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Salvaging European media diversity while protecting personal data

Ine van Zeeland, Heritiana Ranaivoson, Jonathan Hendrickx, Jo Pierson, Wendy Van den Broeck, Jaco van der Bank

This policy brief deals with current issues in media related to the profiling of users for the purposes of personalising news and advertising content. The aim is to suggest policy interventions in support of EU players. These are based on the learnings of three research projects that SMIT is involved in: SBO DIAMOND, H2020 CPN and ICON ECODALO. These projects show the disparate impact of EU regulations between smaller and larger players in the media industry. This brief offers a two-fold recommendation to regulators and policy-makers: (1) protect the diversity in the European media sector, and (2) level the playing field, but do not be simplistic. Our recommendations to businesses are: (1) be transparent and build trust, and (2) collaborate and develop standards together.

1. Online profiling and personal data protection in EU law

Online user profiling in the European Union (EU) is subject to various laws and regulations, from consumer law to industry-specific regulations, e.g. for financial advertising. Most relevant to online profiling is an EU Regulation, with directly binding force throughout the EU: the General Data Protection Regulation (Regulation 2016/679, 'GDPR'). According to the GDPR, profiling involves automated processing of personal data to evaluate individuals' personal aspects, to analyse or predict their economic situation, health, preferences, or behaviour. Cookies and other user tracking techniques fall under this definition.

The GDPR grants individuals the right not to be subjected to automated decision-making, if this has significant effects on their lives. In their guidance for profiling, the Article 29 Working Party (WP29)¹ interprets 'significant effects' as "the potential to significantly influence the circumstances, behaviour or choices" of individuals. Automated decision-making for online advertising and personalisation may, in some cases, be very intrusive or target people's particular vulnerabilities. Moreover, it can have a significant effect on certain groups, e.g. when it results in differential pricing. The GDPR requires that profiling and its consequences be explained to users in a meaningful way, including an explanation of the logic involved in the profiling. In January 2019, the French Data Protection Authority gave Google a 50 million Euro fine for not properly explaining the consequences of its profiling activities.

When automated profiling and personalisation have significant effects, they will only be allowed if users have consented (see Figure 1). When profiling is unintrusive or without other significant effects, user consent may not be needed. The GDPR also allows for 'legitimate interests' as a legal basis for processing personal data, which can be appropriate when the data are used in ways people would reasonably expect and with a minimal privacy impact. In that case, the profiler's interests must be balanced against the individuals' interests, and the necessity and proportionality of the profiling must be taken into account. Again, users must

¹ The WP29 is the predecessor of the European Data Protection Board, composed of representatives of all EU national data protection authorities and the European Data Protection Supervisor.

be provided with information about those interests and the use of personal data.

The above does not cover all legal requirements for profiling and personalisation. Another pertinent piece of EU legislation, the e-Privacy Regulation (ePR), is coming up (see section 3). For the time being, the 'old' e-Privacy Directive (Directive 2002/58/EC) still applies, but according to the WP29, the GDPR's consent requirements are preconditions for all processing of personal data based on consent. In other words, valid consent in situations falling within the scope of the e-Privacy Directive also should be freely given by a clear affirmative act.

GDPR consent requirements

Consent must be

- freely given
- an affirmative act; 'opt-in'
- explicit, clear, and specific
- separate for each data processing activity
- proven, including when, how, and what individuals were told.

Figure 1: GDPR consent requirements

We will now discuss how these legal requirements play out in practice: how do media companies use profiling capabilities and how does the media market respond to personal data protection requirements?

2. The use of personal data for recommendation and personalisation by media services

SMIT has an extensive track-record in media projects focussing on recommendations and personalisation. The change in European legislation has brought about new challenges. Personalised media services are mainly based on recommendation algorithms that are self-learning or use predefined profile information of users (or a combination of both). Recommendation systems have been heavily criticized for leading to biases such as the so-called 'filter bubble', when users are unintentionally consuming only media that appeals to their interests.

2.1 Personalised recommendations for online news

In the EU H2020 project CPN (Content Personalisation Network), SMIT is developing a new approach to personalisation of digital news content, together with its media partners Flemish public broadcaster VRT, German international broadcaster DW, the Cypriot DIAS Media Group, and other research partners. The CPN project seeks to identify news consumers' needs, expectations, and motivations to accept news personalisation. Its goals are to maintain European media diversity and to offer the right content at the right time. To achieve this, a news application is being created. At the same time, the project reflects on questions such as how to avoid filter bubbles and how news personalisation can lead citizens to be better informed.

