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# Online Behavioural Advertising: the impact of “cookies” on consumers’ privacy

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## Abstract

In the digital context, commercial communication may pose risks to consumer privacy. Online Behavioural Advertising (OBA) uses monitoring technologies (“cookies”) for consumer profiling and presenting personalized advertising, which involves the processing of personal data of users over time. To defend consumer rights, the use of “cookies” requires transparency, informed consent, and compliance with legal framework for protection of privacy in the electronic communications.

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## Introduction

In today’s world, the Internet is a universe of opportunities, progress and well-being. To the same extent, there are potential (and real) risks to citizens’ fundamental rights, including the right to privacy, personal data protection and consumer rights.

The value of privacy as essential to the guardianship of the human person, stated by Samuel Warren and Louis Brandeis (who claimed the ‘right to be let alone’ in their article “The right to privacy” published in the Harvard Law Review in 1890) has its counterpoint in technologies that allow “violating overwhelmingly that same value”<sup>1</sup>, reflected in the writing of Wolfgang Sofsky (“Privacy, a Manifesto”). All human activity leaves traces, often followed for unlawful purposes or exploited by unscrupulous professionals.

The scope of this paper is to discuss the use of “cookies” within the activity of marketing and advertising, specifically for Online Behavioural Advertising (OBA). The Article 29 Data Protection Working Party (Art. 29 WP)<sup>1</sup> defines OBA as the one that “entails the tracking of users when they surf the Internet and the building of profiles over time, which are later used to provide them with advertising matching their interests”<sup>22</sup>.

Overall, according to Art. 29 WP, online advertising can take three forms: contextual, segmented and behavioural. Contextual advertising is selected based on the content currently being viewed by the data subject. Segmented advertising is selected based on known characteristics of the data subject which the data subject has provided at the sign up or registration stage. These are instantaneous methods, and as such, less invasive long term. On the other hand, behavioural advertising seeks to study the characteristics of individuals’ behaviour through their actions (repeated site visits, interactions, etc.) in order to develop a specific profile.

<sup>1</sup> Independent European advisory body on data protection and privacy, set up under the Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data. Cf. <http://ec.europa.eu/justice/data-protection/article-29/>

<sup>2</sup> Cf. <http://www.google.pt/intl/pt-PT/policies/technologies/types>

This monitoring is achieved through “cookies”, short alphanumeric text files which are stored on the data subject’s computer when he/she accesses certain websites, and that keep information about the users and their preferences, information which can be “reread” in future visits. Widely used on the Internet, examples of “cookies” are the ones used to store login information (username and password) for the user not having to log in on each visit to a particular website and the ones used by electronic commerce websites to store the items in the shopping cart during the buying process. “Cookies” can be temporary (session “cookies”) or persistent (if they remain stored after closure of the internet browser), and either have their origin in the website itself (first party “cookies”) or others (third party “cookies”, through banner or pop-up advertisements, for instance). It is mainly the tracking or persistent “cookies” which are more disturbing, given their high degree of intrusion into the privacy of users.

### **The Interests Of Advertisers**

Advertising is a form of commercial communication in connection with an economic activity in order to promote the commercialization of any goods or services or any ideas or principles, initiatives or institutions.

“An essential element and motor of programming and economic development”<sup>3</sup>, it is undeniable that advertising takes a dual function - informative and persuasive -, since it is through it that the consumer knows the characteristics of goods and services and takes business decisions, but also because it is the aim of advertising to seduce, awake desires, induce needs, and entice choices. The universe of advertising receivers includes those to whom the advertising message is, directly or indirectly, addressed. But as the power of brands “depends primarily on its psychological effect on the public”<sup>4</sup> no advertisers will want to spend their resources for trade promotion with consumers unrelated to the product or service advertised. That is why OBA is, in the voice of economic operators, essential to digital marketing and e-commerce. The use of “cookies” to target and personalize marketing communications turns “advertising more engaging for users and more valuable to publishers and advertisers”<sup>2</sup>.

The EU legislator itself recognizes, in Directive 2002/58/EC of the European Parliament and of the council, concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) that “cookies” “can be a legitimate and useful tool, for example, in analyzing the effectiveness of website design and advertising, and in verifying the identity of users engaged in on-line”<sup>3</sup>.

The International Working Group on Data Protection in Telecommunications (IWGDPT)<sup>4</sup> states that “the value of a potential customer is related to the chance to convince him to buy a product”, task facilitated by monitoring of users life (online and offline), virtually “from the cradle to the grave”<sup>5</sup>. For example, you can record the researched or purchased assets on a particular e-commerce site, so that in forthcoming visits the site manager may highlight, in advertising spaces, products or services that are in line with the preferences of that concrete user. So is therefore undeniable that “is effectively in advertising the action of cookies becomes more valuable”<sup>6</sup>.

