

Department for Business, Innovation & Skills consultation on implementing the revised EU electronic communications framework

Response by IAB UK

1. Introduction

- 1.1 The Internet Advertising Bureau (IAB) is the UK industry body for digital advertising, representing over 600 businesses engaged in digital marketing, including media owners and advertising networks. The IAB's role is to help marketers find the best role for online and mobile advertising, promote understanding and good practice, and to ensure a responsible medium. Further information at www.iabuk.net.
- 1.2 Digital is the fastest growing marketing medium in the UK: in 2009 advertisers spent over £3.5bn online¹. In the first half of 2010, the UK online advertising market grew by 10% (on H1 2009) and now makes up for 24.3% of the total UK advertising market². Although still a nascent market, advertisers spent £37.6m on mobile devices in the UK in 2009³.
- 1.3 Advertising is the lifeblood of the digital economy in the UK, EU and globally. It pays for much of the content and many of the services we all enjoy online: from search, webmail, social networking websites and price comparison sites, to productivity suites, blogs, video/photo sharing and the majority of news, information and video / entertainment sites.
- 1.4 It is also a key driver of online commerce, itself worth £50bn to the UK economy and continuing to grow by 14% a year⁴. In October 2010, UK consumers spent an estimated £5.2bn online, compared to £4.2bn in October 2009, an increase of 23%⁵. According to research in October 2010 by the Boston Consulting Group, commissioned by Google, the internet contributed an estimated £100bn to the UK economy, the equivalent of 7.2% of GDP. This is expected to increase to 10% of GDP by 2015⁶.
- 1.5 The rapid growth of this environment – driven by consumer demand – has been a product of faster internet speeds as well as new data-driven advertising models which allows advertising to be more relevant and customised to internet users. The greater efficiency of these models has reduced the barriers to market entry for businesses of all sizes, allowing the richest mixture of content and services to be made available to the public.
- 1.6 The IAB's response to the consultation document only seeks to address the specific issues raised in Article 5.3 of the Directive 2002/58/EC (pages 57-58 of the consultation document – and relevant parts of the Impact Assessment) concerning the processing of personal data and the protection of privacy in the electronic communications sector (the ePrivacy Directive).
- 1.7 The IAB continues its dialogue with the UK Government (and others, such as the Information Commissioner's Office (ICO)) and is pleased with the collective commitment to deliver a balanced, proportionate and pragmatic implementation of Article 5.3 and one that leaves space for innovative new business models to develop.

¹ IAB / PwC / WARC 2009 www.iabuk.net/en/1/iabresearchadspendadspendfctshth2009.html

² IAB / PwC / WARC 2010 www.iabuk.net/en/1/iabresearchadspendadspendfctshth12010.html

³ IAB / PwC Mobile AdSpend 2009

⁴ IMRG 2009

⁵ IMRG e-Retail Sales Index November 2010

⁶ BSG October 2010 www.bcg.com/documents/file62983.pdf. [NB These figures do not include the £3.5bn advertisers spend online]

