”Free” online service in exchange for targeted advertising : the business model with feet of clay

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“Free” online service in exchange for targeted advertising : the business model with feet of clay [1]

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The services offered by Facebook and TF1 have in common that they do not cost a euro to their users, while being perfectly profitable for those who exploit them[2]. The financing is in fact provided by advertisers, who are looking for "available human brain time" under a formula that resists the passage of time[3]. The similarities, however, end there: while both the social network and the television channel seek to get a commercial message as far as possible into the minds of those exposed to it, they pursue this common goal using radically different instruments.

Facebook, in principle, is able to paint a very fine portrait of each of its users. It takes the form of a cloud of variables: where you live, who your friends are, what places you frequent during your lunch break and on Saturday nights, which web pages you open and how long it takes before you close them, which books you pretend to read and which ones you actually read. The individual is geolocalized, timed, inserted in a social graph. His or her rich and complex personality, which has been subjected to the flame of algorithmic treatments, is reduced as if by pyrolysis to a clear, dry and supposedly reliable list of his or her centers of interest. The profile thus constituted is sold, by auction in real time, to the highest bidder. The advertising suggestion arrives in conquered territory. Perfectly in line with the target's expectations, it only needs to be whispered to be enthusiastically integrated, in a barely conscious process.

Meanwhile, on the private television channel, the advertiser tries to see the characteristics of the audience through the fog. His vision is no longer individual, but collective: he perceives a herd. From the schedule and the type of program, he will obviously draw a rough diagnosis. For example, advertisements at half-time of a soccer match will be full of shaving foam, roaring cars and musky scented shower gels. But in front of the screen, in reality, there is a young woman concerned about global warming, who sighs with lassitude at the nullity of the proposals that are addressed to her in this way. The commercial is no longer whispered, but shouted, in the hope that it will reach as many friendly ears as hostile minds. It is the famous: "Half of the money I spend on advertising is wasted, but I don't know which half"[4].

This fundamental difference may soon be a thing of the past. On February 13, 2020, the Minister of Culture Franck Riester publicly declared his intention to authorize "segmented advertising" on television, in order to put an end to "an inequity of treatment between television channels and Internet actors"[5]. Technically, the collection of information would pass through the connected televisions or through the "boxes" of the access providers. To the journalist who questioned him,

1 These few lines at the crossroads of personal data protection and business law to pay tribute to one of Strasbourg's masters of business law, forever my laboratory and master's director, without whom I would not be an academic today.

2 TF1 is one of the main French television channels.

3 A former director of the TF1 channel, Patrick Le Lay, had explained in an interview that his job was to sell advertisers "available brain time".

4 For example, this famous formula is attributed to John Wanamaker by O. Nallis, *Veille et études : communication, marketing, publicité*, éd. Lilu.com, 2011, p. 91.

5 He was interviewed by Ms. Sonia Devillairs in "L'instant M". The excerpt quoted can be seen here: https://twitter.com/Sonia_Devillers/status/1227905196556275713.

and who pointed out that it is possible, on the Internet, to refuse to consent to data processing corresponding to targeted advertising, the minister replied that it was still necessary to work "with the CSA, with telecommunications operators" to ensure the protection of privacy in terms of personalized television advertising.

These statements by Mr. Riester are edifying from two perspectives. First, from an economic point of view, because they acknowledge the incredible success of targeted advertising as a source of funding. The invention, in its current form, is not twenty years old, yet it is essentially on this basis that two of the ten largest market capitalizations in the world were built: Alphabet and Facebook. The influx of new converts is therefore not surprising. But the Minister's comments are also remarkable from a legal point of view. They downplay the threats that personal data law currently poses to this model, and suggest that a motivated working group will overcome this simple technical difficulty within a few months. Including the CSA, but not the CNIL, is a spectacular missed opportunity[6]. The whole thing amounts to denial and borders on blindness.

The reality is not well known, but it is this: the targeted advertising market, which already weighs more than 5 billion euros per year in France, and continues to expand rapidly, is threatened with a sudden end by a combination of interpretations of the general regulation on data protection[7] . The text does not impose any direct prohibition on this business model. Neither does the e-privacy directive, which governs the placing of cookies on the terminals (computers or telephones) of Internet users[8]. Consequently, the professionals concerned have remained free to imagine that with sufficient effort, they would manage to ensure that their data processing complies with European requirements. In the end, this may not be possible.

