Bird & Bird & Adtech

The impact of tracking-related changes to iOS 14.5 and other key challenges on the horizon

Your Speakers

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Today - Agenda

- iOS 14.5:
  - what has actually changed and why does it matter?
  - industry challenges in France and Germany
- An update on the new ePrivacy regulation
- Key regulatory views across Europe, including:
  - France: now that the CNIL grace period is over, what to expect?
  - Germany: Publisher alliances and enforcement
- Future gazing – what's on the horizon that you need to prepare for, including the "death of third party cookies"?
- Q&A

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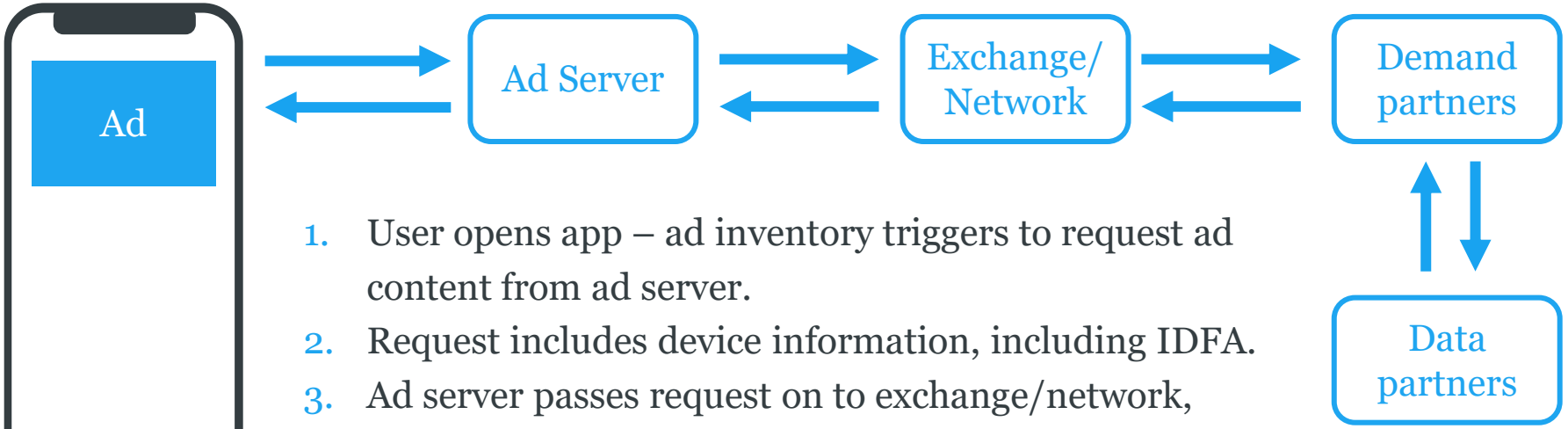
How did the ecosystem work before iOS 14.5?



1. User opens app – ad inventory triggers to request ad content from ad server.
2. Request includes device information, including IDFA.
3. Ad server passes request on to exchange/network, including IDFA.
4. Exchange/network passes request onto demand partners, including IDFA.
5. Demand partners share IDFA and other identifiers with data partners.

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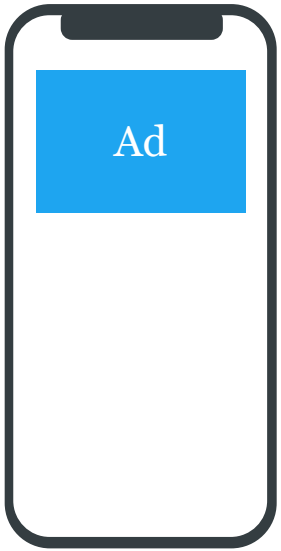
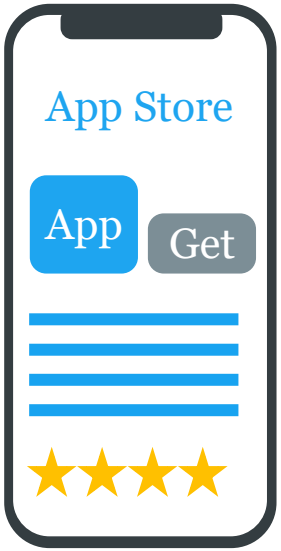
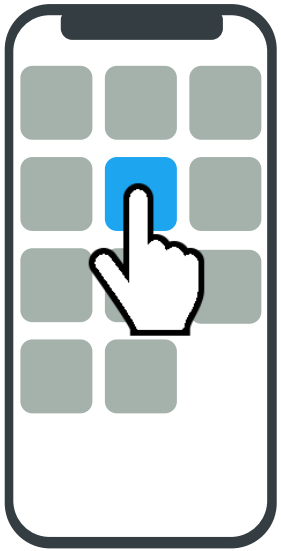
How did attribution work before iOS 14.5



In-app ad registers IDFA when the ad is clicked



User installs app from app store



On first launch, app sends IDFA to complete attribution.

