

# World Communications Regulation Report

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## News

**Margin Squeeze — Landmark Judgment on the Application of Abuse Rules.** The CJEU has rejected an appeal by Deutsche Telekom against an earlier judgment that the company had imposed a margin squeeze in breach of EU competition rules. (Page 9)

**Parliament Sidesteps Courts to Charge EU€180m for 2G Licenses Renewal.** Three telcos are challenging in court the constitutional validity of the law passed by the Belgian Parliament which will force 2G operators to pay additional renewal fees for their 2G licenses. (Page 4)

**EU Panel Partially Approves Israeli Data Protection Adequacy.** A European Commission committee has decided Israeli law adequately protects the privacy of EU citizens' personal data that are transferred to Israel. (Page 13)

**French Agency, Google to Cut Restrictions in Online Ad Service.** The French Competition Authority has accepted commitments from Google Ireland and Google Inc to remedy anti-competitive practices in its AdWords online advertising service. (Page 9)

**Digital Economy Act Under Challenge.** Two ISPs have launched a court challenge to the copyright enforcement provisions of the Digital Economy Act 2010, while Ofcom has now closed its consultation on the Initial Obligations Code. (Page 19)

**Supreme Court Delays Hearing on Vodafone Tax Case.** India's Supreme Court agreed to put off its hearing on Vodafone's tax case after the company said it needed time to scrutinize the US\$2.5 billion tax bill relating to Vodafone's purchase of a majority stake in Hutchison Essar in 2007. (Page 11)

**Spanish Authority Determines Funding Criteria.** The Telecommunications Market Commission in Spain establishes criteria for determining whether operators are required to fund state-owned broadcasts. (Page 16)

**Irish Courts Lack Power to Order ISPs to Terminate Net Access.** Irish copyright laws do not allow courts to order ISPs to interrupt, divert or cut off internet access of customers engaged in alleged unlawful P2P file-sharing. (Page 11)

**Regulator Approves Nationwide Fiber-Optic Network.** Italy's antitrust regulator reversed earlier statements and gives thumbs up to a proposal from telecom operators to join forces to create a nationwide fiber-optic network. (Page 14)

## Commentary

**Czech Website Liable for Forum User Comments.** By Andrea Jarolímková and Vojtech Chloupek, Bird & Bird, Prague. (Page 32)

**Guarding Data Against Security Breach.** By Ross McKean, Baker & McKenzie, London. (Page 33)

**Swedish Guidelines on Public Sector Use of Social Media.** By Henrik Nilsson, Bird & Bird, Stockholm. (Page 34)

**Cyber Criminality in Turkish Law.** By Esra Dündar-Loiseau, Attorney at Law, Istanbul. (Page 35)

## Domain Name Briefs

**News from ICANN, Colombia, France.** Hogan Lovells LLP, in Paris, reports on recent domain name activities around the world. (Page 25)

## Special Report

**Industry Launches Self-Regulatory Program for Online Behavioral Advertising.** By D Reed Freeman, Jr, Julie O'Neill, and Kimberly S Robinson, Morrison & Foerster. (Page 30)

# Special Report

## Industry Launches Self-Regulatory Program for Online Behavioral Advertising

By *D Reed Freeman, Jr, Julie O'Neill, and Kimberly S Robinson, Morrison & Foerster*

On October 4, 2010, media and marketing associations representing more than 5,000 leading US companies announced the launch of their highly anticipated Self-Regulatory Program for Online Behavioral Advertising (“the Program”). The sponsors of the program (the American Association of Advertising Agencies, the American Advertising Federation, the Association of National Advertisers, the Direct Marketing Association and the Interactive Advertising Bureau), supported by the Council of Better Business Bureaus (CBBB) and other industry members, hope that it will not only give consumers a better understanding of, and enhanced control over, online behavioral advertising,<sup>1</sup> but also protect the industry from unnecessary governmental intervention.

### What Prompted the Program?

Industry and regulators have taken turns at imposing guidelines on online behavioral advertising for more than ten years. These efforts began in 1999, when network advertisers joined to create the Network Advertising Initiative (NAI), developing self-regulatory guidelines that required the disclosure, within a company’s privacy policy, of its behavioral advertising practices and the provision of an easy-to-use opt-out link. The Federal Trade Commission (FTC) initially endorsed the NAI’s guidelines (which were updated from time to time over the years); however, as the use of online behavioral advertising expanded and, in its eyes and those of privacy advocates, became more intrusive and less transparent, it decided that government-mandated “guidelines” were necessary. Accordingly, in February 2009, FTC staff issued Self-Regulatory Principles for Online Behavioral Advertising, outlining recommended practices. The FTC staff’s report accompanying the principles encouraged industry members to develop even more consumer-friendly processes for notice and control.

Industry responded quickly. Represented by the organizations named above, it released its own Self-Regulatory Principles for Online Behavioral Advertising (“the Principles”) in July 2009. The Principles largely mirror those issued by the FTC. They call for:

- (1) **Education** for both consumers and businesses about online behavioral advertising and the Principles;
- (2) **Transparency** about the data collection and use practices associated with online behavioral advertising,

ing, by providing consumers with clear, meaningful and prominent notice through multiple mechanisms;

- (3) **Consumer control** over whether data is collected and used or transferred for online behavioral advertising purposes, provided through easy-to-use opt-out mechanisms;
- (4) **Security** for, and limited retention of, data collected and used for online behavioral advertising;
- (5) Consumer consent for **material changes** to online behavioral advertising data practices;
- (6) Limitations on the collection and use of **sensitive data** for online behavioral advertising; and
- (7) **Accountability** for entities collecting and using data for online behavioral advertising, including mechanisms for enforcement of the Principles.