One of the most fundamental requirements of the GDPR is that there be lawful basis. Once those that have no chance of being applicable in the area of interest are removed, Article 6 suggests the following possibilities:

"The processing is lawful only if, and to the extent that, at least one of the following conditions is met:

a) the data subject has consented to the processing of his/her personal data for one or more specific purposes;

(b) processing is necessary for the performance of a contract to which the data subject is a party (...);

(f) processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party, except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.

The hurdle may be insurmountable for "retargeting" specialists such as the French giant Criteo or data brokers. Such companies are currently under investigation by the French and Irish data protection authorities[9]. Their situation is particularly critical because they trade in information from Internet users without providing any service or being in direct contact with them. It is difficult to

6 The CSA is the Conseil Supérieur de l'Audivisuel, a regulatory body for television and radio. The CNIL is the Commission Nationale de l'Informatique et des Libertés, the French data protection authority.

7 See the 23rd study of the e-pub Observatory of the Syndicat des régies internet, on sri-france.org. Online advertising will reach 5.862 billion euros by 2019. Most online advertising is personalized.

8 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector.

9 "RGPD: the CNIL investigates Criteo", nextinpact.com article of March 10, 2020.

see why a user who correctly represents the situation *would consent to* expose his privacy for their benefit.

The "legitimate interest pursued by the data controller" would seem to be the most serious avenue for them. The G29, the forerunner of the European Data Protection Board (EDPB), also recognized "the economic interest of a company to know as much as possible about its potential customers in order to better target advertising for its products or services"[10]. But this was only the starting point of the reasoning. The interest thus identified must then be weighed against the rights and freedoms of the person concerned: this is the whole specificity of the lawful basis f). However, the G29 considered further on that the processing of targeted advertising, which is particularly intrusive, leads to an unfavourable balance[11].

Companies like Facebook or Google seem to be in a slightly better position. They are in direct contact with their users and provide them with a pseudo-free service in exchange for access to their personal data. They can take advantage of this position to ask Internet users to consent to the processing of targeted advertising (I). They may also take the more radical view that a user who takes advantage of a service without a grant has, in so doing, agreed to be exposed to advertising messages: what he does not pay in euros, he pays for in other ways (II). However, the first of these positions has already failed in the French courts. The second has not yet been the subject of a national or European decision.

I - Exposure to advertising as a faculty: special consent to data processing

Google had chosen to base its data processing for targeted advertising purposes exclusively on the consent of users. Following collective complaints by the associations La Quadrature du Net (LQN) and None of Your Business (NOYB), the CNIL, in the most important decision in its recent history, was led to rule on the relevance of this choice[12]. The response took the form of an administrative sanction in the amount of 50 million euros.

In this case, the CNIL examined the process by which the new purchaser of a phone powered by an Android operating system is invited to open a Google account, if he does not already have one. Some points of the decision, very important in the absolute, will not be developed here. In particular, the lack of clarity in the privacy policy is not a problem specific to business models based on targeted advertising. Moreover, it is a grievance that can theoretically be remedied. The same is not true of the Commission's criticisms of the chosen lawful basis.

At the time of the account creation, Google checked by default a box by which the Internet user agreed to be addressed advertisements in adequacy with his centers of interest. This implied that his online activities, searches on the engine, choice of YouTube video, travel history ... were used to reveal his tastes. If the user left the default choices unchanged and clicked the "next" button, a "pop-up window" would appear, which stated: "*This Google Account is set up to include personalization features (such as recommendations and personalized ads), which are based on information stored in your account. To change your personalization settings and the information stored in your account, select More options*"[13]. The user is then reminded quite clearly of the consequences of his choice, or

10 G29, Opinion 06/2014 on the notion of legitimate interest pursued by the data controller within the meaning of Article 7 of Directive 95/46/EC, 9 April 2014, p. 27.

11 Ibid, p. 35, "Scenario 2". The example imagined by the G29, which features a site selling pizzerias, nevertheless involved much less powerful treatments than those conducted by Google or Facebook.