2. Key Points:

- The digital economy – with advertising at its heart – is fundamental to the growth of the UK (and EU) economy. The IAB stresses the importance to consumers, business and the economy as a whole of getting the implementation of Article 5.3 right in practice. As the digital ‘hub’ of Europe, the UK is well placed to help find a solution for all EU markets. Many IAB members operate at a pan-EU level (and globally) and therefore it is essential that the UK helps ensure a pragmatic and harmonised approach across the territory.
- The IAB welcomes the UK Government’s intention not to introduce a ‘prior consent’ regime. We know that this was not the political intention of the legislator and, indeed, an amendment to this effect was specifically rejected by both the European Parliament and the Council of Ministers. We believe that the default web browser settings can amount to ‘consent’ as set out in Recital 66, as supported by the UK Government in its November 2009 statement, and as clarified by the parliamentary Rapporteur for the Directive, Alexander Alvaro MEP.
- It is important that appropriate Recital 66 wording be included in the implementing UK Regulation to provide greater clarity as what the the Directive means in practice. The IAB also supports the transposition without a prescriptive list of what cookie uses are deemed “strictly necessary” (although would welcome guidance from the European Commission on what might be considered “necessary”). In addition to this it would maximise the ICO’s flexibility in finding a practical solution that meets the ‘proportionate’ (Recital 62) balance of safeguarding consumer privacy with the objectives of the UK / EU digital agenda.
- We understand that the UK Government is minded to faithfully transpose Article 5.3 and use some of the helpful wording of Recital 66 on browser settings. If the outcome relies on a system of informed consent via modified browser settings (rather than existing default browser settings), the IAB advocates that it seeks clarity from the European Commission on what flexibility there is with respect to transposition and enforcement of Article 5.3 in order to allow time for an industry-led and practical pan-EU self-regulatory solution to be explored.
- Significant business resource and investment is being made to progress a pan-EU self-regulatory framework for behavioural advertising. This is specific to the behavioural advertising business model. It is important to note that it does not intend to specifically address cookies or provide a compliance mechanism for Article 5.3 with respect to other cookie uses besides behavioural advertising. It does though provide a system of notice and choice which reflects the spirit of Article 5.3.
- Should the UK Government be successful in seeking clarification from the European Commission on flexibility for the enforcement of Article 5.3 (or its transposition into other national laws) in order to explore a common technical implementation via a broader self-regulatory solution, the IAB suggests that the starting point be a discussion with web browser manufacturers to examine the feasibility of a solution via browser settings. The IAB and its members are happy to contribute to these discussions.

3. The potential implications of Article 5.3 on the UK and EU digital economy

- 3.1 Article 5.3 of the revised ePrivacy Directive introduces the concept of ‘consent’ for “the storing of information or the gaining of access to information stored in the terminal equipment of a subscriber or user...having been provided with clear and comprehensive information.” As the policy document acknowledges, this would affect the main legitimate practice on the internet today, i.e. the use of cookies.
- 3.2 Cookies are the engine of the internet: they are essential to its effective functioning (see Annex One for an explanation of cookies, how they work and their importance to the internet). The policy document states that the implementing Regulation will “copy out the relevant of the wording, leaving the ICO (and any future regulators) the flexibility to adjust to changes in usage and technology”. Whilst we understand why the UK Government proposes to take this approach, it should be pointed out that a narrow legal interpretation will carry a very serious risk to the digital publishing and advertising industry, ecommerce sector, broader internet industry and business community by potentially requiring an ‘opt-in’ regime.
- 3.3 In particular, a narrow interpretation could have a direct and indirect impact upon the following:
- **Usability** – the impact upon the functionality of many websites (including government and political party websites), disrupting the consumer experience.
 - **Economics** – the impact upon the digital advertising sector, worth over £3.5bn in the UK in 2009 (IAB), and an important revenue stream for online publishing.
 - **Commerce & Business** – the impact upon broader business, such as retail (ecommerce worth £50bn to the UK economy in 2009 (IMRG)).
 - **Innovation** – the impact upon technological innovation and developing publisher and advertiser business models.
 - **Self-regulation** – the significant investment businesses are making in delivering self-regulatory initiatives (eg developing EU self-regulatory Framework for behavioural advertising – see 7) based on current practice.
 - **Political objectives** – the impact upon the UK Government’s digital vision, with publishing and advertising at its heart, and its desire to broaden access to the internet to the 9.2 million people who are not currently online⁷.
- 3.4 Recent public statements by UK Ministers have emphasised the importance of advertising to the digital economy and to UK plc, as well the need for a proportionate policy environment to ensure new and emerging advertising business models can develop and flourish. Secretary of State for Culture, Olympics, Media and Sport, Rt. Hon Jeremy Hunt MP, recently spoke of the need to for “transparency and openness” whilst allowing small businesses to monetize their content and services⁸. UK Communications Minister, Ed Vaizey, recently stated: “A lightly regulated internet is good for business, good for the economy, and good for people”⁹.
- 3.5 **The digital economy – with advertising at its heart – is fundamental to the growth of the UK (and EU) economy. The IAB stresses the importance to consumers, business and the economy as a whole of getting the implementation of Article 5.3 right in practice. As the digital ‘hub’ of Europe, the UK is well placed to help find a solution for all EU markets. Many IAB members operate at a pan-EU level (and globally) and therefore it is essential that the UK helps ensure a pragmatic and harmonised approach across the territory.**

