptions of Art. 22(2).

## GENERAL PROVISIONS ON PROFILING AND AUTOMATED DECISION-MAKING

As mentioned above, Transparency and Fairness are key elements in the context of Profiling and Automated decision-making. ETNO companies are fully committed to providing the necessary and relevant information for the data subject to be able to understand the implications of a given processing, including any processing leading to any kind of Automated-decisions making.

Art. 12 GDPR fully applies and data controllers are obliged to provide data subjects with concise, transparent, intelligible and easily accessible information regarding the concrete processing and also the eventual Automated decision-making.

From the right to transparency and transparent information, all other data subject's rights will derive: right of access, right of rectification, right to erasure and to be forgotten, right to data portability. However, to be fully compliant with the GDPR, data controllers need to ensure that transparency and information does not mean "over-information" that could provide alarm and unnecessarily concern to customers.

What is really important from the point of view of the data subject is an easy access to information, being the basic information "who is the controller", "which is the data processed", "why is the data processed", "where the data is going to", "which are my rights as data subject", "who should I contact to exercise my rights". In this sense, Profiling and Automated decision-making should not make any difference vis-à-vis other kinds of processing.

## CONCLUSION

ETNO thanks the Article 29 Working Party for this opportunity to provide comments on these important issues and calls for WP29 to take a balanced approach when adopting its final Guidelines on Automated decision-making and Profiling. Both kinds of processing can bring enormous opportunities for social good, public health and improvement of people's live at large and it is important that these opportunities and benefits can be materialised. For that, GDPR establishes the right framework, which should be interpreted in a dynamic and future-proof way so that technological developments are not welcome by fear, but by the assurance that consumer's and citizen's personal data is rightly protected.

ETNO is looking forward to providing additional input in the future in light with the practical application of the GDPR and the new technological developments that may arise.

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ETNO (European Telecommunications Network Operators' Association) represents Europe's telecommunications network operators and is the principal policy group for European e-communications network operators. ETNO's primary purpose is to promote a positive policy environment allowing the EU telecommunications sector to deliver best quality services to consumers and businesses.

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