

European Commission  
Directorate-General Health and Consumers  
Brussels, Belgium

### European Commission Consultation: Non-Paper on Data Collection, Targeting and Profiling of Consumers For Commercial Purposes in Online Environments

The undersigned associations (“Associations”) represent a wide array of industries and companies across the European Member States that have joined together to evaluate and respond to the DG SANCO’s non-paper on data collection, targeting and profiling.<sup>1</sup>

*Several of these associations and their constituent members have filed their own responses, which complement this submission and elaborate on particular issues of interest to their members or company.*

This coalition includes leading trade associations from the media, publishing, advertising, marketing, retail, and Internet industries. These associations are, *the European Association of Communication Agencies (EACA), European Newspaper Publisher’s Association (ENPA), European Federation of Magazine Publishers (FAEP), European Publisher’s Council (EPC), Federation of European Direct and Interactive Marketing (FEDMA), Interactive Advertising Bureau Europe (IAB) and World Federation of Advertisers (WFA)*. The members of these Associations represent thousands of advertisers, agencies, marketers, publishers, media companies, ad networks, and other service providers. The associations represent companies that create offer and / or use a diverse range of digital products and services, including digital marketing communications, to consumers and businesses across the EU. Their innovations deliver significant value to European consumers and contribute to improving the European competitiveness. The diversity of these companies demonstrates the wide variety of industry sectors that are impacted by issues addressed in this non-paper. All of these industries have an important stake in the application of existing laws to current online marketing practices, as well as the potential development of standards or regulation in this area in particular with respect to Online Behavioural Advertising (‘OBA’).

The Associations welcome the Commission’s non-paper and the roundtable of 31 March, as well as the Consumer Summit that followed on 1-2 April. These events served an important role in bringing together key stakeholders across the industry, the consumer representation community, government, and Internet users to discuss and explore online advertising technologies and methods, and consumers’ benefits and potential concerns relating to this means of targeted online advertising.

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<sup>1</sup> Non-Paper issued 5/3/2009, Data Collection, Targeting and Profiling of Consumers For Commercial Purposes in Online Environments

The Associations strongly believe that self-regulatory initiatives and leading business practices offer the most effective framework to protect consumers and allow for further innovation in the area of online advertising, in particular with regard to the more widespread use of OBA.

Internet advertising generally has been growing exponentially in the past few years and is expected to continue to grow substantially <sup>2</sup>. OBA <sup>3</sup> is a smaller, but promising subset and is still in its nascent phases - although certain OBA models such as the ad network OBA have been developed and used for a decade or so. The various industry players involved in OBA are continuing to explore the different ways to channel the power of the medium to give consumers more transparency and control. In addressing any issues concerning the use of online consumer data, in particular data on past browsing activity, it will be critical also to acknowledge the value users attach to more relevant advertising, the importance of advertising to the continued growth of the Internet, e-commerce, online content and the European economy; Preserving the innovative and robust advertising that supports the vast array of free online content and services is essential.

The Associations and the member companies they represent take data protection and privacy very seriously, and stress that consumer trust and confidence is key. Consistent with the recent statements of Commissioner Meglena Kuneva in connection with the publication of the Commission's guide for internet users, the Associations stress that "Confidence and trust is the new currency in Europe" <sup>4</sup>. The success of our member companies depends on user trust and they understand that transparency, user control and data security are the essential building blocks for retaining and earning this trust.

Building on the initiatives and leading practices of our constituent companies and members, the Associations and its member companies already have engaged in an evaluation of the issues raised by online advertising in particular by OBA. We welcome a further dialogue with DG SANCO and interested stakeholders on this matter. We hope that the European Commission will involve all EU Institutions in its work.

The following points, which are described in detail below, are important to the Commission's consideration of the issues related to OBA:

- Advertising is one of the main sources that finances a wide range of business models that provide consumers with an immense range of high quality content and online services;

<sup>2</sup> Internet advertising grew in 2007 by 40% compared to 2006 and by 20% in 2008 (*IAB Europe AdEx 2007 & 2008 Reports, European Internet Advertising Expenditure in 2007 & 2008*).

<sup>3</sup> The term 'profiling' of internet users in relation to behavioural advertising is misleading. Data is typically collected to build so-called 'interest segments' for the purpose of delivering more relevant advertising. These 'interest segments' are then used to 'identify' (via cookies) and target groups of consumers.