⁷ RaceOnline2012 www.raceonline2012.org

⁸ Speech to the IAB, 2 September 2010: www.iabuk.net/en/1/huntoutlinescommitmenttosector020910.mxs

⁹ Speech to FT World Telecoms Conference, 17 November 2010.
<http://nds.coi.gov.uk/content/Detail.aspx?ReleaseID=416583&NewsAreaID=2>

4. The Directive does not mean 'prior consent'

- 4.1 The IAB welcomes the UK Government's opposition to a 'prior consent' regime which "which would lead to permanent disruption of services.... [and] require repeated pop-up windows, or other intrusive virtual labels on every web page visited by a user. In order to make these decisions informed each pop-up would need to give details about the individual cookies" (Impact Assessment - page 156). We support this position (as does the ICO) for the reasons outlined above. We also note that it is in many cases unworkable since a cookie has to be set on the user's device in order for a web page containing a notice to be rendered to a user. It was not the political intention of the EU legislator as the word 'prior' was removed from the final text of the Directive before adoption. Such wording would have added weight to an interpretation suggesting that pop-up boxes, or similar technical implementations, would be needed, whereby the user gives consent prior to cookies being placed on the user's equipment.
- 4.2 The reference to 'prior' was deliberately removed in order to demonstrate that there was more flexibility as to how consent should be obtained and that the timing and context associated with how consent is obtained is also an important part of meeting the policy goal. This is addressed, for example, in correspondence from Peter Rodford, Head of Unit at the EU Directorate General Information Society and Media, to IAB UK on 28 May 2009:

*"As you are aware, the text of Article 5(3) as eventually voted by the Parliament is a combination of enhanced transparency and consent (not "prior", as in earlier versions). The Commission considers that this compromise solution is a proportionate one and strikes the appropriate balance between **the legitimate interests of the industry to continue to build on the current business models** and the fundamental right of the internet users to decide about the use of their personal information."* (emphasis added)

It is clear from this that the European Commission and European Parliament intended the final text to indicate that the current regime, based on informed consent, should continue to apply (although it is important to note that consent for the processing of any data associated with the purpose for which a cookie is set is covered by separate measures under EU data protection law, and not Article 5.3).

- 4.3 This more flexible interpretation is reinforced by the statement supported by 12 Member States (including the UK) and annexed to the Directive regarding the interpretation of the amendment:

*"The amended text of Article 5(3) clarifies that the existing consent requirement for the use of such technologies, applies regardless of whether they are delivered via electronic communications networks or other technical means... However, as indicated in recital 52(a) {66}, the amended Article 5(3) is not intended to alter the existing requirement that such consent be exercised as a right to refuse the use of cookies or similar technologies used for legitimate purposes."*¹⁰

- 4.4 More recently this approach was supported by Alexander Alvaro MEP, the Rapporteur for the revised ePrivacy Directive in the European Parliament. In an article to Privacy and Security Law (October 2010), Alvaro confirms that Article 5.3 does not mean 'prior consent' and, where technically possible and effective, "the default browser settings are a means to provide consent." Alvaro also confirms that new Article 5.3 and Recital 66 "must be read together to understand my intention."¹¹

¹⁰ Statement by a group of EU Member States (Austria, Belgium, Estonia, Finland, Germany, Ireland, Latvia, Malta, Poland, Romania, Slovakia, Spain and the United Kingdom) on the adoption of the amended Article 5(3), dated 18 November 2009.

¹¹ www.alexander-alvaro.de/archives/1368/privacy-security-law-report-cookies-prior-consent-not-required

4.6 The IAB welcomes the UK Government's intention not to introduce a 'prior consent' regime. We know that this was not the political intention of the legislator and, indeed, an amendment to this effect was specifically rejected by both the European Parliament and the Council of Ministers. We believe that the default web browser settings can amount to 'consent' as set out in Recital 66, as supported by the UK Government in its November 2009 statement, and as clarified by the parliamentary Rapporteur for the Directive, Alexander Alvaro MEP.

5. The importance of including Recital 66 wording

5.1 As with Alvaro, the policy consultation document recognises the importance of Recital 66 in providing "useful clarification of the Article text" and that the UK is considering "including appropriate elements of this [Recital 66] in the implementing Regulations."

