

ONLINE ADVERTISING- IMPACT ON CONSUMERS

BEUC Reflection Paper

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Summary

The European Consumers' Organisation (BEUC) has identified a number of areas where new forms of online advertising have a significant impact on consumers and therefore EU action is necessary. In particular, BEUC would like to raise its concerns as to the following issues:

1. **Privacy:** consumers do not always realise that information about their web activities is being collected. New forms of targeted advertising and profiling and through social networks may raise privacy concerns and therefore EU action is needed to ensure that:
 - o Privacy notices need to be **easily accessible** and **clearly displayed** in plain and intelligible language.
 - o Online targeting and profiling should fully **respect data protection rules**,
 - o It is important to ensure that **consumers give meaningful consent** for online targeting and profiling;
 - o **Privacy and security by design** and the use **of Privacy Enhancing Technologies (PETs)** is a way to enhance consumer control against the collection of personal data
 - o Establish a **general data breach notification obligation**
 - o Ensure that the consumers can **claim full compensation for the damage suffered from data loss or misuse**, including through collective judicial actions.
 - o The European Commission should carry out a **legal gap analysis** to identify how the current European set of rules could apply to online profiling and targeting
 - o Where online services are targeted at EU citizens, the **law of the data subject's country of residence** should apply.
2. **Competition:** EU regulators closely monitor the market development and fully apply their powers to ensure that the market remains competitive. It is equally important to integrate privacy issues in competition law analysis, as closely linked to consumers welfare;
3. **Price discrimination and consumer choice:** when traders should only be able to offer subsequent differential better offers to consumers, in the basis of profiling, under the cumulative conditions that 1. The basis on which the offer has been made is transparent (i.e. not on hidden profiling and tracking) and 2. The individualised price is clearly indicated along the catalogue price or reference price.
4. **Vulnerable consumers:** Online marketing practices that target children should be subject to specific provisions. If such practices have a negative impact on children and young people's cognitive and emotional development they should be prohibited.
5. **Digital diversity:** in case the development of online behavioural advertising continues without any specific regulatory framework in place, there is the risk that the tendency to generalise the results from profiling may also lead to a diminution of preferences, differences and values and ultimately have a negative impact on digital diversity.
6. **Health advertising:** The EU should adopt specific measures to fight against the advertising of illegal online pharmacies, including a careful assessment of sponsored ads through online search engines in line with the existing Community legislation.
7. **Food advertising:** the EU needs to effectively address the problem with advertising of unhealthy/junk food to young people, including thorough measures such as a ban on advertising of such food to young people and children.
8. **Financial advertising:** proper enforcement of the rules on the marketing of financial services online is needed.

Introduction

New forms of advertising are emerging and they are overtaking traditional media such as television, newspapers, magazines, etc. as a consequence of a shift towards the digital media. Understanding their key audiences has always been important for advertisers, driving them to develop new practices for the identification of consumers' preferences and consumption habits. Advertising and marketing practices keep track of consumer online behaviour with the development of new technologies and their endorsement by consumers in an effort to maximise their own effectiveness. Advances in technology also mean advances in online advertising.

With the advent of the Internet and the growth in computer processing and storage capacity, advertisers have the tools to collect and analyse unprecedented loads of data to help target their ads. Advertisers can now obtain a clear view of Internet users' interests by analysing their online searches, surfing behaviour and the information they post about themselves. The Internet has turned out to be a true gold mine for advertisers. The revenue that web sites can earn through this kind of advertising ensures that consumers are not charged for content. But this does not mean that consumers are getting web content for free. Web users are paying for content indirectly through the data that they, often unknowingly, supply to advertisers.

Although advertising has brought benefits to consumers, especially in the online environment where it has fuelled the growth of content, a number of existing practices lack the necessary transparency and fail to comply with the existing regulatory framework to the detriment of consumers. In some cases, specific rules may be necessary to address the challenges of new online practices.