<sup>4</sup> See: <http://www.europeanvoice.com/article/2009/05/commission-wants-stronger-sanctions-against-online-spam/64786.aspx>

- Advertising on the Internet is key to the continued growth and expansion of the Internet economy, online content and e-commerce in Europe and provides significant benefits to consumers and businesses alike;
- Any initiatives taken in this area must show evidence of potential consumer harm, and be careful to not inadvertently limit the tremendous benefits to consumers and businesses of online advertising;
- Any policy considerations need to specifically evaluate different business models as well as different practices of collecting and using data, and their implications on privacy; and
- A *self-regulatory approach* and leading business practices afford the best way to respond to changes in the marketplace, business practices, technological advances and, notably, consumer expectations without jeopardizing well established and accepted, or new legitimate business models and innovation.

We also provide in section IV. comments to some of the specific questions and areas identified for further work.

## I. Online Advertising is Key to the Continued Growth of the Internet Economy

Online advertising promotes the objectives of the Lisbon Agenda, fostering the growth of Information Society Services (content and eCommerce). It supports the growth of the interactive era and creates opportunities for both large and small websites (especially SMEs) to develop new services and provide a more cost-effective and efficient way to reach new consumers and new markets. This, in turn, furthers economic growth, competitiveness, innovation, and new jobs for EU citizens, which are particularly important in the current economy.

Recent studies show that 56% of all adults (16-74 years old) used the Internet regularly in 2008<sup>5</sup>. Consumers use the Internet for a variety of reasons, including consuming goods and services. For example, 32 % of individuals in the EU ordered online in 2008. This widespread participation resulted in EUR 124 bn in total e-commerce sales for 2008 and is expected to increase to EUR 136 bn this year<sup>6</sup>. The Internet economy is strong, and interactive / online advertising is a major contributor to its growth. In 2007, revenues from interactive advertising increased

<sup>5</sup> Eurostat: <http://epp.eurostat.ec.europa.eu/tgm/table.do?tab=table&init=1&language=en&pcode=tin00061&plugin=1>

<sup>6</sup> Forrester, European Technographics Benchmarks Survey

year by year by 40% to EUR 11 bn, and in 2008 by 20 % to EUR 13 bn <sup>7</sup>. While the gap to the stronger US market is closing (EUR 3.5 bn), the UK, France and Germany still lead the European market, accounting for 65% of total European online advertising spend.

When considering the issues set out in the non-paper regarding the online advertising techniques that rely upon user data, it is important to remember that OBA is still in its infancy and accounts for only a small percentage of the overall advertising market. OBA is a way of targeting advertising based upon anonymous web browsing activity which is collected over a period of time across non-affiliated websites and used to create interest 'segments' (such as cars, finance and travel) to provide more relevant and useful advertisements. Behavioural targeting methods are particularly well-suited to improve the serving of rich media advertisements such as display and video ads, and have therefore great potential to drive ad revenues for premium web properties such as newspapers and online portals. Therefore, consistent with the Commission's own concluding remarks it will be important to fully ascertain and develop an evidence based approach to identifying any adverse effects or potential consumer detriments in the area of OBA and explore the best possible means to address them, rather than risking premature or disproportionate policy responses in this area. The non-paper only contains a number of hypothetical scenarios but fails to identify concrete actual or potential harm.

## **II. Online Advertising Provides Significant Benefits to Consumers and Businesses**

It is very important to consider the significant consumer and business benefits from online advertising generally. Advertising helps to fund the vast majority of content and services on the internet, providing consumers with access to many benefits such as:

- Communications services - webmail, chat, telephone services, video and photo storage and sharing;
- Information gathering tools, such as search engines; product reviews; shopping and price comparison tools;
- A vast array of rich and high quality content - newspaper and magazine websites, audiovisual online services, entertainment, and e-commerce sites;
- Social and professional networking environments;
- Online services such as resume services and job banks;

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<sup>7</sup> IAB Europe AdEx 2007 & 2008 Reports, *European Internet Advertising Expenditure in 2007 & 2008*

Without advertising, consumers would have to pay for many of these services. Online Advertising therefore plays a fundamental role in Europe's information society, providing consumers with access to a wide range of goods, services and opportunities (such as employment) and regardless of socio-economic factors, such as income.

Often it enables the delivery of more targeted, relevant content to the user, thereby enhancing consumers' online experiences. Consumers have been very responsive to these offerings, as evidenced by the rapid growth in both Internet usage and e-commerce in the past decade.

