

Comments on the Profiling Guidelines

The Article 29 Working Party, wp251

28 November 2017

About us

The European Association of Communications Agencies (EACA) represents more than 2,500 communications agencies and agency associations from 30 European countries that directly employ more than 120,000 people. EACA members include advertising, media, digital, branding and PR agencies. Their service offering includes the development of brand-building and promotional ad campaigns along with the creation and distribution of suitable ad formats across a range of media channels.

Preliminary remarks

EACA agrees with the need to provide guidelines on Article 22 of the GDPR. It is important to protect users from being disadvantaged by automated decision-making and to facilitate the successful implementation of this provision. However, we are concerned that, in their current form, the guidelines risk expanding the scope far beyond what was originally intended by decision-makers.

Definition of 'similarly significantly affects him or her'

EACA agrees with the guidance on the concepts of 'based solely on automated processing' and 'produces legal effects' in Article 22(1), which are a welcome clarification to the law.

The definition of 'similarly significantly affects him or her', however, is unsatisfactory. The characteristics provided by the Article 29 Working Party are difficult to apply to targeted online advertising. Respecting the Working Party's Guidelines could lead to the collection of more (sensitive) personal data and the vague language of the guidelines may create misconceptions as to the required threshold of the necessary effect.

EACA welcomes the statement of the Article 29 Working Party that 'In many typical cases targeted advertising does not have a significant effect on individuals'. Yet it is explicitly mentioned in the Guidelines that online advertising could fall within the scope of Article 22 if the particular characteristics of the case are serious enough. The guidelines provide a list of characteristics which should be taken into account:

- The intrusiveness of the profiling process
- The expectations and wishes of the individuals concerned
- The way the advert is delivered
- The particular vulnerabilities of the data subjects targeted (e.g. minorities)

The Working Party gives an example of a case that would fulfil the criteria above, namely when 'someone in financial difficulties who is regularly shown adverts for on-line gambling may sign up for these offers and potentially incur further debt'.

The problem with this example and implementing the list of characteristics in determining whether a situation is 'similarly significantly affecting' an individual is the lack of information of the particular vulnerabilities of the user. An agency, for example, can make a decision to deliver an advert as a result of profiling that is limited to very few characteristics of an individual. In effect, the user may see online gambling adverts because they

have recently visited an online gambling website, without the agency knowing the financial situation of the specific individual.

In order to take into consideration the particular vulnerabilities of the data subjects targeted, such as financial difficulties, more data would need to be collected. This would lead to additional profiling activities and the creation of segments of vulnerable individuals in order to avoid advertising to them. The solution is unlikely to be in line with the GDPR's principle of data minimisation (Article 5.1 (c)). To collect so much information and classify individuals based on very sensitive information could even be against the Working Party's first characteristic 'intrusiveness of the profiling process'.

EACA therefore calls on the Article 29 Working Party to introduce a new example of a situation where automated decision-making 'similarly significantly affects' users.

Furthermore, EACA would like to avoid a situation where Article 22 is applied as a blanket to all categories of advertising which could potentially have a 'significant' effect on certain individuals. We emphasise this point because, according to the Working Party's Guidelines, processing can fall within the scope of Article 22 when individuals are not directly affected, but there is more likelihood than not that they will endure a substantial effect. The Guidelines could thus create confusion, as the lower-sounding threshold of 'substantial effect[s]' could be equated to significant effects.

Distinction between advertising and offering products or services

The next issue relates to the distinction between advertising and offering products or services. The guidelines explain that in some cases profiling can lead to a restriction of individuals' choice by 'undermining their freedom to choose, for example, certain products or services' or lead to discrimination through the denial of services or goods. EACA agrees that there can be a 'denial of services or goods', for instance, if adverts are only targeting white people with regard to a job opportunity with no or very little possibility for other audiences to be informed of the services or goods in other ways. However, EACA would like to clarify that simply not being shown an advert is not in itself discriminatory. The outcome depends on the circumstances. It should remain acceptable to show advertising to people who are the most likely buyers, with all potential users still having a possibility to access the advertised services or goods.

Furthermore, the decision to show the advertising is often not the one that generates significant effect but the subsequent decision to purchase the product or service concerned.

For example, it is not the decision to show somebody a mortgage advertisement that creates a significant effect, but the decision of the bank to grant that mortgage.

Exceptions from the prohibition

Finally, the exceptions to the data subject's 'right not to be subject to a decision based solely on automated processing producing legal effects concerning him or her or similarly affect[ing] him or her' are listed in Article 22(2) of the GDPR. Despite the proposals from EACA and other advertising stakeholders, the Guidelines do not discuss pseudonymisation and anonymisation techniques as 'suitable measure[s] to safeguard the data subject's right and freedoms and legitimate interest' under Article 22(2)(b). EACA therefore calls for the mention of such techniques, potentially leading to their further development.

Profiling is not forbidden per se under the GDPR

Finally, EACA would like to note that the Article 29 Working Party's Guidelines offer a highly liberal interpretation of the 'right not to be subject' in Article 22(1) of the GDPR as a general prohibition of automated decisions and

profiling which produce legal effects concerning users or similarly significantly affect them. This change can be considered to exceed the powers of the Working Party, marking a radical departure from the legislative text and the spirit of the law as adopted last year. In order to avoid legal uncertainty, EACA requests the Working Party to respect the original wording of the legislation and return to the phrase 'right not to be subject'. Automated decisions should not be banned outright but users should have an opportunity to decide for themselves.

We thank you for the opportunity to submit comments and remain at your disposal regarding the above.

Kind regards,

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Director General