New forms of advertising

- **Social media marketing:** as social networks play an increasingly important role in the lives of young people, social media marketing is becoming even more sophisticated providing marketers with new possibilities to identify the nature of an individual's preferences and exploit them for targeted brand promotion and advertising.
- **Profiling and targeted advertising:** more and more business models for the online distribution of content are based on the use of users' data for profiling and marketing purposes. Profiling involves data harvesting and conversion of data into profiles that are used to make suggestions or recommendations to users through personalised advertising on the Internet.
- **Keyword Search Advertising:** search engines place advertising in the search results of certain keywords. Companies pay fees to search engines when users click on a link to their web sites.
- **Immersion:** high-definition video and other multi-media applications are spawning a new generation of immersive environments, including interactive games and three-dimensional virtual worlds. This provides myriad opportunities for advertisers. For example, ads can be incorporated into a game's storyline, and programmed to respond to the player's actions in real time.
- **Contextual advertising:** With contextual advertising, targeted ads appear based on the page's actual content. First, a contextual advertising system scans the text of a webpage for keyword phrases. Then, the system returns specific, targeted ads based on the content people are viewing.
- **Location-based advertising:** is a new form of advertising that uses location-tracking technology in networks to target consumers with location-specific advertising on their mobile devices.

IMPACT ON CONSUMERS

I. PRIVACY

The majority of European consumers are concerned about data protection, privacy and security. The Eurobarometer survey¹ revealed that 64% said they were concerned as to whether organisations that held their personal data handled this data appropriately and 82% of respondents who were Internet users thought that data transmission over the Internet was not sufficiently secure. Most European Internet users were also not familiar with tools or technologies that helped to limit the collection of personal information while using the Internet.

Behavioural advertising

Consumers do not always realise information about their web activities is being collected. Some may like getting targeted information that matches their interests - however, they may not realise that they might not be getting the full range of options available because of records of previously visited internet sites, already in the hands of some companies. Consumers do not control where their data is going and in many cases would not know whom to address to exercise their rights under the relevant Data Protection laws. The Eurobarometer survey found that only 27% of informed EU citizens were aware of all their rights in relation to data privacy.

Consumers lose control over their data and privacy notices fail to provide clear information to consumers as regards the collection and processing of their personal data or the purposes of use of the data collected. Furthermore, consumers rarely read through the terms of service due to their length and complexity. Privacy notices are drafted in order to comply with legal requirements, rather than to inform consumers.

In some circumstances², behavioural advertising may qualify as 'undue influence'³ under the Unfair Commercial Practices Directive. First, there is a position of power: the advertisers know a lot about the consumers - even information that the consumers do not intend to disclose - while consumers hardly know what is going on. Then, the repetitive aspect – especially through retargeting – may put pressure on the consumers. Furthermore, the selection of advertisements – based on the presumed consumer interest - may prevent the display of other advertisements and reduce consumer choice. Consumers might thus be pushed to take an economically unsound decision (e.g. as they might not be able to compare prices of other advertisements). The qualification of behavioural advertising as 'undue influence' will nevertheless very much depend on the specificities of a particular case. A number of online practices may also qualify as misleading advertising, such as stealth advertising and unclear display of advertorials⁴.

¹ Eurobarometer survey on data protection in Europe (February 2008).

² This is the case of targeting in an aggressive manner and targeting of vulnerable consumers.

³ Undue influence" in the UCP Directive "means exploiting a position of power in relation to the consumer so as to apply pressure, even without using or threatening to use physical force, in a way which significantly limits the consumer's ability to make an informed decision".

⁴ Mix of editorial and commercial content. For instance, running fake blogs about a business or writing commercially-motivated reviews of a company without making clear the commercial intent should be considered misleading advertising and thus must be banned under the Unfair Commercial Practices Directive.

BEUC calls upon the European Commission to carry out a **legal gap analysis to identify how the current European set of rules could apply and where, if necessary, new rules need to be adopted**.

Furthermore, business needs to be sanctioned for a lack of diligence and for the non-respect of contractual obligations. Sanctions need to have a deterrent effect, while strong liability and public accountability rules are needed. Business should also compensate consumers for any detriment they may suffer as a result of data breaches or unauthorised use of data.