Is news personalisation always an appealing strategy for media companies? This is analysed at the level of Mediahuis, a leading media company in Belgium, in the SBO DIAMOND (Diversity and Information Media: New Tools for a Multifaceted Public Debate) project, where news personalisation is still in its very early, experimental days. At the website of *Het Nieuwsblad*, the headlines are randomly changed. Online journalists who submit an article add up to four alternative titles, alternating word choice, how lurid the headlines are, and their length. During the first twenty minutes after the publication of an article, visitors of the website will randomly see one of the titles. Subsequently, the most clicked title automatically becomes the title for all visitors.

Attempts at introducing a similar routine in the choice of pictures accompanying an article, are frequently made, though they are not as common, nor as sophisticated. Logged-in website visitors of *Het Nieuwsblad* can see different pictures appearing with articles than other visitors. A popular example are e.g. articles about cruelty against animals. The scrolling speed of visitors who are logged in can be tracked to deduce which types of pictures they do not like. Visitors appalled by the sight of a tortured animal will scroll through the pictures quickly. Those

people can be offered a picture of a lamb in a meadow instead, which will make them scroll slower and more susceptible to clicking through to the article, reading it, and spending valuable attention time on the website of *Het Nieuwsblad*.

The question is then, why is news personalisation not more developed in *Het Nieuwsblad*? One reason could be the high cost of implementation relative to immediate effects; revenues will not increase instantly. It is also worth mentioning that automated recommendations are sometimes negatively perceived by journalists and editors, who may feel their autonomy is threatened and their job may lose its value, if artificial intelligence takes over some of their tasks.

A CPN market and business model analysis showed that publishers cannot rely solely on monetisation programmes (for example ad revenue) offered by platforms like Google, Facebook, or News360. In fact, publishers wish to become less dependent on such platforms, but very few have the in-house knowledge and skills to offer a tailored, personalised service to compete. There is a disparity between the effort to create content and the revenue obtained from it. While few content-aggregating platforms like Google News or Apple News also create content, they control the interaction between publishers and news consumers, allowing them to acquire and re-use fine-grained user knowledge and insights. This enables them to provide a more tailored user experience, which, in turn, drives market imbalances that force media companies into a content supplier role for larger platforms.

The gap between larger platforms and smaller players in the ecosystem grows: smaller brands struggle to experiment with more advanced forms of profiling and personalisation. The CPN project therefore envisions fulfilling the needs of these smaller brands by either offering an end-to-end solution or providing building blocks as individual microservices.

2.2 Personalised advertising

For online behavioral advertising (OBA), internet users' behavioral data (clicks, website visits, mouse movements, etc.) and metadata (browser type, location, etc.) are collected to create profiles used to personalise ads. The advertising industry is convinced that OBA is more effective than, for example, contextual advertising, because it is thought to improve conversion rates. During an US congressional hearing Facebook CEO Zuckerberg explained: "even though some people do not like ads, people really don't like ads that aren't relevant."²

The effects of requiring explicit consent for user tracking vary between large tech platforms and smaller players. Users know Facebook and Google, and (to a certain extent) expect the use of their data by these 'first' parties. But research shows that most users do not expect the large number of third parties in the 'regular' OBA ecosystem, such as ad tech providers, advertising agencies, and data brokers, and sharing data with these 'third' parties appears to users as a norm violation. Unsurprisingly, the use of ad and cookie blockers is increasing. Smaller OBA players will thus hold fewer user data due to (I) lower visitor numbers, (II) fewer incentives for users to share data, (III) users' reluctance to share data with third parties.

In Belgium, the media industry faces similar pressures: big tech platforms capture an increasing share of advertising budgets and put downward price pressure on local advertising inventory value. In response, market actors are looking at options to combine efforts. SMIT is involved in the EcoDaLo (Ecosystem for Data management of Local publishers) project, which aims to bring about an orchestrated effort to provide advertisers with enhanced personalised advertising capabilities, while applying privacy by design, in the sense that project partners will not be able to access each other's datasets. Some of the challenges outlined above remain: should users' consent be required, they may discern few incentives to share their data and feel reluctant towards third parties.

Although all players in the OBA market are affected by the GDPR, larger players are more resilient to regulatory interventions. Partly due to the delay in the finalisation of the ePR, it is too early to tell whether the effects of new data protection regulations may sweep smaller

² Washington Post (10 April 2018), Transcript of Mark Zuckerberg's Senate Hearing, at: www.washingtonpost.com/news/the-switch/wp/2018/04/10/transcript-of-mark-zuckerbergs-senate-hearing/

European companies in advertising off the market in favour of the large platforms. If smaller competitors drop away, the consolidation of personal data stores in fewer hands will increase, and perversely, negatively affect people's rights and freedoms overall.