12 Deliberation SAN-2019-001 of January 21, 2019 : ECC, 2019, No. 5, p. 31, and No. 6, p. 28, note by N. Metallinos.

13 Extract from the above-mentioned deliberation; JCP G, 2019, n° 12, p. 608, obs. A. Bellotti; JCEP E, 2019, n° 6, p. 33, obs. J. Deroulez; Dalloz actu. 30 January 2019, obs. O. Tambou; Dalloz IP/IT, 2019, n° 3, p. 165, obs.

rather of his previous non-choice, and given a chance to amend it. In practice, he didn't take it, since everyone's obsession in such cases is to get to the end of the registration process as quickly as possible, by clicking on the most pleasant looking button as soon as it appeared, without any further ado. The narrow elite attentive to these issues could, however, show their vigilance at that moment or, failing that, go at any time to the account settings once created to deactivate the targeted advertisement, which then turned into a simple contextual advertisement. Contextual advertising consists, for example, in displaying a commercial message on the margin of a search query linked to the words that have just been typed (e.g. "hotel in Marrakech"), without trying to identify the particular interests of the person for whom it is intended: this is a return to the Stone Age of advertising, the one in which television is currently blocked, much to Mr. Riester's chagrin[14].

Google had therefore skillfully saved appearances: it was possible to *uncheck the* box, but those who twice missed the opportunity to do so were caught in the net of custom advertising. He could get out on simple request, because consent to data processing is always revocable (art. 7.3 of the GDR), but he would never do so.

However, this was forgetting Recital 32 of the Regulation, which states: "*Consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement to the processing of personal data relating to him or her, such as by a written statement, including by electronic means, or an oral statement. This could include ticking a box when visiting an internet website (...)*". The CNIL therefore recalled that an *opt-in* is necessary. An *opt-out*, even a clever and relatively elegant one, would not be enough. Its decision has been confirmed in all respects by the Conseil d'État[15] . The Google company must thus convince the Net surfer to actively check the box by which he accepts to be recipient of targeted advertisements.

This would have been very simple, if it had been possible to make it a condition of access to the pseudo-free service. However, article 7.4 of the GDPR states: "*When assessing whether consent is freely given, utmost account shall be taken of whether, inter alia, the performance of a contract, including the provision of a service, is conditional on consent to the processing of personal data that is not necessary for the performance of that contrac*t".. As the EDPB points out, the "coupling" of the data processing and the service is not absolutely prohibited, but the expression "*utmost account"* means that it will only be allowed in "*highly exceptional*" cases[16]. One of these extremely rare cases, according to the EDPB, would be the case where there is "*an equivalent service offered by the same controller which does not imply consent to the processing of personal data for additional purposes*"[17].

A question then arises, to which the EDPB unfortunately does not answer: can the alternative service free of advertising tracking be invoiced? Can a company offer the same service, at its choice, "against payment in data" (formula A) and "against payment in euros" (formula B)? The answer is doubtful. Assuming that the supervisory authorities accept the approach in principle, which is not certain, they would probably control the price charged in formula B. If it were too high, they would see an overall result that would push Internet users towards Formula A while extorting their consent, which would be illegal.

A similar problem occurs with cookies. Many sites are still struggling to make the refusal of cookies for advertising purposes as painful as possible for the Internet user. An e-privacy regulation was

14 It is also a model that meets online. It is for example that of the search engine Qwant.
15 EC, June 19, 2020, No. 430810.
16 EDPS, Guidelines 05/2020 on consent under Regulation 2016/679, 4 May 2020, §35.
17 Ibid, §37.

supposed to succeed the directive of the same name[18] . It was supposed to provide the possibility for Internet users to refuse once and for all this type of cookies in a general setting of their browser. Who would be deprived of it, if it were not to lead to any negative consequences? The EDPB has indeed just specified that it is forbidden for a site to subordinate its access to the acceptance of advertising cookies[19]. The situation becomes the following: you want to access a Google service, or an online media? Would you be so kind as to tick the box by which you agree to have your interests collected, compiled and analyzed? If you don't want to do this, please note that the service will work perfectly... but the ads that will be displayed will be much less exciting! You don't care? Ah...

In this context, the designers of the Android registration path and cookie banners obviously do not try to find out what the Internet user really wants, if he accepts the *deal that is* proposed to him. Enter with payment with your data... or enter for free? There is *no deal*.

The reality is that the 6a lawful basis in the GDPR, consent, was not designed for such a situation. Do you wish, after a purchase on an e-commerce site, that he remembers your bank details to speed up a next purchase? This is a question that really accepts two answers. Would you like your municipality to collect and keep your email address to notify you when road work is going to take place near your home[20]? Do as you please. Your children's school will decorate its next newsletter with a few class photos, will your offspring be able to appear in it? It's up to you.