Online Advertising has benefited business too, especially Small and Medium Enterprises (SMEs):

- Thousands of small businesses have expanded their reach through online advertising from local to regional or national to European or global markets; and
- Online advertising has enabled businesses of all sizes to achieve more cost effective and efficient marketing.

For example, where in the past the reach of a local band or clothing designer would have had a local focus, their music or fashion can now reach people nationally or internationally. This increased competition encourages cultural and commercial diversity, product and service innovation and leads to lower prices, all to the direct benefit of consumers.

Targeted online advertising affords businesses with more efficient and effective means of reaching consumers likely to be interested in their offerings. This reduces costs to both businesses and consumers and improves competition. Competition, in turn, results in significant corresponding consumer benefits in reduced prices and improved products.

Online advertising has revolutionized consumers' online experience by improving the relevance of particular advertisements. Through OBA, consumers receive advertisements for goods and services that are likely to be of interest to them - without limiting consumers' freedom of choice. Consumers have expressed a strong preference for advertisements for products and services in which they are likely to be interested. Relevant advertising provides consumers with access to information relevant to their interests, when it is most useful to them, enabling them to make more informed buying decisions.

In this respect we think that DG SANCO should take into account that there is a range of different business models for OBA, as well as different business practices within a given model that vary in the scope of what information is used, how it is collected and, finally, whether the advertising is likely to be consistent with

consumers' expectations. Different situations can require different responses. For example:

- An online publisher may track its consumers' online activities on its own websites in order to deliver tailored advertising. This is often known as 'first party' or 'intra-site' advertising;
- Advertising networks may collect and use information when an internet user visits websites participating in that particular network. This is known as 'third party' advertising.
- Service providers such as certain Internet Access Service Providers are currently testing the use of data from all or substantially all URLs traversed by a Web browser across Web sites for OBA. Other *potential* scenarios for the use of all or substantially all URLs for the purpose of OBA could include the use of a toolbar, an Internet browser, or a comparable desktop application or client software. It is fair to say that such use of essentially the entire browsing history for building interest categories meets different consumer expectations and are potentially subject to different legal requirements.

### **III. Self-Regulatory Initiatives and Leading Business Practices Provide the Most Effective Means of Transparency, Choice and Security to Consumers**

More relevant advertising on the Internet takes place through use of anonymous or non-personally identifiable data. Aggregated, anonymous, or categorised data is key to effective delivery of more relevant advertising. To the extent that personal data is used to further enhance customisation, such practices are subject to the requirements of EU laws, notably the ('General') Data Protection Directive on the protection of individuals with regard to the processing of personal data and on the free movement of such data (1995/46/EC), the, 'e-Privacy' Directive (2002/58/EC) and Member State implementing laws. Companies are required to ensure that data are secured appropriately and deploy adequate measures to maintain an appropriate level of data security.

As the non-paper recognises, transparency and meaningful consumer control over customisation practices in connection with personal data currently are addressed through the existing legislative frameworks, notably the Data Protection and ePrivacy Directives.

Companies with well-known brands are also increasingly competing by developing innovative best practices improving transparency on how they collect and use data as well as providing genuine and granular choices for users. Gaining and retaining the trust of users is essential to the continuing success for businesses thriving on online advertisement, especially those companies that have a direct relationship with end-users and risk to be 'punished' immediately and effectively by the marketplace for any abuse of consumer trust.

There are a number of certification bodies that companies can approach to earn a seal of quality on their data protection systems, e.g. the EU Privacy Seal <sup>8</sup>. Voluntary seals or certification can be useful especially for smaller, B2B companies (such as technology providers) to demonstrate that they comply with legal requirements. At the same time, it should be noted that such mechanisms may also involve important upfront costs - especially for SMEs - and take a lot of time while technological innovation progresses at a very rapid pace. Hence formal seals or certification may become quickly outdated, and frequent updates of seals and certificates often prove to be too costly. Seals and certification should be encouraged, although they are not the only means to build and retain user trust.