The associations’ release of the Principles was just the first step. FTC officials repeatedly warned that industry’s failure to launch appropriate processes could result in action by the agency, including a recommendation for legislation. The October 4 announcement represents industry’s response to that warning: the implementation of the Principles into practice in the form of the Program.

### What Types of Entities Does the Program Cover?

The Program covers the different types of entities that work together to deliver targeted advertising to consumers based on their online behavior. These include websites (i.e. publishers), as well as the advertising service providers (such as ad networks and agencies) that collect and use behavioral data to deliver advertisements for a website. Although the Program places compliance obligations on publishers, a publisher may choose to comply through its ad network, agency or other service provider, such as by contractually requiring the vendor to participate in the Program (and then monitoring its compliance). Another option for a publisher is to place the distinguishing icon (described below) on its own website and direct those who click on it to a notice containing the disclosures required by the Program.

Program participation is voluntary, except for members of the Direct Marketing Association. The American Association of Advertising Agencies and the Interactive Advertising Bureau may also require member participation, but they have not yet finalized any such requirement.

## What Does the Program Require?

The Program has five major components. They are described in detail in the Program's implementation guidelines. In summary, they are:

### I. The Advertising Option Icon

The Program requires participants to use an icon and accompanying language, displayed in or near online ads or on web pages where data is collected and used for behavioral advertising. The icon is:



The icon indicates that the advertising is covered by the Program. By clicking on it, a consumer is linked to an explanation of the data collection and use practices associated with the advertising, as well as an easy-to-use opt-out mechanism.

The icon represents a major shift in how a company notifies consumers of its online behavioral advertising practices (including their choices with respect to them). Historically, sites have included such notice solely within their privacy policies. The icon provides for far more conspicuous notice and choice.

The fee to use the icon is US\$5,000 annually.<sup>2</sup>

### II. A Second Consumer Choice Mechanism

Once use of the icon has become common, consumers will also be able to visit a single, industry-developed site to opt out of some or all participating companies' online behavioral advertising.

### III. A Dedicated Site

The site, <[www.AboutAds.info](http://www.AboutAds.info)>, has been developed to provide both consumers and companies with information about online behavioral advertising and the Program (companies can join the Program through the site). Both the FTC and legislators have, in recent months, expressed dismay over consumers' apparent ignorance about how information about their online behavior is collected and used. The site is intended to help address that concern and to familiarize consumers with the advertising option icon.

### IV. Mechanisms for Accountability and Enforcement

Beginning next year, the CBBB and the Direct Marketing Association will begin to monitor and enforce Program compliance. In addition, the CBBB will identify companies that are engaged in online behavioral advertising and not following the Program. These organizations will also manage the resolution of consumer complaints.

## V. Educational Campaigns

Over the coming months, the participating trade associations will conduct educational campaigns targeted at both consumers and businesses. These will include webinars and other practical guidance for interested businesses on how to understand, implement and comply with the Program's requirements.

## Is Participation Recommended?

In a word, yes. If a company operates a website and engages a service provider to deliver online behavioral advertising, it should seriously consider contractually requiring the provider to participate in the Program (and then monitor its compliance). If a company delivers behaviorally-targeted advertising directly, it should also apply directly for Program membership. Why? The Program is designed to deliver increased levels of transparency and consumer choice, which the FTC has been calling for since it published its own principles back in February 2009. By adhering to the Program's requirements, an entity will be in good company for the time being, meeting the industry's newest standard for transparency and consumer control. Moreover, participation will give companies involved something positive (and innovative) to say about consumer transparency and choice. If an entity delivers its own advertising, participation will also keep it from being called out by the CBBB for a failure to comply with industry standards.

All that said, a decision to participate should not be made lightly. Participation involves strict adherence to the Program's licensing terms, as well as proper use of the icon. In addition, a company's use of the icon could be viewed as an implied claim that it meets all of the Program's requirements. A failure to fully comply with them could subject it to an FTC enforcement action, just as a failure to keep the promises made in a privacy policy could give rise to a cause of deception.

The Program is innovative, and hopes are high that it becomes widely adopted. If it does, then industry can show the government that it can regulate itself and that intervention is therefore unnecessary. The proof will be in the level of participation by the end of this year. If the FTC (or Congress, for that matter) believes that participation is inadequate, it could step in and take action.

### Notes

<sup>1</sup> "Online behavioral advertising" is defined by the Principles underpinning the Program as "the collection of data from a particular computer or device regarding Web viewing behaviors over time and across non-affiliate Web sites for the purpose of using such data to predict user preferences or interests to deliver advertising to that computer or device based on the preferences or interests inferred from such Web viewing behaviors. Online behavioral advertising does not include the activities of First Parties, Ad Delivery or Ad Reporting, or contextual advertising (i.e. advertising based on the content of the Web page being visited, a consumer's current visit to a Web page, or a search query)." See <http://www.iab.net/media/file/ven-principles-07-01-09.pdf> at pp 10-11.

<sup>2</sup> There is no fee for publishers with annual revenues from online behavioral advertising of less than US\$2 million.

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