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# Building Compliance, Manufacturing Nudges: The Complicated Trade-offs of Advertising Professionals Facing the GDPR

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**Abstract.** This chapter examines nudges from a producer perspective. Our study of GDPR compliance by online advertising professionals shows that the design of consent collection interfaces is the point of crystallization of technical, economic, legal and moral issues. We can thus in certain configurations consider nudges as "impossible designs" seeking to integrate contradictory objectives and moralities, rather than the only result of self-interested calculations and intended actions.

In Spring of 2018, new dialog boxes popped up all over the web, asking European Web users, in various formats and terms, for permission to collect their personal data (mainly in the form of cookies, hence their labelling as ‘cookie banners’). These interfaces offer choices: that of accepting or refusing cookies, or that of managing personal data collection and usage. But most of these interfaces are designed to secure

a positive sign, a consent, on the part of the users. They are a typical instance of nudges, or even dark patterns, that is, intentionally misleading or unbalanced interfaces, relying on low-level cognitive strategies intended to influence the supposedly free choice of Internet users. Many empirical research studies emphasize the massive and systemic nature of these practices (Kampanos et Shahandashti, 2021 ; Krisam et al., 2021 ; Mathur, Kshirsagar et Mayer, 2021 ; Santos, Bielova et Matte, 2020).

These interfaces are the direct consequence of the General Data Protection Regulation (GDPR), ratified in April 2016 and entered into force in May 2018. The text is intended to cover all the issues related to the protection of personal data: its main ambition is to moralize the practices related to the collection and processing of personal data (Albrecht, 2016) after long years of controversy and disputes. To this end, the regulation grants a central place to the consent of individuals, prior to the collection and use of personal data. In the field of online advertising, the GDPR marks a break with established conventions and practices. Before the implementation of this framework in 2018, most of the collection of personal data took place there with the tacit consent of the user. However, while the GDPR clearly establishes the need to obtain “free, specific, informed and unambiguous” consent for advertising, it does not explain the concrete conditions for its implementation. Experienced as a threat by online advertising players, the obligation to obtain consent has been the subject of a series of translations, interpretations, and transpositions during the first year of the GDPR.

At the heart of these translations, consent interfaces have become the focal point and the place of crystallization of a series of normative, infrastructural, cognitive, and moral issues that shape the scope and effective practice of personal data protection. By studying the organizational processes and decisions leading to the development of consent interfaces, we have the opportunity to examine the generative side of nudging.

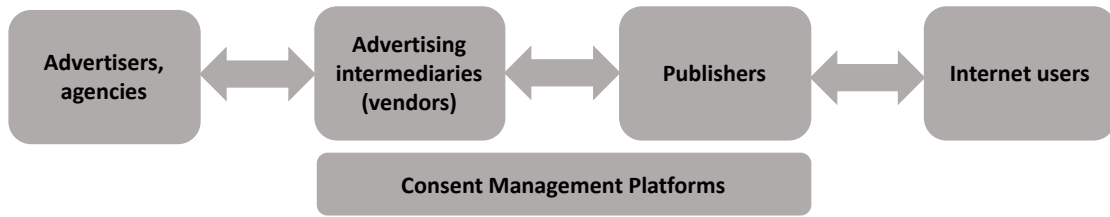
In the specific case, consent interfaces incorporate arbitrations between legal, economic, and ergonomic rationalities: we show that nudges do not emanate from a malicious, unequivocal intention, but rather from tensions between contradictory rationalities and moralities.

This is what we examine in this chapter. The first section of the article is a brief reminder of the emergence of regulation by consent in the field of online advertising. In the second section, we describe the process of constructing conformity and the result of this process. The third section questions the moral scope of the model of regulation by consent and more generally of the integration of moral concerns in the market.

## **1. Our approach**

Between April and July 2019, we conducted 15 interviews with professionals involved in bringing their company into compliance with the GDPR. They work in organizations that occupy three positions in the online advertising value chain. Publishers of websites and mobile applications (n=6) are in direct contact with users; they are responsible for designing and managing consent collection interfaces, for themselves and for their partners (or “vendors”), who constitute the second category of actors (n=4). The latter occupy a position of intermediaries in the online advertising market. We also interviewed four managers of Consent Management Platforms (CMP), which market software solutions for collecting and storing consent online for publishers. This new category of economic actors is a direct consequence of the GDPR. The diagram below helps to situate publishers, advertising partners and CMPs in the simplified advertising value chain:

Figure 1. Simplified online advertising value chain



The second empirical material on which this study is based is a corpus of banners. We have designed a tool capable of automatically collecting an image copy of a web page. We applied this tool to the home pages of the 500 most visited French sites in France according to the ranking of the company Alexa in France, in March 2019. This dataset was then analyzed manually to measure the prevalence and visibility of consent interfaces, and the choices offered in first intention, this method leaving aside the secondary interfaces (settings and detailed information, cookie and privacy policy).

