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On line behavioural advertising: surfing between EU - not EU regulations



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G. Marcoccio, January 2012

Online Behavioural Advertising (OBA), i.e. advertisement based on the analysis of the behavior of individuals who access the Internet and more generally make use of electronic communications and information society services, is of strategic importance for companies that promote their products and services on the network in a context of increasingly globalized market. The size of this phenomenon is indeed remarkable and destined to grow and be more and more extensive and accurate, thanks to the means of data detectors, made available to the OBA operators by the technology of electronic communications. In this context and in particular in the European Community, an essential source of regulation is represented by Directive [2009/136/CE](#)¹. This 2009 directive amends Directive [2002/58/CE](#)² in particular in paragraph 3 of Article 5³, where the insertion and use of information in the data subject terminal device (computer, mobile phone, ...) it is clearly constrained to the prior informed consent, excluding the cases of technical purposes or explicit requests of the user / subscriber. In practical terms, the requirement also applies to cookies, small pieces of code that, once installed in the terminal concerned, they are able to gather data (such as web pages visited) that allow the OBA operators to track and infer the interests of any Internet user.

It is worthy to mention that Directive 2009/136/EC, despite the end date of May 25, 2011 stated for its transposal, it has not been fully implemented in most EU countries: in this regard the recent news that the European Commission has sent to 16 (of 27) EU member countries a specific 'reasoned opinion'.

The requirement on the prior informed consent already has significant impacts in the field of online marketing and business: moreover possible not homogenous transpositions at national level made by EU⁴ member countries could represent another source of criticality (as it has been extensively experienced with the transposition of the European Directive 95/46/EC on privacy). Further element in making complex the OBA global regulatory framework (which is the real Internet scenario of reference) is the contrast between the European approach based on prior consent, commonly referred to as opt-in, and the opt-out (data subjects can in any moment withdraw their consent, that is deemed to be granted by default) that represents the general approach followed in the north American legislations .

At European level, however, it seems to prevail the prior informed consent as fundamental precondition to make lawful most of the processing data: the upcoming review of Privacy Directive 95/46/EC should follow this direction.

¹ DIRECTIVE 2009/136/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 25 November 2009 amending Directive 2002/22/EC on universal service and users' rights relating to electronic communications networks and services, Directive 2002/58/EC concerning the processing of personal data and the protection of privacy in the electronic communications sector and Regulation (EC) No 2006/2004 on cooperation between national authorities responsible for the enforcement of consumer protection laws

² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications)

³ Para 3 of Article 5 of Directive 2002/58/EC, as amended by Directive 2009/136/EC:

Member States shall ensure that ~~the use of electronic communications networks to storing of information, or to gain or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent, having been is provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia about the purposes of the processing, and is offered the right to refuse such processing by the data controller. This shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of to provide an information society service explicitly requested by the subscriber or user to provide the service.~~

⁴ More precisely in the countries adhering to the European Economic Area (EEA): it includes Island, Liechtenstein and Norway other the 27 EU member states



Meanwhile, some online advertising operators, also in answering the explicit invitation from WP 29⁵ with its "[Opinion 2 / 2010 on Online Behavioral Advertising](#)," have delivered a self-regulation code based on the use of a dedicated [website](#), mainly with the dual purpose of giving information to data subjects and collect their possible refusal (opt-out approach) to the installation on their terminals of cookies for the purpose of online behavioral advertising.

However WP 29 has recently expressed a definitive opinion⁶ mostly opposed to this initiative, especially for the approach adopted for the opt-out consent, for which WP 29 reiterates the opt-in way, as outlined by Directive 2009/136/EC.

Although WP 29 is not an EU regulatory body, it is clear that such so strong stance cannot be disregarded by the operators of online advertising.

Although it is evident the complexity and sustained opposition of different reasons and interests regarding the consent rule in OBA context, however a reasonable solution should be found, perhaps observing the actions and positions chosen in other non-EU countries, deserving of attention for their extensive experience in privacy matters and number of data subjects served. In this sense, the relevant recent intervention of the Canadian Data Protection Authority represents, at first sight, an interesting solution. The approach followed with the Canadian guidelines "[Privacy and Online Behavioural Advertising](#)" shows a practical attention for the protection of the data subjects and at the same time a strong awareness of the importance of the role played by OBA for the business.

Making a comparison with the EU regulatory context, certainly an undoubted basic advantage for the Canadian guidelines is represented by the general eligibility of the opt-out approach in the US-Canadian privacy laws (the opt-in is generally required only for special cases of data processing). Anyway the 'opt in - opt out' opposition at European level is likely to be not only unproductive but also detrimental to the online marketplace, considering also that for Internet users, the real benefits of a strict opt-in approach are yet to be assessed on a practical level, not only from a theoretical and formal point of view.

Of course, opt-in and opt-out can be viewed as the limits white - black of a large range of grays, where to find one or more solutions, in concrete balancing between opposing philosophies and needs of stakeholders, who have to face global market scenarios, not only European.

To this end it might be evaluated specific EU measures, no longer based on the Directive approach, which requires to be transposed into the national regulations and as such it often leads to not homogenous rules at EU member states level. For example this choice has been already undertaken for the forthcoming revision of the European privacy Directive 95/46/EC: no longer a Directive but a European Regulation, and as such, once the EU's approval process will be completed, it will be directly applicable in all EU member countries.

Another possibility could be represented by a specific guideline, fully agreed between the European Data Protection Authorities and made effective in the national contexts with appropriate general Orders/secondary legislations.

In any case what should be sought for the OBA EU regulatory framework is the overcoming of the rigid opposition between opt-in and opt-out, perhaps by identifying a set of assumptions and measures that, under certain conditions, admit the equivalence of prior informed consent to opt-out approach. For example, in Italy this solution already runs in the field of marketing to people listed in the directories of

⁵ WP 29: This Working Party was set up under Article 29 of Directive 95/46/EC. It is an independent European advisory body on data protection and privacy. Its tasks are described in Article 30 of Directive 95/46/EC and Article 15 of Directive 2002/58/EC.

⁶ WP 29: Opinion 16/2011 on EASA/IAB Best Practice Recommendation on Online Behavioural Advertising, adopted on 08 December 2011



subscribers of telephone services: an 'opposition register' is managed by a body of public administration, to which the subscriber can submit to make effective its opposition to advertising communications made by telephone or paper mail⁷.

In summary, the interesting conditions and safeguards identified in the guideline of the Canadian Data Protection Authority are:

- A clear and understandable information, the aim of treatment should not be "hidden" within a complex privacy policy (as often happens in many internet websites)
- Data subjects receive information on the purpose of the processing at or before the time of collection of their data (via cookies or equivalent means) and this notice must clarify the various parties involved in on line behavioural advertising (OBA content providers, service providers, ...)
- Opt-out takes effect immediately and is persistent
- The data collected for OBA purposes is limited to what is strictly necessary and must not contain sensitive data, such as data concerning health
- The data collected are destroyed as soon as possible or made truly anonymous

A reassessment by the European legislators on this type of approach for the OBA consent, supported by an effective information campaign and by specific activity of controls and application of appropriate sanctions by the competent authorities, perhaps may help to achieve, even for the consent in the European context, a foundation feasible and certainly more acceptable to all the involved parties, including data subjects.

⁷ In Legislative Decree no. 196/03 see Article 129 "Directories of Subscribers" and paragraphs 3-bis and 3-ter of Article 130 "Unsolicited Communications", and the website: <http://www.registrodelleopposizioni.it>