

ETNO comments on the Article 29 Working Party Guidelines on Transparency under Regulation 2016/679 (WP260)

On 28 November 2017, the Article 29 Working Party (WP29) adopted a set of Guidelines on Transparency under Regulation 2016/67 and invited interested stakeholders to present comments. ETNO welcomes this opportunity to comment on WP29's guidelines and would like to stress the importance of the right to transparent information as the most significant right of the data subject. This right allows the data subject to be aware of a given processing, and thus to exercise all the other rights provided for by the GDPR. We could comfortably argue that all the data subject rights granted by the GDPR (access, rectification, erasure, portability, etc.) spring from the right to transparency.

ETNO members stand fully behind the right to transparency and are committed to providing their data subjects with all the necessary information that allow them to fully understand the implications of the processing of their personal data. ETNO believes that the information given to the data subjects should be customer-friendly and efficient, rather than an exercise of mere compliance with the law which could well exacerbate into "over-information" that confuse the data subject. ETNO members aim at providing modern ways of fulfilling transparency obligations to give data subjects control of the data that is being processed.

ETNO members welcome the examples provided together with the explanations in the WP29 guidelines. We believe they could be complemented with further elaborations in some cases to help companies make proper adjustments in fulfilling the provisions of the GDPR.

GDPR is the adequate instrument that establishes the right principles and leaves the concrete application to the own assessment of data controllers and processors, and ultimately, leaves to Judges and competent Data Protection Agencies the role to ensure that the Law is correctly applied.

ETNO trust the capacity and ability of Judges and competent Data Protection Authorities to adapt general rules to concrete cases. This is how Law has always worked: general rules to be applied to specific cases and Judges and competent Authorities to be able to interpret the general law within a concrete case. Otherwise, the risk is high that overregulation would turn into a negative application of the rules for individuals.

ETNO is convinced that the legislator has provided a comprehensive set of rules to ensure full transparency on the processing of personal data to the data subject. It should be reconsidered if it is appropriate and necessary to complement transparency obligations set by the GDPR by further obligations derived from principles like fairness or best practice. ETNO questions whether these further obligations will improve transparency to the data subject. Under any circumstances the risk for the controllers to infringe the GDPR by breaking unwritten transparency obligations will increase.

INFORMATION TO BE PROVIDED TO THE DATA SUBJECT

ETNO believes that most important is an easy entrance to relevant information, the basic information being "who is the controller", "which is the data processed", "for what purposes 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 addition, once this basic information is provided, data subjects will be able to require additional layers of information if they want to have more detailed information about the specific processing (layered information). Some companies are implementing “consent by layers” and some DPAs are very receptive to this concept.

Regarding specifically the modalities/format of provision of information, as electronic communications service providers ETNO members believe that information must be provided to the data subjects at the time of initiating a contract,. Furthermore ETNOs members also believe in ensuring that relevant information is continuously available in the most suitable manner to data subjects throughout the relationship between the parties.

However, the GDPR does not oblige the controller to remind the data subject of the privacy statement in appropriate intervals (paragraph 28). Additional unwritten transparency obligations should be avoided.

The information and the means used to convey this information should be tailored to the content of the interaction and the channel used. The WP29 guidelines describe various means of providing information (see specifically points 29-34), including “telephonic environment”. While the full information is expected to be featured in an easily accessible means to data subjects, in the case of an interaction over the phone it is reasonable that the controller gives the basic and most relevant information to the customer at the beginning of the conversation, giving the data subject the possibility to access the whole information by other means (e.g., a privacy portal in a company’s website).

Articles 13 and 14 GDPR give a clear framework of the information to be provided to the data subject. As mentioned above ETNO believes that most important is an easy entrance of the data subject to all relevant information and if required to more detailed information in a layered format. Articles 13 and 14 GDPR also limit the information to be provided to the data subject. WP29’s position in paragraph 9 that the controllers should not only to provide the information under Articles 13 and 14 GDPR but also separately describe what kind of effect the specific processing will have on a data subject goes far beyond the legislative text of the GDPR.

The same applies to some additional obligations set out by WP 29 in the schedule of the guideline, based on best practice or fairness considerations:

- Article 13 (1) (d), the obligation to provide the data subject with the information from the balancing test,
- Article 13 (1) (f), the obligation to explicitly mention all third countries to which the data will be transferred,
- Article 13 (2) (b), the obligation to give a summary of what the right data subject right involve and how the data subject can take steps to exercise them.

Furthermore, controllers should regularly check whether the information/communication is still “intelligible” and tailored to the actual audience (as done in the first identification by the controller). However, it is not fully clear to ETNO members what conditions apply to the audience measuring in terms of how frequent it should be done. Controllers should spell out the most important consequences of the processing in addition to the information prescribed under Articles 13 and 14. Here, it would be helpful to have further guidance from =WP29 regarding how to find the appropriate middle ground between too little and overcomplicating information. Along the same lines, not only negative but also positive examples would be welcome regarding the demand to provide “clear and plain language” as described in paragraph 11 of the guidelines.