5.2 Recital 66 of the Directive states that:

"Third parties may wish to store information on the equipment of a user, or gain access to information already stored, for a number of purposes, ranging from the legitimate (such as certain types of cookies) to those involving unwarranted intrusion into the private sphere (such as spyware or viruses). It is therefore of paramount importance that users be provided with clear and comprehensive information when engaging in any activity which could result in such storage or gaining of access. The methods of providing information and offering the right to refuse should be as user-friendly as possible. Exceptions to the obligation to provide information and offer the right to refuse should be limited to those situations where the technical storage or access is strictly necessary for the legitimate purpose of enabling the use of a specific service explicitly requested by the subscriber or user. Where it is technically possible and effective, in accordance with the relevant provisions of Directive 95/46/EC, the user's consent to processing may be expressed by using the appropriate settings of a browser or other application. The enforcement of these requirements should be made more effective by way of enhanced powers granted to the relevant national authorities."

5.3 Recital 66 states that consent is to be interpreted flexibly and "may be expressed by using the appropriate settings of a browser or other application". This reference to the use of browser settings was included in earlier drafts of Article 5.3 itself and demonstrates that the European Parliament also intended to adopt an approach which would be in line with current industry practices. Recital 66 also clearly refers to the user's "right to refuse".

5.4 There is also language in other provisions of the Directive that does call for 'prior explicit consent' or 'explicit consent'. This is clear evidence that when legislators mean 'prior consent', they knew how to achieve it and we should not dilute these significant differences.

5.5 Recitals can play a significant part in the transposition process by influencing the manner in which operative provisions are transposed. Recitals are particularly useful in resolving any ambiguity in the operative provisions (as acknowledged in the policy consultation document) and there are a number of examples in European case law where they have been used in this way:

- In *Moskof*¹², the ECJ considered whether a provision introduced pursuant to an EEC Regulation concerning the agricultural conversion rates in the tobacco sector was transitory. The operative provision was ambiguous as it did not provide clear guidance on this point. However, on looking at the recital, the ECJ found that the operating provision was indeed intended to be transitory.
- In the *CCAA* case¹³, the ECJ were asked to consider the scope of an operating provision which imposed a levy on the purchasers of milk. The case involved a consortium which did not actually purchase milk but was nevertheless taking deliveries of milk. Having looked at the recitals, the

¹² Case C-244/95, P. Moskof AE v Ethnikos Organismos Kapnou, 1997 ECR I-06441

¹³ Case C-288/97, Consorzio fra I Caseifici dell'Altopiano di Asiago v Regione Veneto, 1999 ECR I-02575

ECJ decided against applying a literal interpretation of the provision by finding that its intention was for the levy to cover the delivery of milk and, therefore, the consortium was to be considered a purchaser even though no purchase had been made.

- In *Spain v Council of the EU*¹⁴, the ECJ considered a claim from the Spanish government that new regulations, which increased the quotas for the import of toys into the EC from China, were damaging to its traders and breached their legitimate expectations. After considering the wording of the Recitals to the regulations, the ECJ found that the quotas could be adjusted and, therefore, did not breach the legitimate expectations of the traders.

5.7 It is clear from the above examples that the ECJ refers to Recitals as a source of explanation behind the objective of an operating provision, which then allows the Court to apply a purposive interpretation. There have been plenty of occasions where Recitals have been taken into account in the UK implementing legislation as a means of adding clarity to an ambiguous operating provision. The following are examples of where the UK has taken such an approach:

- The Copyright and Rights in Databases Regulations 1997
- The Electronic Commerce Directive (EC Directive) Regulations 2002
- The Control of Major Accident Hazards (Amendment) Regulations 2005

5.8 Recital 66 allows for wording to be included in the implementing UK Regulation to clarify ambiguity. In addition to this, Recital 62 of the Directive states that, in implementing the Directive, Member States should also “ensure that they do not rely on an interpretation of it which would conflict with fundamental rights or general principles of Community law, such as the principles of proportionality”. [Emphasis added]

5.9 It is important that appropriate Recital 66 wording be included in the implementing UK Regulation to provide greater clarity as what the Directive means in practice. The IAB also supports the transposition without a prescriptive list noting what is deemed “strictly necessary” (although would welcome guidance from the European Commission on what might be considered “necessary”). In addition to this it would maximise the ICO’s flexibility in finding a practical solution that meets the ‘proportionate’ (Recital 62) balance of safeguarding consumer privacy with the objectives of the UK / EU digital agenda.