3. Upcoming developments: the e-Privacy Regulation

Especially for the EcoDaLo project, much depends on what will happen with the new ePR, which will specifically regulate the confidentiality of electronic communications and devices, and in particular, collection of personal data through tracking. Draft proposals for the ePR are still under debate between the European Parliament, the European Commission and the Member States. The ePR proposals introduce a strict consent standard for tracking, while 'legitimate interests' will not be allowed as a basis for personal data processing. Cookies may only be processed without explicit consent if they are 'strictly necessary'. Consent cannot be a condition of access to the service; users who reject cookies must be given an alternative option to access the service.

Should the final version of the ePR indeed disallow tracking without user consent, programmatic buying³, that underlies the OBA system, will no longer be possible. For news personalisation and recommendation, the question of whether users expect these practices becomes much more pertinent - if not, consent will be needed. Even if the final version of the ePR does not introduce major changes compared to the e-Privacy Directive, we are to expect major changes to the status quo. Advocacy groups like noyb and Panoptikon have filed complaints with Data Protection Authorities against online services. The legal response to these complaints will set the landscape for all online media. Moreover, the meaning of consent has already changed under the influence of the GDPR (see section 1).

4. Conclusion and recommendations

Regulatory interventions frequently risk endangering smaller European players to the benefit of (American) tech behemoths. We therefore recommend to legislators and policy makers for further regulation addressing the media:

a) Protect the diversity in the European media sector

Consider disparate impact effects of privacy regulations on local players versus large multinationals: concentrations of personal data in fewer hands pose a more profound risk than decentralized, smaller datasets. A recent decision by the German Bundeskartellamt acknowledges this issue regarding the anti-competitive data practices of Facebook.⁴

b) Level the playing field, but do not be simplistic

One size does not fit all: levelling the playing field should not translate into the same rigid rules for all, as larger market players will benefit at the expense of smaller players. Legislation should promote initiative and leave room for experimentation, albeit within certain constraints. 'Regulatory sandboxes', allowing companies to test innovative products with temporary authorisation, as also recently proposed by the UK's Information Commissioner's Office, can support the development of privacy-friendly alternatives to dominant practices.⁵

What can businesses do?

a) Be transparent and build trust

Media companies should not delude themselves about the impact of further privacy regulations (such as ePR), nor about consumers' sentiments. To prepare for new legislation and growing privacy sensitivity, businesses should become more transparent about their use of personal data and involve 'data subjects' and civil society in decisions about those data (e.g. by explaining and asking for consent).

³ Behaviorally targeted ads are generally bought ('real-time') in automated systems: programmatically.

⁴https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Pressemitteilungen/2019/07_02_2019_Facebook_FAQs.pdf

⁵ <https://ico.org.uk/media/about-the-ico/documents/2614219/sandbox-discussion-paper-20190130.pdf>

b) Collaborate and develop standards together

A single media company that changes its practices to become more privacy-friendly may place itself at a competitive disadvantage. Standards should be reconsidered at a sectoral level. Rather than await regulatory and judicial decisions, media companies should collaborate to design new sectoral standards for transparency, consent, involving users, and so on. Advocacy groups can play a significant role in such developments.

Ine van Zeeland is a PhD student within the VUB research chair on [Data Protection On The Ground](#). Within SMIT, she is involved in the [EcoDaLo project](#).

Heritiana Ranaivoson is a senior researcher at SMIT, where he has led several studies and projects on diversity and innovation in the creative industries. He leads the research on the supply of news diversity in the [SBO DIAMOND](#) project.

Jonathan Hendrickx is a former online journalist and now a PhD student at the Vrije Universiteit Brussel. Within SMIT he is part of the SBO [DIAMOND project](#).

Jo Pierson is in charge of the research unit 'Privacy, Ethics & Literacy' at SMIT and associate professor in the Department of Media and Communication Studies at the Vrije Universiteit Brussel. He holds the VUB research chair on [Data Protection On The Ground](#).

Wendy Van den Broeck is head of the Living Lab cluster at SMIT and assistant professor at the Department of Media and Communication Studies of the Vrije Universiteit Brussel. She is involved in the [CPN project](#).

Jaco van der Bank is a researcher at SMIT, responsible for the development of novel business models and commercialisation strategies for projects pertaining to media and the telecommunication domain. He is involved in: [CPN project](#).

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* the CPN project, visit www.projectcpn.eu

* the DIAMOND project, visit soc.kuleuven.be/fsw/diamond

* the EcoDaLo project, visit www.imec-int.com/en/what-we-offer/research-portfolio/ecodalol

For questions about this policy brief, please contact Ine van Zeeland, ine.vanzeeland@smitresearch.be