Google or Facebook services are not really free: you pay for them with data. If we accept the very principle of such a model - but do we accept it? - then it makes no more sense to refuse advertising tracking than to have a drink on the terrace of a café and then tell the waiter that you don't "agree" to pay the bill. The most adequate basis of legality is quite different.

II - Exposure to advertising as an obligation: the necessity of the treatment for the performance of the contract

Let's leave Google's defense strategy before the French authorities for Facebook's defense strategy before the Irish authorities. Banks have their tax havens, data processors their information havens: in Europe, the nirvana is in Dublin. On the desk of the Irish data protection authority, the dust peacefully piles up on files bearing the names of all the world's digital giants. The social network founded by Mark Zuckerberg is accused by the aforementioned associations LQN and NOYB, among others, of carrying out targeted advertising processing without respecting article 6 of the GDPR.

But on what basis of legality does the company claim to operate? The privacy policy, which is particularly opaque, does not allow even an attentive reader to answer this question[21]. However, in an open letter intended to denounce the bogging down of the proceedings before the Irish authority, NOYB revealed the social network's line of defense[22]: "*the procedures that were triggered by three complaints filed by noyb.eu two years ago (within the first hours of the GDPR becoming*

18 See the proposal for Regulation 2017/0003 of January 10, 2017 replacing the above-mentioned Directive 2002/58/EC.

19 Ibid, §39.

20 Example taken from §18 of the above-mentioned guidelines.

21 The First Level Privacy Policy devotes a specific section to the lawfulness grounds employed, and cites all those available in the GDMP (including the protection of vital interests or the public interest), en bloc and without linking them to any of the purposes previously presented. The "learn more" button provides more detail, but does not specifically provide the basis for advertising tracking treatments.

22 https://noyb.eu/en/open-letter, document dated May 24, 2020.

applicable), the Facebook Group openly acknowledges that it simply switched from highly regulated "consent" to an alleged "data use contract". This contract allegedly obliges Facebook to track, target and conduct research on its users. According to Facebook, this switch happened at the stroke of midnight when the GDPR became applicable".

Nothing more is revealed about what the outlines of this *data use contract* would be, but it is likely to present the use of personal data for advertising purposes as the consideration for the use of the service. It is indeed a synallagmatic contract for valuable consideration. The lawful basis is then 6b: "*processing is necessary for the performance of a contract to which the data subject is party ".*

And this is the reality of the underlying business model[23]. However, cases using 6b are usually situations in which treatment is necessary for the proper performance of an obligation on the *professional*, and not *on the client*. The CNIL thus evokes the classic example of an e-merchant forced to process his client's banking data and postal address to collect his payment and deliver the order[24]. In our context, it is the customer who would be supposed to carry out his obligation to expose himself to targeted advertising. The CNIL is very hostile to such a reasoning: "*a treatment of advertising targeting on an online service cannot, as a general rule, be considered as objectively necessary for the execution of the contract concluded with the persons concerned, even if the treatment is mentioned in the general conditions of use of the website. Indeed, the use of the service is not conditioned by the implementation of the advertising targeting processing and the fact that this processing is necessary with regard to the business model of the organization or to the economic viability of the website is not sufficient to make it necessary for the execution of the specific contract concluded with the data subjects*". The EDPB, for its part, has specifically devoted guidelines to this question. In particular, it states: "(...) *Article 6(1)(b) cannot provide a legal basis for online behavioural advertising simply because such advertising indirectly finances the provision of the service. Although such processing may contribute to the provision of a service, it is not in itself sufficient to establish that it is necessary for the performance of the contract in question (...)*[25].

By refusing to see exposure to targeted advertising as a service to be paid for by the Internet user within the framework of a synallagmatic contract for valuable consideration, the EDPB is clearly seeking to protect the user as well as possible. But other people want to do him good, such as the TGI of Paris. Google having claimed that consumer law did not apply to users of its services, since they are offered free of charge, the court replied as follows: "*it follows from th*e *foregoing that, if the company Google offers to users of the disputed platform services without monetary consideration, it markets for consideration to partner companies, advertisers or merchants, data, whether personal or not, submitted free of charge by the user when registering or browsing and using this "Google+" device. Thus, a service without monetary payment cannot be considered as a completely free service, the provision of data collected free of charge and then used and valued by the Google company must be analyzed as a "benefit" within the meaning of Article 1107 of the Civil Code, which is the consideration for that which it provides to the user, so that the contract concluded with the Google company is a contract for consideration and not a contract for free"*[26].