## 2. Regulating advertising through consent

In Europe, legislation on personal data was put in place from the mid-1990s. The 1995 directive on the protection of personal data (95/46/EC) and article 8 of the Charter of Fundamental Rights of the European Union constitute the protection of personal data as a fundamental right. The so-called ePrivacy Directive, adopted in 2002 and amended in 2009 (2009/136/EC), directly targets the online advertising sector, requiring that the use of personal data in this sector be based on consent – taking up a request formulated by associations for the defense of individual freedoms and privacy (Christou et Rashid, 2021). In practice, the entry into force of this provision, in 2011, led many websites to add a discreet banner informing users of the collection of personal information in the form of cookies that continuing to browse constitutes consent.

As Jockum Hildén (Hildén, 2019) shows, this first attempt to regulate online advertising through consent is perceived as a failure, both by the legislator and by

privacy associations: consent is defined too vaguely, and the penalties are not significant. In his investigation into the development of the GDPR, Hildén underlines the importance, in the eyes of the legislator, of correcting these shortcomings. The GDPR thus strives to define the criteria characterizing valid consent, first and foremost its “explicit” nature. In addition, it introduces significant penalties – up to 4% of global turnover – in the event of non-compliance with the regulations. Voted in April 2016 and entered into force on May 25, 2018, the GDPR offers a regulatory model that actively and directly involves individuals, which represents a novelty for advertising, which is more accustomed to discussing with consumer representatives than with consumers themselves. The regulation thus established is clearly part of a liberal perspective of market extension and individual accountability, while recognizing the fundamentally asymmetrical nature of market relations (to the detriment of consumers) and the need to put in place mechanisms to rebalance these reports by confirming or extending individual rights: consent, right to information and access to data, rectification, and erasure, right of opposition. Respect for these rights should compensate for the imperfections and excesses of market practices (predation, abusive exploitation, misleading and fallacious practices, etc.) and contribute to moralizing the market.

### **3. The crafting of consent interfaces**

For online publishers and advertising vendors, GDPR compliance is built in two distinct arenas. The first compliance arena is managed by advertising vendors, within a professional association (the Interactive Advertising Bureau, or IAB) and has led to the publication of a set of standards and technical specifications: The Transparency and

Consent Framework or TCF. It only interests us indirectly here, because it does not concern the design of nudges, but rather the technical and logistical conditions ensuring the proper circulation of consents in the complex and sophisticated infrastructure of online advertising (Mellet et Beauvisage, 2020). In fact, the TCF is mainly focused on the issues of circulation of consent, and it completely puts the issue of producing consent on the side (it just ensures that a consent given to a publisher also applies to its countless vendors).

Thus, it is up to the publishers of websites and mobile applications, in direct contact with Internet users, to bear the heavy and difficult task of designing consent collection interfaces, at the risk of non-compliance. Website publishers are responsible for the conditions for obtaining consent, under strong constraint: neither the regulations nor the Data Protection Authority (the CNIL in France) specify exactly how, in practice, to produce consent falling under a "manifestation of free will, specific, informed and unequivocal" (article 4), answering a question presented "in an understandable and easily accessible form, and formulated in clear and simple terms" (article 7). In addition, publishers are under strong pressure from advertising intermediaries, who are waiting for consent to feed their advertising value chain.

Our survey shows that publishers only engage in the development of these interfaces after May 2018. They do so in a dispersed, relatively isolated manner. Analyzing our landing page dataset provides good quantitative insight into publisher banner practices. Based on the visual examination of the 450 sites actually accessible, we evaluated two elements of the first interfaces: the choices and links offered, and the visibility of the banners. The first observation is that 32% of the sites examined do not include consent or cookie-related interfaces. These sites include e-merchants (Amazon, Ikea, etc.), pornographic sites, a few major web players (Whatsapp, Apple), and sites notoriously

concerned about respect for privacy (Qwant, Mozilla, Wikipedia). If for the latter, we can assume that they simply do not collect personal data, for the others, it is likely that the sites are not in compliance.