(*BEUC has published a Discussion Paper on targeting and profiling, which provides for a more detailed position⁵*)

Social networks

The increasing popularity of social networks (65% of Internet users use social networks⁶) has also attracted the attention of marketers and advertisers that develop new strategies aimed at targeting users on the basis of their preferences and online behaviour. Social networks are based on interaction between online users, shared interests and the posting of information about their own profile either for everyone or with limited access, but certainly accessible to the publisher. Social networks have provided a wealth of information for advertisers regarding the users' preferences and lifestyle.

Different models of social network advertising exist. However, the most intrusive one takes the form of direct advertising based on the user's network of friends, as was the case with Facebook's 'Beacon' programme, where a consumer's purchase on a partner website was announced to the network of friends. Such a model is based on the exploitation of users' personal relationships with their group of friends and raises serious concerns related to privacy.

One of the most difficult issues when trying to reconcile the current rules on personal data with the realities of the Internet is that of deciding which law should be applicable to the collection and processing of personal data, particularly when the data controller is established outside the EU. Given the legal certainty and the divergence of implementation by Member States, currently many companies based outside the EU still claim they are not subject to European law, but rather to their national law⁷.

- **Privacy notices need to be easily accessible and clearly displayed in plain and intelligible language.** Notice must be provided before or at the point of collection (including secondary purposes, whether data is shared with or sold to third parties, who these third parties are and what they intend to do with the data...).
- Online targeting and profiling should fully respect **data protection rules**, when these techniques collect and use data on tastes and behaviours that can be linked to an identified or identifiable person⁸. This includes, amongst other things, the respect of data protection principles such as having the minimum amount of data kept for a minimum time period.

⁵ Data collection, targeting and profiling of consumers online, BEUC Discussion Paper, Ref.: X/010/2010 – 15/02/2010

⁶ Study by the Norwegian Consumer Council.

⁷ For instance Facebook, LinkedIn, Twitter, Google and Bing apply US law.

http://forbrukerportalen.no/filearchive/matrix_terms.jpg

⁸ CNIL (French DPA) opinion on online targeted advertising, February 2009.

- It is equally important to ensure that consumers give **meaningful consent** i.e. "free, informed and specific consent" for online targeting and profiling.
- Privacy and security by design and the use of Privacy Enhancing Technologies (PETs) is a way to enhance consumer control against the collection of personal data by businesses and facilitate consumer choice. **Privacy and security by design** needs to be integrated to new online marketing business models. **Privacy Enhancing Technologies (PETs)** could help enforce the principle of data minimisation by limiting the collection of personal data and serve as identity management instruments.
- Establish a general data breach notification obligation and impose joint responsibility between controllers and third parties which process data on their behalf for material breaches that have a detrimental effect on consumers.
- Ensure that the consumers can **claim full compensation** for the damage suffered from data loss or misuse, including through **collective judicial actions**.
- The European Commission should carry out a **legal gap analysis** to identify how the current European set of rules could apply to online profiling and targeting and where, if necessary, new measures may be needed.
- EU law should apply to cases where services are targeted at EU citizens and more specifically **the law of the data subject's country of residence**.

II. COMPETITION

The landscape of online advertising has undergone significant changes with ad networks becoming bigger and broader and Information Service Providers (ISPs) entering the market of online advertising. Large advertising companies cooperate in advertising networks, getting access to publishers and other intermediaries, thus tracking consumers on different sources and passing the relevant information to the members of the network.

In addition, the recent trend toward the merger of online advertising networks⁹ and the fading of borders between content and advertising providers implies an expansion of these networks' capacities to monitor and collect data related to Internet users. Furthermore, they entail the risk of the creation of *de facto* monopoly in online search advertising to the detriment of competition.

Reduced competition would result in consumers having to bear higher prices for the products, services and content they access online. They would also encounter reduced choice and experience less innovation and quality in online offerings.

