

**In-House Counsel**

## Online data collection: Home Depot, Meta Ireland decisions point to opt-in consent

By **David Young**

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(March 8, 2023, 9:26 AM EST) -- In two recent privacy decisions — one in Canada and the other in Europe — the groundwork has been laid for new rules regarding consent for the collection of personal information online.

The key finding in the Office of the Privacy Commissioner's investigation into Home Depot's tracking of customer purchase activity, and disclosure of this information to Meta for purposes of its Facebook platform, was that opt-in consent was required. Without such consent, Home Depot failed to obtain the required permission for collection notwithstanding generic language in its Privacy Statement that included "improving products and services" and "looking at trends and customer interests."

A similar result was determined by the European Data Protection Board (EDPB) in the long-running case involving Meta Ireland in respect of its collection of users' personal information for purposes of ad targeting on its Facebook and Instagram platforms. In the EDPB's decisions, a prominent opt-in was ruled necessary for valid consent for such collection and use, as opposed to burying disclosure of the practice in the platforms' terms and conditions and in effect making such consent a condition of users using the platforms.

The underlying basis for the determinations in both cases was that consent to so-called "secondary uses" of personal information cannot be made a condition of a service for which the uses are unrelated. Any consent for such uses must be optional for the user. This is the privacy law under both Canada's *Personal Information Protection and Electronic Documents Act* (PIPEDA) And Europe's *General Data Protection Regulation* (GDPR) — consent to collection of personal information in connection with a product or service can only be required if necessary for the product or service.

It is interesting to note that in the OPC's 2009 Facebook investigation, using a user's personal information for ad targeting purposes was ruled an integral part of the social media site's services and necessary to support its economic model.

A similar position was taken by Meta in its opposition to the complaint brought against it in the *Meta Ireland* case. Meta pointed to the "contractual necessity" provision in the GDPR as the lawful basis for its collection and use of such information, arguing that stipulation in the platforms' terms and conditions of use — which users were required to accept in order to participate in the platforms — precluded the need to obtain consent.

While the facts of the two cases are quite distinct — Home Depot was collecting email addresses ostensibly for purposes of providing in-store customers with an e-receipt, whereas Meta was tracking users' activity while using its Facebook and Instagram platforms (as well as elsewhere online), the resulting — albeit evolving — principle is the same: separate, prominent opt-in consent is required for such "secondary" data collection and use.

In the OPC decision, Home Depot was sending in-store customers' personal information to Meta through its Facebook "Offline Conversions" tool which allowed businesses to measure the effectiveness of their Facebook ads. Specifically, Home Depot was sending a customer's hashed email

address and their in-store purchase details to Meta when the customer provided that address, at checkout, ostensibly for purposes of providing the customer with an emailed receipt. Meta then matched the email address to the customer's Facebook account. Meta compared offline purchase information to ads delivered to the customer on Facebook, for purposes of measuring the effectiveness of those ads, and provided the results of that analysis to Home Depot in the form of an aggregated report. It also used the information for its own purposes of creating "lookalike audiences" to deliver ads across the Meta technologies to people with similar profiles.

The data sent to Meta related only to in-store customers who requested an e-receipt for their purchase. Customers were presented with an on-screen option to receive an e-receipt. If they clicked "yes," they were then directed by the system to provide their email address. At no point in this process was reference made to Home Depot's data sharing with Meta.

By using the tool, retailers such as Home Depot could send Meta in-store transaction data to (i) understand how much of their customers' offline activity can be attributed to ads, (ii) measure the offline return on ad spending, and (iii) reach people offline and show ads to people based on the actions they take offline.

In sum, the OPC concluded that express consent was required because the customer would not have reasonably expected the uses and disclosures that Home Depot would make regarding the information, and also because the information could become sensitive — both recognized under Canadian privacy laws as criteria requiring express consent.

Significantly, the OPC went further and stated that such express consent must be obtained in a transparent and active manner, by opt-in choice, at the time of customers providing their email, including to have their information shared with Meta, whether for Home Depot's secondary purposes or for Meta's purposes unrelated to those of Home Depot.

The EDPB's *Meta Ireland* decision was a precursor to the OPC's determinations in the Home Depot case and arguably undercut its 2009 Facebook Findings that collection and use of users' data for advertising purposes was an integral part of Facebook's service, not requiring separate user consent.

The EDPB determined that Meta, through its Facebook and Instagram platforms, could not rely on the GDPR's "contractual necessity" basis for establishing lawful collection and use of users' data for behavioural advertising purposes, but needed to obtain consent, separate and distinct from its terms and conditions of use. Brief reference to such uses in Facebook's Terms and Conditions was inadequate to communicate users' knowledge sufficient to have supported a basis to establish contractual necessity — when the users in all likelihood were unaware that they were agreeing to such uses.

While the OPC's Home Depot decision has a more narrowly Canadian impact, focused on our federal and provincial privacy laws, the EDPB's decision (if upheld on appeal) although made in the context of the GDPR, likely will have much wider impact, not the least of which that it should lead to Meta adjusting its data collection formats in all jurisdictions, worldwide.

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