The second result is that most consent banners make it much easier to agree than to refuse. In the most extreme case, 28% of banners leave no choice to the Internet user: only a cross to close the consent interface is offered, often associated with a text stipulating that continuing to browse implies acceptance of the consent. use of cookies – this format corresponds to the interface model that spread after the entry into force of the ePrivacy directive in 2011. For the 72% of sites offering a choice, a great disparity in the presentations and formulations (“OK”, “I understand”, “I accept”, “Accept”, etc.) complicates the apprehension of each of these interfaces, by increasing their attentional cost. And above all, only 7 sites out of the 306 (2%), offer a refusal button next to the acceptance button; and even in this case, the refusal button is less visible than the other (typically: white background on white for one, and colored background for the other).

The third result of the analysis of the corpus of home pages is the very great heterogeneity of the interfaces, increasing the cognitive cost for the Internet user. First of all, on the 306 sites displaying a consent banner, the visibility is very variable (Figure 2): the consent interfaces are not very visible on a quarter of the sites, moderately visible on half of the corpus, and a last quarter of the sites have chosen to make them very visible, even blocking.

### **Banner visibility coding (highlighted in red)**



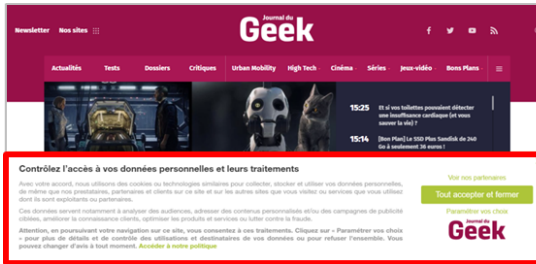
Low visibility: 23 %



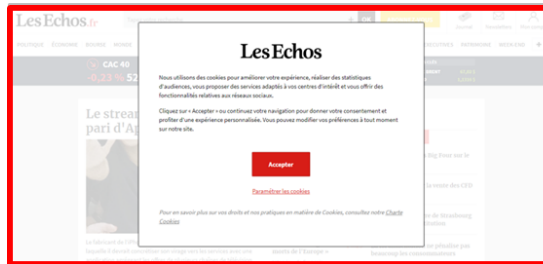
Medium visibility: 50 %



High visibility: 15 %



Full page (blocking) interface: 12 %



The formulations are also very variable, while understating the question of personal data. Thus, all the sites offer to "parameterize" or "configure" its cookies or its "preferences", mention targeting in the form of "personalized advertisements" and "centres of interest", and leave aside the terminology of "data", yet at the heart of the GDPR.

For publishers, the implementation of consent collection interfaces is not a straightforward operation, it is the result of arbitration, compromise, decisions. As the analyses within the field of *Law and Society*<sup>1</sup> have shown, the activity of interpreting the law is not like an operation of "neutral" application, but an activity leading to the convergence and collision of various normative registers. This "legal pluralism" is

<sup>1</sup> The Law and Society perspective shows that the legal regulations in force are the product of a certain interpretation of the legal rules of reference, operated by the organization and the actors that compose it (Edelman et Suchman, 1997). This theory of endogenous law starts from the existence of "inevitable ambiguities" of any legal rule resulting, following the interpretation carried out to implement it, in forging conformity to this rule (Edelman, 2007). It leads to looking at the activity of interpreting the law, not as a "neutral" application operation, but as an activity leading to the meeting of various normative registers (Bessy, Delpeuch et Pélisse, 2011).

particularly visible when the law must be articulated with other bodies of rules – technical norms, management standards, etc. – which is the case with online advertising. Consent banners are the frozen reflection of a combination of exogenous regulatory imperatives, and endogenous logics of maximizing the collection of consents, and integration into the commercial infrastructure of online advertising.

When configuring interfaces, publishers are confronted with three normative orders that they find difficult to reconcile: the regulatory interest, represented by legal advisers and legal intermediaries within the organizations themselves (corporate lawyers, protection delegates data, or data protection officers, DPO, whose function is established by the GDPR); the commercial interest, generally represented by the sales and marketing teams of advertising agencies; and the interest of the user, represented at the publishers by the developers and graphic designers in charge of the ergonomics of the sites and the design of the user experience (or User Experience, UX). In this balance of power, our investigation shows the primacy of commercial interests in these arbitrations. The attention of publishers is mainly focused on a key metric, systematically mentioned during our interviews: the consent rate, i.e., the proportion of Internet users giving their consent. For publishers deriving the majority of their income from advertising, any drop in the consent rate translates into a drop in income: "There are even companies that largely prefer to pay 4% of turnover [the maximum amount of foreseen sanctions], rather than losing 80% of the consents. The calculation is done quite quickly". (Vendor 1, Manager).