PROVIDING INFORMATION TO CHILDREN

In the process of identifying the audience to receive the information, controllers should also take into account vulnerabilities of data subjects. ETNO members would like further clarification on how controllers can ascertain whether services are offered to vulnerable members of society with regards to what kind of vulnerabilities that should be taken into account.

INFORMATION RELATED TO FURTHER PROCESSING

At paragraph 41, the WP29 guidelines rightly acknowledge that information in relation to further processing must be provided “prior to that further processing”. WP29’s position is that *“a reasonable period should occur between the notification and the processing commencing rather than an immediate start to the processing upon notification being received by the data subject.”* However, Articles 13.3 and 14.4 GDPR only request the controller to provide the necessary information prior to the further processing without a defined period of time. This is in line with the information obligations regarding the initial processing, where the data subject needs to be informed at the time when the data is obtained (Art. 13.1). In the case of initial processing, no transitional period between the collection of the data and their processing is required. According to Art. 14.3 it is even possible to inform the data subject retrospectively when the data have not been obtained from the data subject. Therefore, it is advisable to not introduce overly specific timeframe constraints in the case of further processing, for the sake of legal consistency. The condition that information be provided prior to the further processing is sufficient in our view.

Furthermore, it should be sufficient that information on the possibility for the operator to further process the data be provided once using sufficient information channels this. It would not be necessary to inform the subject every time the operator performs further processing in practice if the purposes are those listed in the information initially provided in the contract. In addition, the guidelines suggest that for situations where data processing occurs on an ongoing basis, the controller should re-acquaint data subjects with the scope of the data processing, for example by way of reminder of the privacy statement/notice at appropriate intervals.. As ETNO members put high importance to user experience, there are concerns of annoyance due to overly many reminders or pop-ups.

Furthermore, regarding a fundamental change to the nature of the processing (e.g. enlargement of the categories of recipients or introduction of transfers to a third country), ETNO members would like to have examples of situations where the change to the processing should not be deemed fundamental and thus not subject to a stricter information time frame. This would be important to be able to draw a distinction between different situations.

VISUALISATION TOOLS

Visual tools, interface design and in particular standardised icons could play a role in facilitating the provision of relevant information to the data subject. However, it is important to learn from practical experience in specific sectors (e.g. insurance sector) and assess if icons have worked effectively in these sectors.

European Commission could promote the use of standardised icons by means of a delegated act as foreseen by Recital 166 of GDPR. This would provide industry with a legal framework that allow icons

to effectively meet the information requirements under Article 13 and 14. The categories of information that shall benefit from the use of icons should be identified in cooperation with the industry. In this sense, ETNO is fully committed to further work with European Commission. It would be helpful to have a preliminary indicative schedule published as soon as possible to allow companies to better plan their work on icons.

Standardised icons should be based on the following design principles:

- Reader-friendliness and self-explanatory
- Usable across Europe irrespective of the national/local cultural context
- Adaptable for different platforms – to ensure a wide-spread usage of standardized icons, the design must be adaptable to different platforms (e.g. mobile platforms, real-life vs. digital...)

We agree with WP29 that the use of icons should not simply replace information necessary for the exercise of a data subject's rights. Icons should never replace general privacy policies. They should rather guide the user through those policies and help him capture the key information on specific processing types.

However, the use of icons shall not be mandatory.

EXERCISE OF DATA SUBJECTS' RIGHTS

Currently data subjects have limited number of options to exercise their rights (eg.: via call centres). ETNO members are aiming at modern ways of fulfilling transparency obligations and apps or portals appeared as user-friendly tools to provide information, and give data subjects control of the data processed by its members (including consent management, right to object and forgotten). In the end there is no one-size-fits-all solution, and it must be left to controllers to decide which options it deems appropriate for their specific business.

EXCEPTIONS TO THE OBLIGATION TO PROVIDE INFORMATION

With regard to Article 14 exceptions, "impossibility" (see paragraphs 52 and 53) and "disproportionality effort" (paragraphs 54-57) should be evaluated on a case-by-case basis, following the Risk Based Approach and Accountability principle established by GDPR. ETNO members, as data controllers or processors, will have to assess if the concrete exception applies. Ultimately, it will be up to DPAs and Judicial Authorities to determine if the GDPR rules have been applied correctly to the concrete cases.

CONCLUSION

ETNO thanks Article 29 Working Party for this opportunity to provide comments on this important issue and calls for Article 29 Working Party to take a balance approach when adopting its final Guidelines on Transparency. The spirit of GDPR is to empower the data controller (Risk Based Approach). Therefore, a wrongly designed guidance with a short list on "how to achieve transparency" should be avoided, as it would likely turn into a "prescriptive environment". This would be counterproductive.