6. Informed consent via browser settings

6.1 The impact assessment of the policy consultation document (page 157-159) states that the preferred option of the UK Government is to “allow consent to the use of cookies to be given via browser settings.” The reason for this preferred option is to “find a balance within the amended ePrivacy Directive between safeguarding consumers’ privacy online and delivering more customised and efficient online services.”

6.2 Any guidance for Member States from the European Commission (as expected) needs to clarify how informed consent could be achieved in practice and, in particular, how this might relate to the ‘opinion’ of the Article 29 Data Protection Working Party on behavioural advertising which expressed certain views on the interpretation and practical implementation of Article 5.3. It would be helpful if the Commission could clarify the relationship between its expected guidance and the Working Party’s ‘opinion.’

¹⁴ Case C-284/94, *Spain v Council of the EU*, 1998 ECR I-07309

6.3 We understand that the UK Government is minded to faithfully transpose Article 5.3 and use some of the helpful wording of Recital 66 on browser settings. If the outcome relies on a system of informed consent via modified browser settings (rather than existing default browser settings), the IAB advocates that it seeks clarity from the European Commission on what flexibility there is with respect to transposition and enforcement of Article 5.3 in order to allow time for an industry-led and practical pan-EU self-regulatory solution to be explored.

7. The role of industry self-regulation

7.1 The IAB welcomes the UK Government's support for self-regulation in the policy document (page 58). We acknowledge that consumer trust and confidence is critical to the take up of new digital advertising models. The IAB has led self-regulatory work – both in the UK and EU – for behavioural advertising (a technique which infers users' interests over time to provide more relevant and useful content and marketing messages), just one of the business models that is potentially impacted by Article 5.3 of the revised ePrivacy Directive.

7.2 In March 2009, IAB UK members agreed to a set of Good Practice Principles for behavioural or interest-based advertising to provide internet users with greater transparency and control over this practice. The Principles – focusing on notice, choice and education - were developed by leading providers of behavioural or interest-based advertising, such as major advertising networks (eg Google, Yahoo!, Microsoft and AOL) and technology companies (eg Audience Science). The Principles have received widespread support, including from the ICO, Ofcom and most recently in a market study by the Office of Fair Trading (OFT)¹⁵. The previous UK administration specifically highlighted this work (and the value of this practice to publishers) in its final Digital Britain report¹⁶. To raise consumers' awareness of the Principles, the IAB has also developed a website – www.youonlinechoices.com – specifically aimed at helping consumers find out more about this practice, how privacy is protected and how to exercise greater control.

7.3 We are currently in discussion with the European Commission about a self-regulatory Framework for behavioural for all EU markets. This involves an unprecedented level of co-operation across the EU advertising industry and seeks to build upon the good practice developed in the UK, with a particular emphasis on transparency and consumer control. The EU Framework will also join up with similar initiatives across the world, such as in the USA, to provide a global self-regulatory solution. At the heart of this initiative is the concept of 'enhanced notice' – providing consumers with contextual notice in or beside the delivered advertisement itself – and a 'one stop shop' pan-EU consumer control tool (available in different languages) a couple of clicks away from the notice.

7.4 Significant business resource and investment is being made to progress a pan-EU self-regulatory framework for behavioural advertising. This is specific to the behavioural advertising business model. It is important to note that it does not intend to specifically address cookies or provide a compliance mechanism for Article 5.3 with respect to other cookie uses besides behavioural advertising. It does though provide a system of notice and choice which reflects the spirit of Article 5.3.

7.5 The IAB would welcome European Commission's support for self-regulation in its expected guidance for Member States. In particular, it would help to receive guidance on how the new legal framework maps the behavioural advertising self-regulatory work at EU level. Further self-regulatory and technical initiatives covering other uses of cookies captured by Article 5.3 could be considered by industry. However they will take time to develop and may not be completed before the

¹⁵ <http://oft.gov.uk/news-and-updates/press/2010/53-10>

¹⁶ www.official-documents.gov.uk/document/cm76/7650/7650.pdf

implementation deadline in May 2011, which in meantime will lead only to industry uncertainty about how to comply with the new law in practice.