As OBA has raised privacy questions, as opposed to other forms of online advertising, leading business practices in this field, widely adopted by the members of the Associations, are the most effective means of providing a variety of effective choices to consumers regarding online data collection practices. These practices, using, *inter alia*, latest privacy enhancing technologies ('PETs') to implement transparency and choice more effectively than has been possible before the digital age, will continue to evolve and form the basis of self-regulatory frameworks for OBA. The Associations have many years of experience developing practices and standards to protect consumers' privacy online, and their efforts offer the most flexible and effective means to do so. Moreover, there are emerging global standards on OBA in the USA where the thinking on these issues is advanced and we are participating in and learning from the developments there to include:

- The work of the Network Advertising Initiative (NAI) on third party OBA, in the USA, in which many companies participate directly, as well as its coverage of many of our members indirectly through contract obligations on Web publishers<sup>9</sup> ;
- The US Federal Trade Commission (FTC) staff report and Self-Regulatory Principles on OBA; and
- The recently launched self-regulation programme for online behavioural advertising in the USA.

In the UK, the IAB has developed 'good practices principles' on OBA, on which they worked in consultation with the UK stakeholders, including Ofcom, the Information Commissioner's Office (ICO), Government departments and consumer and privacy advocacy groups. Importantly, the principles cover the key advertising networks as well as ISP-based businesses.

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<sup>8</sup>See: <https://www.european-privacy-seal.eu>

<sup>9</sup>See: [http://www.networkadvertising.org/networks/2008%20NAI%20Principles\\_final%20for%20Website.pdf](http://www.networkadvertising.org/networks/2008%20NAI%20Principles_final%20for%20Website.pdf)

Company initiatives are also an important part of the equation of good practices. Many companies, including eBay, Google, Microsoft, nugg.ad, United Internet Media, Yahoo and others, are looking at, or have already implemented, new ways to enhance transparency and control, e.g. trust marks, granular choice regarding the ads consumers see, and ad preference management. Companies also choose OBA techniques very carefully before making their choice on what is the most reliable technology to safeguard the interests of their users.

Moreover, industry-led initiatives are particularly effective in the Internet environment where innovation is continuous and fast, consumer responses are rapid, and businesses continue to demonstrate their interest in and commitment to adapt self-regulatory frameworks to issues as they emerge.

Technology also provides privacy-enhancing products to consumers. For example, there are a several ways consumers can use existing technology to manage the use of cookies on their browsers and other applications, as well as browse the Internet anonymously. A simple web search by any consumer reveals dozens of products that allow those consumers to surf the Internet anonymously.

We recognise that consumer education is an important component to ensuring that consumers have meaningful choices regarding more relevant advertising. Companies and web publishers provide notice regarding cookies and advertising practices in their privacy policies, and continue to explore additional consumer educational channels in accessible language and user friendly formats. Among the educational initiatives, as early as 2001 the IAB in cooperation with other associations set up a website <http://www.allaboutcookies.org> to increase users' knowledge of their online safety and to provide practical information about how to set browsers to control cookies. In connection with the recent launch of its Good Practice Principles on OBA, IAB UK has released various informational resources for consumers, including an FAQ regarding OBA.<sup>10</sup>

#### **IV. Response to Questions and Future Work Raised in the Non-Paper**

##### **A. A Blanket Opt-in Solution for Online Behavioural Advertising Would Undermine Users' Awareness Resulting in a "Click-Through Exercise", Significantly Hamper Internet Functionality and Negatively Impact the Consumer Experience Online**

In section 7.4, the non-paper asks several questions regarding the impact of an opt-in solution. As noted above, the Associations agree that meaningful transparency and control for users is the most effective way to approach the issues raised by OBA and building and retaining consumer trust, which is at the heart of the issue. It is important to remember that in considering any restrictions, like an opt-in

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<sup>10</sup> See: [www.youronlinechoices.co.uk](http://www.youronlinechoices.co.uk)

requirement, not all business models in this space are the same and not all data are the same.

A blanket opt-in approach therefore without regard for the type of data and business model would significantly hamper the users' internet experience. It would fundamentally change the way the Internet works today, causing users to be faced with repeated pop-up windows or other annoying virtual notices each and every time they visit a web page, slowing the user experience and the provision of Internet services. It should be noted, that in the recent review of the ePrivacy Directive the European Parliament rejected amendments that proposed the introduction of a "prior consent" (i.e. opt-in) for cookies.

A blanket opt-in approach would most likely result in a "click-through exercise", making its introduction meaningless, undermining the goals of transparency and consumer control as users faced with repeated pop-ups would simply click through them to access the desired content. However, user consent is necessary and required in certain contexts, for example the use of certain types of data such as personal data, or sensitive data (where Art. 8 of the general Data Protection Directive requires explicit consent) or where service providers use data from all or substantially all URLs visited by a Web browser across web sites for purposes of OBA.