- Ensure EU regulators closely monitor the market development and fully apply their powers to ensure that they remain open and competitive.
- Integrate privacy issues in competition law analysis, as closely linked to consumers welfare.

⁹ Acquisition of DoubleClick by Google, merger of TACODA with AOL's advertising agency, the acquisition of Aquantive by Microsoft.

III. PRICE DISCRIMINATION AND REDUCED CONSUMER CHOICE

Based on the detailed consumer profiles in their possession, traders may have an incentive to engage in price-discrimination. Such practices can give rise to questions of fairness and discrimination. There could also be cases when based on a profile an individual could be deprived of access to certain goods or services based on the automated assessment. As a result, some consumers may benefit from better prices, whereas others will suffer economic detriment either because they have no access to specific products or because they will have to pay higher prices due to reduced market choice. Should an advertiser have information about the buying patterns of consumers together with data about their salary and card ownership, it may happen that prices offered to an impulsive buyer would be higher than those offered to buyers whose profile indicates that he usually visits different sites before purchasing. Any detrimental offer based on online profiling and targeting should be banned.

As provided under Directive 92/6/EC on Price Indication, the selling price and the unit price shall be indicated for all products offered by traders to consumers in order to improve consumer information and to facilitate comparison of prices. These principles should not be precluded in online sales. Therefore, all online businesses should have an obligation to indicate to all consumers alike a catalogue price or a reference or range price.

This would not preclude traders to offer subsequent differential better offers to consumers under the cumulative conditions that 1. The basis on which the offer has been made is **transparent** (i.e. not on hidden profiling and tracking) and 2. The individualised price is **clearly indicated** along the catalogue price or reference price.

IV. VULNERABLE CONSUMERS

Children and young people

According to the UN Convention on Rights of the Child (1990) "a child needs special safeguards and care, including appropriate legal protection". Children are often easy targets for advertising mainly due to their lack of critical judgement and understanding of marketing practices. Children and young people are also emotional driven and more sensitive to marketing pressure. This is particularly relevant in the context of the childhood obesity pandemic (see below).

Children's privacy needs to be equally protected against intrusive advertising. Currently, the EU privacy directives do not provide any specific provision on data protection for children's online privacy, in contrast to the USA. A number of challenges need to be addressed, including the verification of age and of parental consent, compliance with the requirement of knowledge and control, the transparency of privacy notices and the provision of relevant information to children and their parents. Collecting web browsing data for the purpose of targeting adverts at children also raises concerns as children may be more prone to manipulation and are less likely to understand about the practice or be able to exercise control over the technology.

Online marketing practices that target children should be subject to specific provisions. If such practices have a negative impact on children and young people's cognitive and emotional development they should be **prohibited**.

V. DIGITAL DIVERSITY

In case the development of online behavioural advertising continues without any specific regulatory framework put in place, there is the risk that the tendency to generalise the results from profiling may also lead to a diminution of preferences, differences and values and ultimately have a negative impact on digital diversity. With commercial personalisation services, the myriad of individual preferences is reduced to one or few consuming categories, on the basis of which their preferences, character and life-style are determined for a specific context. Because of its tendency to generalise, personalisation may lead to diminishing preferences in a more exaggerated way. Exclusion of access to information and knowledge on the basis of the users' presumed needs and profile may put the fundamental rights of access to information and consumer choice under serious risk. Personalisation may even have broader societal and political consequences if it shapes the overall flow of information within society¹⁰.

VI. HEALTH ADVERTISING

The internet is used more and more by consumers as a source of health information. Unfortunately in many cases, the information is of poor quality and often promotional. The result is that consumers are exposed to unethical marketing practices that take advantage of the vulnerable position of people with medical problems. To guarantee the consumers right to high quality and non -promotional information on health, medicines and treatments, all web sites and blogs accessible to European consumers should comply with the European legislation¹¹.