Can accepting to be exposed to personalized advertising after having undergone data processing revealing one's centers of interest constitute a contractual service or not? To answer yes is to place

23 Note that such an approach makes it necessary to adhere to general terms and conditions and therefore the creation of a user account. It could be difficult to adopt it in certain sectors, such as pseudo-free online media displaying targeted advertising, which could hardly ask the Internet user who occasionally visits them to create dozens of different accounts to carry out his press review. A solution would then consist in creating identity federations grouping together numerous partner magazines.

24 https://www.cnil.fr/fr/le-contrat-dans-quels-cas-fonder-un-traitement-sur-cette-base-legale.

25 Guidelines 2/2019 on the processing of personal data under Article 6(1)(b) of the EDR in the context of the provision of online services to data subjects, version 2.0 of 8 October 2019.

26 TGI of Paris, judgment of February 12, 2019.

the Internet user under the aegis of the Consumer Code. Answering no means protecting his or her privacy - including, perhaps, against his or her will. The approach of the EDPB and that of the TGI of Paris are clearly incompatible. A single French or European court that would be seized in turn in both areas would find it difficult to allow this inconsistency to persist.

The return to harmony can only take two paths.

The first is to consider that this business model is socially harmful. This is tantamount to taking a strong position, of a political nature, which is difficult to hide behind a seemingly purely technical interpretation of section 6 of the GDPR[27] . The EDPB does not entirely disguise this, as he states in the above-mentioned guidelines: "*personal data should not be considered as a tradable commodity*"[28]. The old debate on the real or personal nature of the individual's right to his or her data is not very well invoked here. Privacy is not a commodity, yet it is permissible to give access to it by contract in return for payment[29]. Radically forbidding any form of monetization by the individual of his data is a perfectly admissible social choice, but one that should have been left to the European legislator. It is all the same a question of preventing an individual, even supposing that he is well informed, aware of the consequences and voluntary, from making use of his freedom. The EDPB and the CNIL have, in fact, already enacted this prohibition: the combination of their doctrines presented in the two parts of this study is implacable. This business model is a suspended death, which only has a few more steps to go before it collapses - unless national or European judges adopt other analyses than the EDPB, which is perfectly conceivable. In such a scenario, "pseudo-free" services convert to simply contextual advertising or become paying, and the discordance with consumer law disappears by itself when the *business model* dies out [30].

The second, more liberal way is to allow this model, but with a framework. To take it supposes clearly abandoning the lawful basis "consent" in favour of "necessity for the performance of the contract": if the data is the contractually defined price, one cannot escape payment because one has refrained from ticking a box when entering the service. Under constant law, the combined wrath of the GDPR (the principle of minimization, protection of privacy by default, retention periods, etc.) and consumer law (notably through the prohibition of unfair terms) could already curb a large proportion of abuses, and (very) gradually impose the most virtuous models of the kind. Normative intervention would naturally make it possible to go faster and further.

Above all, in both cases, an intervention by the European legislator would ensure a homogenous and simultaneous treatment of this entire economic sector. Otherwise, the rules will take years to be clarified before the CJEU, leaving professionals and users to deal with variable control priorities and the sometimes insufficient resources of the European data protection authorities.

Europe is now trying to establish a data protection model that can serve as a reference throughout the world. This noble ambition requires it to confront the most difficult issues in this area without trembling. The first of these is the legality of funding through targeted advertising.

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27 The European Parliament has understood the political nature of this debate, having "invited the Commission to prohibit platforms from displaying micro-targeted advertising" on the occasion of a resolution of 18 June 2020 on competition policy (§105).

28 Ibid, §54.

29 For a distinction between the "economic" and "moral" sides of personality rights, V. J. Antippas, "Propos dissidents sur les droits dits 'patrimoniaux' de la personnalité", RTD. com. 2012, p. 35.

30 The revenue per user is much lower for simply contextual advertising than for targeted advertising. It is therefore not possible to assume that the switch from the second model to the first will be sufficient to finance all current pseudo-free services.