A blanket opt-in approach could have a drastic impact on small businesses and a devastating effect on competitive marketplaces not only on the online advertising space, but other important areas fuelling the information and knowledge society such as publishing, e-commerce, software, and web 2.0 applications development. Ill-thought steps would therefore indirectly limit consumers' choice of online content, software and applications. There are many businesses that get all or a significant part of their revenues through online advertising, including OBA. An ill-thought opt-in will harm business models that have fostered creativity and economic development. At a time where newspapers and magazines struggle to sustain revenue streams from offline subscriptions and offline advertising, better targeted online advertisement, especially of display advertisement, provide a complementary source of revenue. Those much visited online portals offer highly valuable advertising space in particular for rich media advertising such as display or video ads - brand building formats that primarily benefit from OBA.

A systemic question that goes to the heart of how many online services work today, should be carefully considered in this context. Ironically, a mandated opt-in for OBA regardless of the business model, may lead to less privacy on the internet. Opting out of cookies-based behavioural advertising can be done anonymously - using an opt-out cookie and, as technology develops, even a persistent opt-out cookie. Another approach requires ways of recording a user's preference, e.g. through

account registration solutions that enable users to use online services from various PCs.

Today, many services on the Internet can be used without registering - a feature that users much appreciate. Forcing online services to require authentication will mean less privacy for users online in the end, and doesn't meaningfully assist the user to protect his/her privacy.

For these reasons, we believe that enhanced transparency about the use of OBA and about how to opt-out of OBA, as well as an easy, as comprehensive as possible, and as persistent as technologically possible, opt-out approach of third party OBA is the appropriate approach. The Network Advertising Initiative (NAI), described in section III, offers an easy, accessible way of globally opting out your browser of all or several of currently more than 30 advertising networks, with just 2 clicks. Members of the NAI are committed to further improve the opt-out technology.

### B. Online Advertising to Children Raises Unique Issues

In discussing consumer expectations in Section 7.1, the non-paper raises the issue of attitudes and awareness of younger consumers regarding online data collection practices. Business has long recognized that advertising to and data collection from children raise unique issues. Therefore, there are extensive requirements and best practices regarding both the content of advertising and data collection practices.

Young people are among the most active users of the internet, which is an integral part in their formal education. They are typically much more digitally savvy than their parents. However, particular care is required to minimise the risk of their exposure to inappropriate, misleading or otherwise unfair practices online.

With respect to the appropriateness of ads and other forms of commercial communication, there is a strong body of existing best practices and codes that ensure honesty, decency and responsibility in marketing communications.

The advertising industry's longstanding commitment to the protection of minors, and particularly of children under 12 years is set out in the ICC Consolidated Code of Advertising and Marketing Communication Practice.<sup>11</sup> This code serves as a common global benchmark for advertising standards including national industry-wide self-regulatory codes for marketing communications and companies' own codes of conduct.

The ICC Code contains a section with specific provisions for the protection of children which states that "*communications should not undermine [children's] positive social behaviour, lifestyles and attitudes.*" The Code adds that "*marketing communication should*

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<sup>11</sup> See:

<http://www.iccwbo.org/uploadedFiles/ICC/policy/marketing/Statements/330%20Final%20version%20of%20the%20Consolidated%20Code%20with%20covers.pdf>

*not exploit inexperience or credulity,” and that “marketing communication directed to children should be clearly distinguishable to them as such.”*

Enforcing these standards is the role of the national self-regulatory organizations under the umbrella of the European Advertising Standards Alliance (EASA) and these standards apply to online as well as offline advertising.

With respect to data protection, where personal data are at issue, the Data Protection Directive applies and there are requirements to ensure that consent is informed and that children would understand the consequences of giving consent. Under Member State laws and in cooperation with other associations, companies are required to obtain consent from a parent or guardian before collecting personal information from children. The requirements of the US Children’s Online Privacy Protection Act are a benchmark for many multi-national brands, and are often implemented globally.

The special level of care required for children is reflected in existing online advertising industry standards for privacy. For example, the IAB UK signatories have adopted a principle regarding children that prohibits signatories to build interest-based segments in behavioural advertising for the sole purpose of targeting children under the age of 13 years.<sup>12</sup> This standard builds upon that of the Network Advertising Initiative (NAI), representing the majority of US-based online advertising companies. By signing on to the NAI Principles, signatories commit to applying such standards wherever they operate, including in Europe.