7.8 Should the UK Government be successful in seeking clarification from the European Commission on flexibility for the enforcement of Article 5.3 (and even its transposition into national law(s)) to explore a broader self-regulatory solution, the IAB suggests that the starting point for this is a discussion with web browser manufacturers to examine the feasibility of a solution via browser settings. Such an approach has many advantages – it would be universal, consistent for users and minimise the impact on web publishers (in terms of changes to their websites and impact on the way users interact with their sites, and on ad revenues). The IAB and its members are happy to contribute to these discussions.

For further information please contact Nick Stringer, IAB director of regulatory affairs, on 07957 691803 or at nick@iabuk.net

ANNEX ONE: THE IMPORTANCE OF COOKIES TO THE INTERNET

What is a cookie?

- An internet cookie (also known as a browser cookie or HTTP cookie) is a small file of letters and numbers stored on an internet user's computer or some mobile devices when most websites are accessed.
- Cookies allow a website to recognise an internet user's web browser (eg Internet Explorer, Firefox) when the user returns to a site. Like a notepad, cookies serve as helpful reminders to websites in providing customised content or services. A simple example is when a shopping website uses a cookie to recognise a user's device in order to display the contents of the user's shopping 'basket' from a previous visit to that website.
- Cookies themselves do not require personal information to be useful and, in most cases, do not personally identify internet users.
- There are two different types of internet cookie:
 - *Session cookies* – these are temporarily stored in the cookie file of the web browser to 'remember' the user's web browser until the user chooses to exit the website or close the browser window (eg when logging in and out of a web mail account or social networking site).
 - *Persistent cookies* – these are stored on the hard drive of a computer or device (and will usually depend on the lifetime established/preset for the cookie). Persistent cookies include ones from websites other than the one a user is visiting – known as 'third party cookies' – which can be used anonymously to remember a user's interests to provide more relevant advertising to internet users.
- Cookies are neither spyware nor viruses and cannot access information on a user's hard drive.

Why are cookies so important to the internet?

- Cookies are central to the effective functioning of the internet, helping to deliver a more user-friendly and customised browsing experience. Rejecting cookies can make some websites unusable.
- Examples of cookie use (that do not require a user to specifically register for or log in to a service or website) include:
 - Content and services customised to the user's preference – such as news, weather and sport web pages, mapping services, public and government services, entertainment sites (eg BBC iPlayer) and travel services.
 - Customised settings offering maximum convenience to the user - such as remembering user names, passwords and language choice (eg search engine results in English).
 - Remembering family-safe modes, such as filters or safe search functions.
 - Advertisement frequency capping - helping limit the number of times a user sees a particular advertisement on a website.
 - Providing more relevant online display advertising on websites.
 - Measurement, optimisation and analytical features – such as ascertaining the level of traffic to a website, what content is viewed and how the user reaches the website (eg via search engines, direct, from other websites etc). All government websites – including 10 Downing Street – conduct this analysis on their websites to help improve the sites for users.

How do cookies work and how are they managed?

- Cookies are sent by a web server (ie a computer programme that *serves* content such as web pages) to a web browser and then sent back by the browser each time it accesses that server. When a user revisits a website, a cookie allows the server to recognise the user's computer or device and the fact that it has been there before.
- Each cookie typically contains the name of the server the cookie was sent from, the lifetime of the cookie and a value (usually a randomly generated unique number).
- Modern web browsers (such as Internet Explorer, Firefox, Safari etc.) allow internet users the ability to view cookies, whether to disable some or all of them, and to decide how long to allow them to remain on the computer. More often than not, this also includes which type of cookie a user can accept. Some web browsers block third-party cookies by default if the third party does not have appropriate privacy notices. Because diverse browsers approach this matter differently, a user may need to adjust his or her cookie preferences in each and every browser that he or she uses.
- According to a comScore survey, 24% of 'first party' cookies and 33% of 'third party' cookies were deleted by UK internet users in the month of November 2009.
- Websites such as www.youronlinechoices.com aim to help internet users better understand how cookies work and how they can manage them to suit their preferences.