### **The Risks To The Privacy Of Users**

Monitoring technologies for advertising purposes is a processing of personal data within the meaning of Directive 95/46/EC, as the information gathered relates to a specific identifiable user

<sup>3</sup> Cf. Whereas (25) Directive 2002/58/EC

<sup>4</sup> Founded in 1983 in the framework of the International Conference of Data Protection and Privacy Commissioners at the initiative of the Berlin Commissioner for Data Protection. Cf. <http://www.datenschutz-berlin.de/content/euro-pa-international-working-group-on-data-protection-in-telecommunications-iwgdpt>

and refers to personality aspects, including consumption profiles.

For advertisers, in whose interest advertising is carried, such data are not worth alone, but by their economic content and market value. For consumer rights, the harmful effect of such “cookies” may arise precisely from commercial exploitation that may be made of the information collected. “Cookies” consist of collecting personal information, in most cases without the knowledge or consent of the data subject allowing behaviour profiling, including sensitive data like sexual or religious orientation, financial and solvability information, clinical aspects, etc. Incautiously, users leave traces of their activities and preferences in the virtual world, including dimensions of intimacy – “The offline equivalent would be to have somebody unknown to us constantly looking over our shoulders no matter where we are (...), or what we do (...), and without knowing when he is looking, and when he isn’t” [5].

### **The Issue Of Consent**

As processing of personal data, storage and access to information stored by “cookies” is subject to the legal framework of protection of personal data, regarding the quality of the data, the legitimacy of data processing, the confidentiality and security of processing, the data subject’s rights (information, access, object) and the notification of processing to a supervisory authority. The informational self-determination requires, in this field, full transparency of the OBA promoters to facilitate control by the data subject. Processing personal data is a “responsibility task” [7]. As summarized by the IWGDPT, “respect for context, transparency and control remains essential” [5].

Regarding user’s consent, the Directive 2002/58/EC, stipulates in Article 5.º n. 3 that “the storing of information, 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 provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing”.

In the initial version of this normative, the consent was not required, but only that the user was offered the right to refuse such processing by the data controller. The shift – from the right to refuse to the need for prior consent – reflects the evolution from an “opt-out” system to an “opt-in” system. So, it’s not enough that the user opposes to the treatment of personal information, but his/hers authorization it’s mandatory before processing.

And for the legislator a trivial agreement is insufficient, as it’s required prior informed consent, provided with clear and comprehensive information, namely about the purposes of the processing. The exception is “the technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service” and “ultimately, to decide if a cookie is exempt from the principle of informed consent it is important to verify carefully if it fulfils one of the two exemption criteria” [8]. But in reality examples of illegitimate practices are constant, such as not informing users that information of personal and behavioural nature is being stored, not providing clear information about the objectives of the use of “cookies”, not asking for consumer’s consent to such processing and rendering inoperative the sites when the user refuses “cookies”, a clear violation of their right to choose.

As well points Luís Menezes Leitão “the collection of data is completely invisible, so seldom arises the question of the user’s consent” [6] given that the technical possibility enabled by the browser to reject or accept “cookies”, cannot amount to a consent for collection.

The best individual practices to implement safety conditions of the data circulating on the net (such as adjusting the privacy settings, and cleaning of your browsing history) and self-regulation initiatives<sup>5</sup> do not relieve the professionals of their ethical and legal duties regarding advertising and personal data protection. It is urgent to reposition the privacy as value of personal and social fulfillment, before it becomes a banality into disuse both online and offline.

### **Conclusions- Recommendations**

We reaffirm our previous conclusions<sup>6</sup> in this matter:

To promote a better information on digital advertising, so that consumers are aware that advertisements presented to them may be based on a custom monitoring of their internet browsing “tracks”, with consumer and behaviour profiling through technologies potentially invasive of their privacy (as “cookies”).

To guarantee the enforcement of privacy in the electronic communications regulations, in particular Directive 2002/58/EC, in its current wording, which impose the consumer “opt-in”.

To supervise that economic operators who use “cookies” do so in strict compliance with the law, with knowledge and informed consent of the subject of personal data collected.

To ban illegal practices and to prohibit the use of “cookies” for treatment of sensitive personal data, such as those relating to private life, religious faith or political beliefs.

To ensure that the authorities responsible for the supervision of data processing are operative against many practices and forms of commercial communication that involve risks to consumer privacy.

To enhance consumer education in the digital age, either by the State or through Self-Regulation, so that consumers are prevented and informed about the dangers posed by the flow of personal data in communication networks, and the commercial exploitation therefrom can arise.

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