### C. The Unfair Commercial Practices Directive

#### i. Unfair Commercial Practices and Behavioural Advertising

The non-paper raises the question under what conditions OBA should be considered as a form of undue influence on consumers under the Unfair Commercial Practices Directive (2005/29/EC; “UCP Directive”). The phrasing of the question seems to imply that the Commission has doubts about the application how to apply the UCP Directive to OBA.

The UCP Directive is based on a very broad concept with regard to its scope of application (Art. 2 d). As a business-to-consumer commercial practice, OBA falls within the scope of the UCP Directive. In article 9, the Directive sets out detailed conditions for determining whether a commercial practice should be considered to have ‘undue influence’ on a consumer. These include its timing, location, nature or persistence; the use of threatening or abusive language or behaviour;

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<sup>12</sup> See: IAB Good Practice Principles available at <http://www.iabuk.net/en/1/behaviouraladvertisinggoodpractice.html> to be implemented by the end of 2009. Current signatories are: AOL, AudienceScience, Google, Microsoft Advertising, NebuAd, Phorm, Platform A, Specific Media, Wunderloop, Yahoo! SARL.

the exploitation by the trader of any specific misfortune or circumstance of such gravity as to impair the consumer's judgment, of which the trader is aware, to influence the consumer's decision with regard to the product; any onerous or disproportionate non-contractual barriers imposed by the trader where a consumer wishes to exercise rights under the contract, including rights to terminate a contract or to switch to another product or another trader; and any threat to take any action that cannot legally be taken.

Should a particular case of behavioural advertising meet one of these tests, it would be considered an aggressive commercial practice under Article 8 and would therefore be prohibited under Article 5.

#### ii. Unfair Commercial Practices Directive and stealth advertising

The non-paper also raises a question as to whether the legislation on unfair commercial practices is sufficient in curbing practices such as '*stealth advertising*'. The Associations believe that there is an extensive body of legal and self-regulatory requirements that is effective in addressing any concerns regarding stealth advertising. With respect to legal requirements, the UCP Directive provides that a commercial practice shall be deemed 'unfair', and therefore prohibited, if it is deemed to be misleading. 'Stealth' marketing, in particular, is clearly prohibited by EU law as a 'black-listed' practice under the same Directive. Annex 1 of the UCP Directive bans the following marketing practice: "*Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*"<sup>13</sup>. Thus, there exists a clear ban on such practices.

Furthermore under the Audiovisual Media Services Directive (2007/65/EC), advertising breaks, sponsorship, product placement, and teleshopping windows are required to be clearly identified as such. This Directive applies to audiovisual media services online, stipulating that all marketing communications in online audiovisual media services must be clearly identified as such.

The media and advertising industries are fully committed to the principle of identifying marketing communications, and to helping identify and prevent practices that fall foul of this principle wherever they appear. This is a matter of advertising content regulation and not related to the use of data for the purpose of advertising. To help address the particular challenges that arise for statutory authorities and self-regulatory systems in enforcing the identification principle in the context of digital marketing communications, the European Advertising Standards Alliance (EASA) adopted in 2008 a Best Practice Recommendation.

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<sup>13</sup> Annex 1 of the UCP Directive bans the following marketing practice: "*Falsely claiming or creating the impression that the trader is not acting for purposes relating to his trade, business, craft or profession, or falsely representing oneself as a consumer.*"

This Best Practice Recommendation establishes a single standard to help self-regulatory systems across the EU identify all forms of “commercial” content as opposed to editorial content, thereby extending the enforcement of the identification principle to all forms of marketing communications. It will also help to recognize illegal practices and bring these to the attention of the authorities.

The advertising industry is firmly committed to implementing this Best Practice Recommendation, and has set itself the target of implementing the recommendation in 80% of the European self-regulatory systems by October 2009.

### iii. Unfair Commercial Practices Directive and advertising/editorial content distinction

The non-paper raises the questions whether the UCP Directive is sufficient in curbing practices such as mixing of commercial and editorial content.

Under the Unfair Commercial Practices legislation there is a strong legal requirement for consumers to be protected from unfair practices. According to Annex I, paragraph 11 of the UCP Directive: *“Using editorial content in the media to promote a product where a trader has paid for the promotion without making that clear in the content or by images or sounds clearly identifiable by the consumer (advertorial). This is without prejudice to Council Directive 89/552/EEC (1)” Therefore we do not see any cases where the mixing of commercial and editorial content might occur which are not already covered by this paragraph.*

Nevertheless, as stated above, the media and advertising industries have equally strong commitments to this requirement through self-regulation. Under international and national codes of advertising practice, the requirement for clear identification of marketing communications is incorporated and respected as a fundamental principle of transparency.

