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Privacy rules should support investigative journalism

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Speech delivered at the IREP Forum, 12 December 2019, on “ID Unique, Fantasma ou Réalité?”

The GDPR’s opt-in rules for personalized advertising hurt the press, and hurting the press poses a threat for democracy. Perhaps news publishers should be exempt from the GDPR’s normal opt-in rules for personalized advertising. This would help support independent press and vibrant investigative journalism.

Four considerations lead me to this conclusion.

First, the recent [report of the Stigler Center at the University of Chicago](#) contains alarming conclusions on the health of local and regional press organizations, and investigative journalism. Ad revenues are on an inexorable downward spiral. Investigative journalism has the characteristics of a public good, and is generally under-produced by the market. Historically, newspapers have cross-subsidized quality investigative journalism through revenues earned on less-costly, headline grabbing, stories. This business model is threatened because news is no longer sold in bundles, but through individualized news feeds. Ad revenues are drawn toward sensational and edgy stories that attract clicks and are likely to go viral. The decline of local and regional news and investigative journalism leads to citizen disengagement from local politics, and favors closed-door cronyism in government that is anathema to democracy. The Stigler Center report recommends subsidies for news organisations based on media vouchers.

Second, the Stigler Center report concludes that relying on informed consent in an online environment is a dead-end in terms of a regulatory approach. [Helen Nissenbaum](#) has been saying this for years, but the Stigler Center report makes the point with a vengeance. Expecting people to have a clear understanding of complex data processing operations and give their free consent to those operations is simply pie-in-the-sky thinking. Most of us already know this intuitively, since every day we click “I accept” to new GDPR cookie notices that have popped up virtually everywhere. How those notices are presented, and the size of the respective buttons, doesn't really matter. What counts to most people is getting them out of their way as soon as possible. The Stigler Center proposes another approach, which they call “consumertarian default” rules. This approach seems similar to Helen Nissenbaum’s contextual privacy.

The third development is the [recent collapse of discussions](#) among Member States of the European Union on the proposed ePrivacy Regulation, meaning that we're back to square

one. One of the areas of disagreement is whether publishers should be allowed to make the acceptance of personalized advertising a condition to be able to access their services – the so-called “cookie wall”.

The fourth development is a [recent paper](#) by researchers from Northwestern, Boston University and the University of Colorado showing what the GDPR actually costs web publishers. Samuel Goldberg, Garrett Johnson and Scott Shriver studied application of the GDPR for a full year, and concluded that the GDPR was responsible for a 10% drop in revenues for publishers.

If you put these considerations end-to-end, several conclusions emerge:

One: the news industry is in trouble and that’s a very serious problem for democracy.

Two: a lot of people think that the opt-in regime is pointless in an online environment and should be replaced by something else.

Three: we have empirical evidence that the GDPR really does hurt ad revenues for publishers.

Four: the E privacy regulation negotiations are currently dead in the water and the European Commission needs to come up with a new proposal to move things forward.

It's not hard to see an attractive solution: We should cut some GDPR regulatory slack for news organizations in order to allow them to conduct personalized advertising **without an opt-in**. This would create a form of subsidy to help news organizations finance quality investigative reporting. Naturally, their processing of personal data for personal advertising would have to fall within reasonable limits, which basically boils down to using the Stigler Center consumertarian default rule approach, or Helen Nissenbaum’s contextual privacy approach. This approach will not save news organizations by itself, but it would help.

The Stigler Center report suggests that the biggest threat to fundamental rights doesn’t flow necessarily from how Google or Facebook handle our personal data, but instead from the progressive destruction of quality news and investigative journalism. Privacy often comes into conflict with freedom of the press (see the CJEU’s [recent decisions](#) on the right to be forgotten). In Europe, privacy and freedom of expression have equal constitutional value so they can be traded-off against each other. Cutting some slack on the privacy side in order to give the news publishing industry breathing room would be constitutionally acceptable, as long as it passes the proportionality test.