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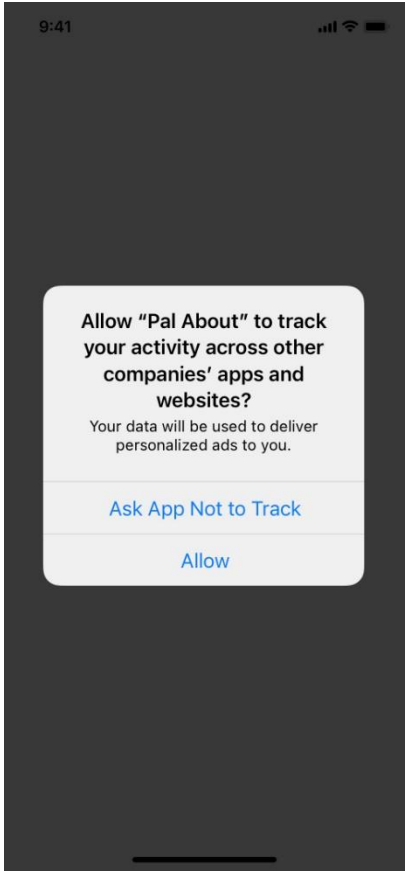
What has changed in iOS 14.5?

- New App Tracking Transparency (ATT) framework
- Apps must request opt-in consent before 'tracking' that user
- This includes accessing IDFA but also any other device identification techniques
- Some exceptions but very narrow (e.g. to prevent fraud)



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What has the impact been?

- Reported up to 90% opt-out rates
- No IDFA or device identifier available through mobile ad supply chain
- No IDFA or device identifier available to track conversions/provide attribution
- Significant revenue decline from app publishers reliant upon an advertising-supported model
- No IDFA or device identifier available to app publishers to use for cross-device tracking
- Challenges for audience extension
- Significant benefit for apps requiring login/registration

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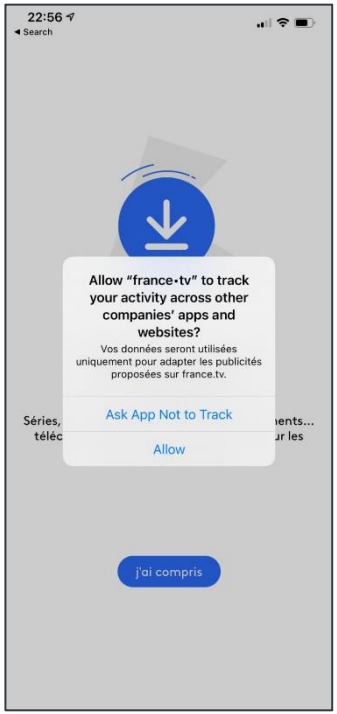
Regulatory action has already started

- IAB France, MMAF, SRI and UDECAM complained to the French competition authority (CMA) in October 2020
  - In March 2021, the French CMA denied a request for provisional measures seeking to block the roll out of ATT
  - Parties are working on their main arguments. The French CMA is expected to issue a final decision in 2 years (at least)
- In parallel, 9 industry associations, representing companies including Facebook, Axel Springer, the owner of Bild, Die Welt and Insider also complained to the German CMA in April 2021



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What to expect next?

- Regulatory challenge takes significant time but regulators are looking at the issue.
- ICO/CMA joint statement on joint approach to data protection and competition:

"It is important to note, therefore, that neither competition nor data protection regulation allows for a 'rule of thumb' approach, where intra-group transfers of personal data are permitted while extra-group transfers are not."

- However, ATT framework here for the foreseeable future.
- Important to focus on pre-consent screens and information presented to the user.
- Remember this does not just cover IDFA – also any other device identification techniques.
- Think about when to display the prompt.
- Think about engaging with industry bodies if concerned.