The advertising of online pharmacies through sponsored search ads in search engines creates additional risks for consumers' health and safety. A US study conducted by research firms LegitScript.com and KnujOn.com has found that over 80% of online advertisements for Internet pharmacies accepted by different search engines were fake or illegal Internet pharmacies and in violation of federal and state laws. The researchers were also able to purchase prescription drugs without a prescription and were sent counterfeit medications.

The EU should adopt specific measures to fight against the advertising of illegal online pharmacies, including a careful assessment of sponsored ads through online search engines in line with the existing Community legislation.

¹⁰ Mireille Hildebrandt, Serge Gutwirth, Profiling the European citizen - cross-disciplinary perspectives, 2008, Springer

¹¹ Directive 2001/83/EC on the Community code relating to medicinal products for human use.

VII. FOOD ADVERTISING

Advertising of food has been recognised as an important factor influencing consumers' food preferences and consumption. The food and beverage industries have rapidly embraced digital technologies, in an effort to target new audiences and maximise benefits. BEUC considers that this needs to be done responsibly and is particularly concerned about the excessive promotion of unhealthy foods to children and young people through a variety of means. We are increasingly concerned that this is done 'behind parents' backs' or in a way in which young people are unaware they are being advertised to.

For example:

- Frito-Lay worked with Microsoft's popular Xbox to "create an engaging interactive online experience" for Doritos, targeted at 16-24 year olds. The campaign began with a contest on the snack food company's website, Snack Strong Productions, where visitors were invited to design their own "user-generated" ideas for a "Doritos-inspired videogame". One million users were attracted to the Doritos site as a result of the Xbox campaign, while more than 160,000 "Doritos theme packs" were downloaded on Xbox Live¹².
- VideoEgg, a social media interactive marketer that has worked with McDonald's, Coca-Cola, P&G, and others (with 13-17 year olds as one of its targeting categories), offers advertisers the ability to gauge how an ad captured the attention, or engagement, of a user. This is called an 'Attention Rank' metric. It claims that improvements in the creation of their ad environments — called Adframes — "have increased average time spent by almost 50%."
- Google's YouTube—the leading online video service with over 80 million monthly users — has been working to increase revenues by forging 'branded entertainment' campaigns with advertisers, including Burger King¹³. Such advertising campaigns have proven to be particularly popular with children.

The rapidly developing marketing and advertising practices in the online environment require a close examination by the EU regulator to ensure that the existing rules reflect the changing dynamics and respond to the challenges. A strong commitment by the EU to putting in practice a coherent strategy to combat obesity and other diet-related diseases and effectively address the problem with advertising of unhealthy/junk food to young people, including thorough measures such as a ban on advertising such food to young people and children, is necessary. Such a strategy should focus on advertising on all media, both offline and online and closely monitor technological advances in advertising deployed by the food industries.

¹² Microsoft Advertising, 'Doritos and Xbox Put Fans in Control,' <http://advertising.microsoft.com/research/Doritos-Xbox> (viewed 7 June 2009).

¹³ Brooks Barnes, 'Serving 3 Brands: Burger King, Google and Seth MacFarlane,' New York Times, 17 Aug. 2008, <http://www.nytimes.com/2008/08/18/business/media/18burger.html>; Brian Morrissey.

VIII. FINANCIAL ADVERTISING

Consumer vulnerability to deceptive advertising is particularly acute in the area of financial services. Online advertising of financial services is one of the largest advertising categories on the Internet, amounting to \$1.5 billion in the US in 2005, which accounts for 12% of all US online advertising¹⁴. Individuals often have little knowledge of the workings of credit, leases, security agreements and so on. It is sometimes difficult to obtain information on such subjects that would be meaningful to the average consumer, so it is especially important that consumers be on guard against misleading or fraudulent advertisement. In other cases, the use of small print and footnotes to provide important information may be misleading to the consumer. Because of the great inequality of bargaining power in this area, a specific regulatory framework providing consumers with protective rules has already been established¹⁵. However, proper enforcement of these rules is needed.

END

¹⁴ Source: Financial Services Online report.

¹⁵ Directive 2002/65/EC concerning the distance marketing of consumer financial services.