#### **4. The moral embeddedness of nudges**

One might be tempted to interpret the supremacy of economic interests as being the strict reflection of a maximizing economic rationality in a context of insufficient

enforcement of the law. This interpretation is correct, but needs to be supplemented, insofar as it is embedded in various moral justifications. The interviews thus reflect the embarrassment of professionals in search of a position of balance between contradictory interests: maximizing the consent rate while preserving the legal markers of conformity (uncertain, in the absence of clear recommendations from the authority regulation), on the one hand, and considering the interests of users, on the other.

First, compliance corresponds for them to this point of balance between consent that is not too vitiated, the legitimacy of economic interests, and the risk of sanction:

*"In my humble opinion, today we are compliant, but we can do much better. That is to say that there are things to optimize [...], there are things on which we can put more effort. For example, unchecking boxes. Today we are checked by default. That can be considered a limit." (Publisher 2, chief technical officer)*

In a second register of discourse on consent, most interviewees oppose a justification of the commercial use of personal data, emphasizing the need for advertising revenue (and, according to them, user data collection) in the digital economy, and more broadly as a form of equity: "I don't think we realize what an Internet would be like without ads, it would be much more closed, it would be limited to an elite who could pay for it" (Vendor 2, Product Manager). Several respondents thus highlighted other moral principles pertaining to justice and equity, competing with that of privacy: the importance of advertising as a means of financing content, or the virtuous nature of the "open" programmatic advertising market as opposed to the closed worlds of Google and Facebook, in particular. The moral norm relating to the protection of privacy is thus hybridized with that of freedom of expression, fair competition between firms, or equality before the law.

Finally, professionals systematically raise a question: what if this regulation, materialized by consent banners, was experienced as an obstacle by Internet users themselves? As part of a liberal and contractualist tradition, the GDPR makes a double assumption. First, to regulate the data economy, the consumer must be brought into the game of the market – not as a participant in the market exchange but because the possibility of exchanges depends on her goodwill. Secondly, this means that, endowed with new rights, the Internet user would act as a “free and enlightened” citizen, as imagined by the regulations.

But is that really the case? Two figures of the Internet user collide in the process of designing interfaces. The user-as-a-clicker who authorizes or not the collection and processing of data is the main object of the attention of website publishers, and it is essentially through the click-through rate that she comes to existence. The user-as-a-citizen, on the contrary, remains an enigmatic figure: does she understand what is done with her data? Is she interested in it? To what extent should we explain to her how online advertising works? Little information exists on the point of view of Internet users. Surveys typically portray Internet users concerned with their privacy in general, among whom only a minority, between a quarter and a third according to the sources, declare that they take the trouble to bear the additional cost of clicks necessary to refuse the use advertising of personal data.

Publishers, for their part, find themselves forced to interpret the effects of the variations made on designs to build their own representation of the interest and understanding of Internet users. Several respondents thus expressed doubts about the way in which Internet users understand and perceive these interfaces which intervene in their browsing and create a screen between them and the pages they are trying to access. For an interviewed marketing manager, what some consider to be a misleading

design actually results from a desire not to over-solicit the user, in other words to offer her “the best experience” by making choices for her.

The horizon of simplicity and transparency for the user refers to a major problem of personal data protection and privacy policies, described by Helen Nissenbaum as the "paradox of transparency", under which the privacy policies of digital services will be less read and understood by users if they are more detailed. For activist Richard Stallman, "to restore the right to privacy, we must stop surveillance before it even comes to ask our consent".

## **5. Conclusion**

Regulating through consent is not restricted to a top-down enforcement of clear-cut rules by regulatory authorities: banners, by the discomfort they cause and by the background investments they require, materialize and delimit a new space of concerted action. They put at the heart of the advertising marketplace, and at the interface of professionals and consumers/citizens, the question of personal data protection. They are the last link in a long compliance process involving many players, and not just the regulatory authority and the lawyers of the concerned companies. This process of compliance is characterized by uncertainty, ambiguity, and the confrontation of contradictory norms and interests: the rules of law, business, and user experience.

Thus, consent banners can be considered, at least in the field of personal data protection, as *impossible designs* seeking to integrate contradictory objectives and moralities. However, exhibiting these contradictions is part of their role. To regulate the use of personal data by the online advertising industry, public authorities operate as they did in the fields of nutrition (Frohlich, 2017) or sustainable consumption

(Dubuisson-Quellier, 2017), by relying on the intersecting interests of consumers and firms, by nudging the stakeholders, and by creating the conditions for their alignment.

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