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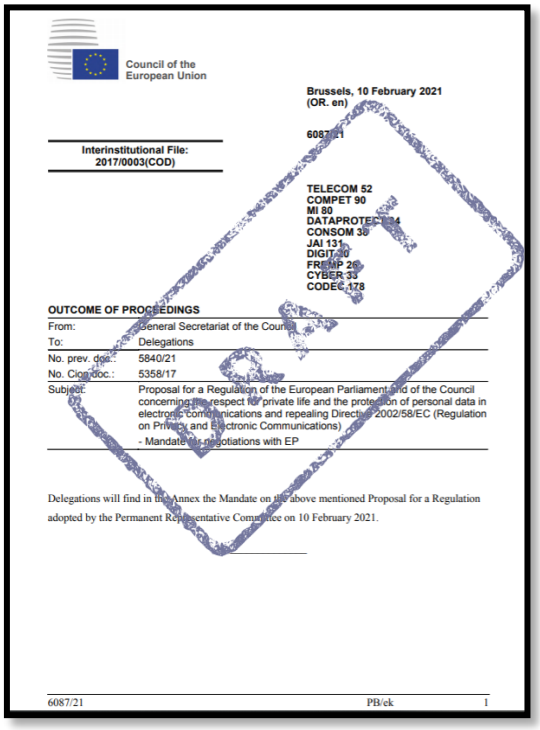
An update on ePrivacy Regulation

- ePrivacy Directive to be replaced by an ePrivacy Regulation (ePR)
- Attempts to harmonize diverse areas including cookie/similar tracking rules.
- "A dream" for one set of the ePR in all 27 countries.
- This is a slow process that started in 2017 and has had significant setback. But…



Council of the European Union

Brussels, 10 February 2021 (OR. en)

6087/21

Interinstitutional File: 2017/0003(COD)

TELECOM 52
COMPET 90
MI 80
DATAPROTECT 34
CONSOM 36
JAI 131
DIGIT 20
FREMP 25
CYBER 33
CODEC 178

OUTCOME OF PROCEEDINGS

From:	General Secretariat of the Council
To:	Delegations
No. prev. doc.:	5840/21
No. Cion doc.:	5358/17
Subject:	Proposal for a Regulation of the European Parliament and of the Council concerning the respect for private life and the protection of personal data in electronic communications and repealing Directive 2002/58/EC (Regulation on Privacy and Electronic Communications) - Mandate for negotiations with EP

Delegations will find in the Annex the Mandate on the above mentioned Proposal for a Regulation adopted by the Permanent Representatives Committee on 10 February 2021.

6087/21 PB/ek 1

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An EU miracle happened

- February 2021 – The Council (all EU members states) agreed its position on ePR

- **What is going on now?**
- The EU institutions are now negotiating the terms of the final text, as part of the "trilogue". This will not be easy because:
  - The EDPB and the EU Commission has some concerns about the proposal.
  - The German Federal Commissioner for Data Protection and Freedom of Information criticized the proposal.

Statement 03/2021 on the ePrivacy Regulation
Adopted on 9 March 2021

The European Data Protection Board has adopted the following statement:

The EDPB welcomes the agreed negotiation mandate adopted by the Council on the protection of privacy and confidentiality in the use of electronic communication services ('the Council's position'), as a positive step towards a new ePrivacy Regulation. It is of utmost importance that the EU general data protection framework is rapidly complemented with harmonised rules for electronic communications.

As already stated on numerous occasions[1], the ePrivacy Regulation must under no circumstances lower the level of protection offered by the current ePrivacy Directive but should complement the GDPR by providing additional strong guarantees for confidentiality and protection of all types of electronic communication. In no way the ePrivacy Regulation can be used to de facto change the GDPR. In this regard, the Council's position is raising a series of concerns and the EDPB wishes to point issues, which should be addressed in the upcoming negotiations.

This statement is without prejudice to a possible future more detailed EDPB statement or opinion on the co-legislators positions.

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Why should ePR be on your radar?

- **Do you need to worry about ePrivacy if your organisation is not established in the EU?**
  - **Yes**, the rules will apply when end-users are in the EU.
  - When processing takes place outside the EU or the service provider is established or located outside the EU.