Furthermore, the industry has acknowledged the additional and complex challenges presented by dynamic content on the internet where sometimes boundaries which may be clear in the offline world could become blurred. Nevertheless we have addressed these challenges head on and we share the concerns of the European Commission and do not support misleading practices, such as marketing that is disguised as editorial content. The Associations are clear what the standards should be and set these out in the European Advertising Standards Alliance Best Practice Recommendation on Digital Marketing Communications in October 2008. At section 5.2.3 the techniques that fall within the remit of the codes and self-regulatory complaints systems are listed. There are a few exceptions in some jurisdictions where other bodies may be responsible, e.g. in the UK, where Ofcom (the statutory regulator) deals with regulating TV sponsorship credits but in general the SROs will deal with the following amongst others <sup>14</sup>:

- Display ads (moving, non-moving);

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<sup>14</sup> For full definitions of the concepts see Annex 2.

- Text ads;
- Paid inclusion/Paid search;
- Marketer-generated virals;
- Online in-game advertising;
- Red button;
- Online 'public' classified (i.e. classified ads placed by companies not private individuals);
- DVD/CD ROM;
- MMS/SMS
- Digital outdoor

At section 5.2.4 of the EASA Recommendation, the approach for User Generated Content (UGC) is explained. Clearly this is an area where some confusion might arise between the direct responsibilities of advertisers, and what is beyond their control in terms of content and its distribution. Although UGC could be seen in certain cases as a form of marketing communications, such assessments pose additional difficulties due to possible ambiguities over origins. In establishing whether a given case of UGC should be regarded as marketing, and consequently fall within the SRO's remit, the primary areas of enquiry to be considered are:

- i) Did the marketer create or distribute the UGC and/or viral material?
- ii) If not, does the marketer endorse the UGC and/or viral material created by a third party?

If the answer to either question is positive, the UGC under consideration constitutes a marketing communication under the agreed definition. If the SRO concludes that the UGC breaches its code, the advertiser must take all reasonable steps to amend or remove it. On the other hand, if the answer to both questions is negative, the UGC is not considered to be a marketing communication and therefore falls outside the SRO's remit.

#### *D. Marketplace Discipline Serves as an Important Check on Potential "Price Discrimination"*

The non-paper raises questions regarding what it refers to as the potential of "price discrimination" in OBA. There are two primary issues when looking into "price differentiation": i) price individualization; and ii) geographical price differentiation (source market pricing).

We are not aware of price individualisation, or source market pricing in online advertising being widespread industry practices within the business-to-consumer (B2C) space.

It goes without saying that consumer trust and companies' brands are critical assets, - businesses can quickly get a bad reputation if they play around with prices to consumers (and in the online environment consumers are quick to publicise practices they disagree with). As the non-paper recognises, the internet also affords consumers many more options than in the offline world for comparing prices

(e.g., shopping comparison tools discussed above), and this also helps to increase competition in source market pricing. Indeed, consumer choice and price visibility online are vast, easily accessible, and just one click away.

The Commission has highlighted in its recent “Report on cross-border e-commerce in the EU” (SEC (2009) 283 final) that 77% of online buyers thought it was easy to compare prices and 60% of all Europeans with Internet access have compared prices online. This demonstrates that technological advances related to online retailing makes illegal price discrimination easier to monitor and prevent. The lack of reported cases in the last decade already indicates that while in the early internet age individualised pricing may have been discussed (and in only one reported case experimented with), the damage to brand reputation due to widespread outcry by consumers has a strong deterrent effect.

Second, regarding source marketing pricing, it is important to view these issues through the current legal framework, where such practices constitute legitimate commercial policies not prohibited by the EC Treaty competition and free movement of goods and services.<sup>15</sup> In a market-based system, prices differentiate for multiple reasons, within a city, a region, a country and an Internal Market. The reasons for this could include size of the relevant market, taxation, transportation costs, specialisation of workforce, employees’ salary levels and marketing costs related to these markets. These factors work together to determine the overall efficiency of a country’s economy and are objective reasons for varying price levels.

Also, in most cases, website referrals are the practical consequence of legal provisions. The national laws of various EU Member States require websites to include specific references to legal provisions (civil, consumer protection, data protection and e-commerce laws). It is not economically feasible for online vendors to offer certain goods or services outside their market place for a number of reasons (transport logistics, security of transactions, costs of delivery/marketing/advertising, difficulty of organising after-sales support, etc).

Thus, to the extent that the Commission continues to explore this issue in the context of cross border e-Commerce, it is important to bear these arguments in mind.

#### *E. Current Requirements and Best Practices Can Effectively Address any Issues Raised by More Transparency Regarding Identification of Advertising Content*

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<sup>15</sup> See also Art. 81 of the EC Treaty and interpretative case law regarding the definition of undertakings as well as 82(c).

The non-paper raises the question under which conditions websites should be considered as advertising space in their entirety.

In the context of marketers' own websites, the EASA Best Practice Recommendation regarding Digital Marketing Communications identifies which parts of a product website can rightly be identified as 'marketing communications'. It would not be feasible to consider that marketer-owned websites in their entirety constitute a marketing communication, as websites often also include content which does not have a marketing function (investor information, corporate reports, press releases, employment opportunities etc). Nor would it be possible to distinguish between corporate and brand websites, as for many companies these are one and the same.

For this purpose, the EASA Best Practice Recommendation identifies four specific cases where content on a marketer-owned website is considered a marketing communication for the purposes of self-regulation. In all four cases, both the legal provisions and the self-regulatory rules apply.

- **Claims** (whether implied, direct, written, spoken or visual) about products or companies. The only exception are claims that appear in the context of editorial content (see below).
- **Price promotions, special offers, invitations to purchase** and similar consumer-oriented commercial practices covered by the EU's Unfair Commercial Practices Directive.
- **User-generated and/or viral content** if it has been distributed or endorsed by the marketer. This excludes messages posted by consumers in chat rooms or on message boards.
- **Marketing communications previously aired/broadcast** on any other media (e.g. TV spots uploaded on the website).

The EASA Best Practice Recommendation also stresses that self-regulation for digital communications cannot be applied to editorial content. Long-standing self-regulatory instruments such as codes of conduct and ethical principles for editorial content should remain the principal way of regulating such content. Press and other media would consider new European-level regulation of their editorial content on whatever delivery platform as a direct and unwarranted infringement of press freedom.

The challenge therefore is to determine under which conditions content on a product website should be considered as "marketing communications".

## F. Consumer's Awareness of and Preference for Behavioral Advertising

According to a recent survey conducted by TNS for TRUSTe (one of the leading internet privacy trustmarks), consumers are more conscious of OBA than ever before:

- Two out of three consumers are aware that their browsing information may be collected by a third party for advertising purposes.
- Consumer discomfort with OBA has been declining year over year (from 57% in 2008 to 51% in 2009), suggesting that although consumers worry about protecting their private information online, they are growing more accustomed to OBA, with some even preferring to be served targeted advertisements from brands they know and trust over irrelevant, intrusive advertisements.
- In fact, 72% of those surveyed said they found online advertising intrusive and annoying when the products and services being advertised were not relevant to their wants and needs.
- According to a survey that Q Interactive ran with 1, 800 Coolsavings.com visitors, a majority of users across major demographic segments are interested in providing data in exchange for content. Asked if they would prefer “to receive free online services and information in exchange for the use of their data to target relevant advertising, “54% of boomers aged 45-55 agreed and 63% of up to 24 year olds agreed<sup>16</sup>. Only 6 to 12% of users (depending on the age group) would see an advertiser unfavourably if its online ad is tailored to their interests.

Consumer awareness of OBA is crucial to enable informed choices. Our industries will continue building on awareness raising by working on good practices that provide users with a better understanding of choice and transparency.

If it were to be forbidden for companies to collect information for the purpose of OBA, it would be likely that consumers would end up dissatisfied with their experience online.

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<sup>16</sup> See: [http://www.mediapost.com/publications/?fa=Articles.showArticle&art\\_aid=105252](http://www.mediapost.com/publications/?fa=Articles.showArticle&art_aid=105252)

The Associations are committed to supporting leading business practices and to considering the role for effective self-regulation in the areas relating to OBA. The Internet revolution is still in its early stages, and we believe that self-regulation complementing the existing, strict legislative EU framework, offers the best means of providing consumer protection and choice. Self-regulation also will further innovation of products and services that will benefit consumers.

As we continue to explore these issues, we are looking forward to continuing our dialogue.

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