- **What are the fines?**
  - GDPR level of fines
  - Up to EUR 10/20 million, or, in the case of an undertaking, up to 2%/4% of its entire global turnover of the preceding fiscal year, whichever is higher. "Cookie rules" in the lower threshold

- **When the text will be finalised and how much time do you have to prepare?**
  - Possible this year
  - Two-year "grace period"

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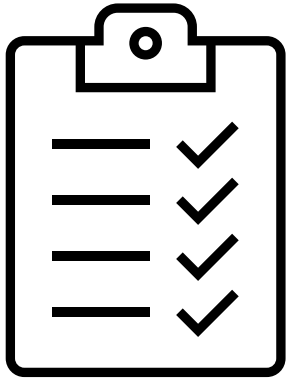
Cookie - an idea for avoiding consent fatigue?

- End-users will be able to give consent to the use of certain types of cookies by "**whitelisting**" one or several providers in their browser settings for their specified purpose across one or more specific services of that provider.
- The EU encourages **software developers to develop tools that facilitate this**. The EDPB proposes to impose **obligation** on software developers .
- End-users who have provided their consent must in principle **be reminded every 12 months** of their right to withdraw consent, unless the end-user requested not to receive such reminders.
- **New exceptions:**
  - fraud prevention
  - sole purpose of **audience measuring** carried out by a provider or third party (the EDPB stresses that it should be limited to low level analytics carried out by the provider of its processor, and not used for profiling)



Art. 4a), Art. 8 (1) (da) of the ePR draft

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"Cookie"- *compatible purposes (exception two pages long!)*

The use of processing and storage capabilities of terminal equipment and the collection of information from end-users' terminal equipment, is possible **for a purpose other than that for which it was collected** if:

- processing is **compatible** with the initial purpose
- there is **no profiling**
- data **is pseudonymized**, and if it is **no longer needed** to fulfil the purpose data should be **anonymized or erased**.

- Data cannot be shared with any third parties, unless conditions under Art. 28 of the GDPR are met or data is made anonymous.

What to take into account to assess **compatibility with the purposes of initial collection**?:

- **Any link** between the purposes of the initial and intended further processing
- **The context** in which the collection occurred
- **The nature** of the processing, storage capabilities, the collection of the information and the modalities of intended further processing
- **Possible consequences** of the intended further processing
- The existence of **appropriate safeguards** such as encryption or pseudonymization.

Art. 8 (1)(g)(h) of the ePR draft

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Cookie walls

- The Council approves that so-called “cookie walls” are in principle allowed.
- Making access to a website dependent on consent to the use of cookies for additional purposes as an alternative to a paywall will be allowed **if the user is able to choose between that offer and an equivalent offer by the same provider that does not involve consenting to cookies.**
- The end-user should have a **genuine choice** on whether to accept cookies or similar identifiers.
- The EDPB stresses the need to enshrine the prohibition to “take it or leave it” solutions" in ePR and stressed the neeed for fair alternatives.

Recital 20aaaa, Art. 4a) of the ePR draft

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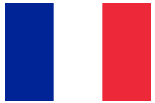
Key data protection regulator views across Europe



France

- End of the cookie compliance grace period regarding the new rules in March 2021
- Series of inspections announced by the French Data Protection Authority (CNIL)
- First wave of companies being caught according a press release issued by the CNIL on May 20th

Germany

- No grace period but also no heavy enforcement so far.
- Last year, many DPAs started (partly) coordinated audit of traditional publishers re their use of tracking technologies (and their "pure abo").
- 20.05.2021: new TDDSG passed German Bundestag (contains cookie rules).

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Future gazing: what's on the horizon?

- **"Death of Cookies":**
  - Changes to the Chrome browser by Google, preventing third party cookies
  - Instead, "FLoCs" – some challenges and questions here
  - Replacement to cookies not yet clear – many competing ideas (e.g. UID)
  - Original timing Jan 22, seems likely to be delayed to later in 22 but not yet confirmed
  - Similar complaints made to regulators – CMA specifically investigating

- **Safety section in Google Play**
  - Google is creating a new safety section in Google Play
  - The section allows Android users to see exactly what data developers collect and share about them and how the data are used, whether an app encrypts data
  - End-users will start seeing the safety section at the start of 2022
  - Any apps that do not include the new labels could see their updates blocked, or their services removed from the Google Play

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Questions?

Ask in the comments section!

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Thank you & Bird & Bird

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