

Information Commissioner's Office

Consultation: GDPR consent guidance

Start date: 2 March 2017

End date: 31 March 2017

Introduction

The General Data Protection Regulation (GDPR) will apply in the UK from May 2018 and replaces the Data Protection Act 1998 (DPA).

The GDPR sets a high standard for consent. It builds on the DPA standard of consent in a number of areas and it contains significantly more detail that codifies existing European guidance and good practice.

Our draft guidance on consent explains our recommended approach to compliance and what counts as valid consent. It also provides practical help to decide when to rely on consent, and when to look at alternatives.

We are now running a short consultation on the draft guidance to gather the views of stakeholders and the public. These views will inform the published version of the guidance.

We are provisionally aiming to publish this guidance in May 2017, although this timescale may be affected if we need to take account of developments at the European level. We intend to publish this guidance as a series of linked webpages that can be downloaded as a pdf.

As the GDPR is a new regulation which applies consistently across the EU, our published guidance will need to continue to evolve to take account of any guidelines issued in future by relevant European authorities (including the Article 29 Working Party of European data protection authorities and the EDPB), as well as our developing experience of applying the law in practice.

Responses to this consultation must be submitted by 31 March 2017. You can submit your response in one of the following ways:

Download this document and email to
joanne.crowley@ico.org.uk

Print off this document and post to:
Joanne Crowley
Information Commissioner's Office
Wycliffe House
Water Lane

Wilmslow
Cheshire SK9 5AF

If you would like further information on the consultation please telephone 0303 123 1113 and ask to speak to Joanne Crowley or email joanne.crowley@ico.org.uk.

Privacy statement

Following the end of the consultation we shall publish a summary of responses received. Information people provide in response to our consultations, including personal information, may be disclosed in accordance with the Freedom of Information Act 2000 and the Data Protection Act 1998. If you want the information that you provide to be treated as confidential please tell us, but be aware that we cannot guarantee confidentiality.

Section 1: Your views

The Internet Advertising Bureau UK (IAB UK) is the industry body for digital advertising in the UK. It represents over 1200 businesses engaged in all forms of online and mobile advertising, including media owners and advertising technology businesses.

The IAB is actively engaged in working towards the optimal policy and regulatory environment for the digital advertising market to continue to thrive. We also seek to promote good practice to ensure a responsible medium. Further information is available at www.iabuk.net.

The IAB's submission specifically focuses on how consent under the GDPR could apply to the digital advertising sector if relied upon as a lawful ground for processing personal data. Our response therefore does not mean to purport the view that consent is preferential over other legal bases available under the GDPR. With that in mind, we welcome the ICO's view that legitimate interest can often provide a more suitable lawful ground for processing personal data and would greatly appreciate further guidance on the matter.

However, we do acknowledge that consent is currently required under PECR for certain types of data processing relevant to the digital advertising industry. It should also be noted that our decision to select 'No' to the questions posed in this document does not signify disagreement with the question per se but rather serves as an opportunity to seek clarification and put forward our views concerning the matters referred to in the draft guidance.

Please provide us with your views by answering the following questions:

1. Is the draft guidance clear and easy to understand?

Yes

No

Please explain why not:

We understand the need to draft guidance in a way that is clear and easy to understand as well as applicable to all relevant stakeholders. However, IAB UK believes that the draft guidance does not sufficiently take into consideration the complexities of a digital economy where multiple intermediary businesses are often

involved in the delivery of a service – in some cases even in real time – such as digital advertising.

IAB UK is keen to find practical ways for businesses involved in digital advertising to obtain consent when relied upon as a legal basis for processing personal data, particularly in the case of B2B companies which do not have a direct interface with the consumer.

The digital advertising industry needs to understand what is acceptable, practical and meaningful to the user, without interrupting the users' experience, specifically taking into account Recital 32 of the GDPR. This has to be achieved by providing businesses with enough legal certainty to confidently implement the necessary processes, and without undermining existing business models that build the backbone of the ad-funded internet. This also means that due regard needs to be given to the complexity of the digital advertising ecosystem. Any consent solution will necessitate high levels of collaboration between companies and may require adequate time to evolve and be tested in order to be ready for 25 May 2018.

2. Does the guidance contain the right level of detail?

Yes

No

Please explain why not:

IAB UK believes it is important that the guidance is not overly prescriptive, allowing for innovative ways to obtain consent under the GDPR and taking into account the variety of business models that exist in the industry.

Consent is an issue that entails several different aspects. The most important amongst those for the digital advertising industry involve technical questions, such as how consent is recorded, archived and shared across the supply chain, and questions concerning user experience. The latter requires careful consideration of user needs and desires. We know that users rightly value transparency and control, but also tend to have low tolerance levels for disruption as they navigate from service to service online. To that end, the draft guidance does raise some issues about what is practical or not, particularly in relation to the specificity and granularity of consent (see more in our answer to question 4), as well as the important role of 'implied' consent.

3. Do you have any examples of consent in practice, good or bad, that you think would be useful to include in the guidance?

Yes

No

Please outline your examples:

We believe it would be difficult to give examples of consent – good or bad – that are compliant with the GDPR in the context of digital advertising prior to seeing the final guidance document.

However we favour approaches that are relevant, contextual, workable and in line with the privacy impact that certain types of processing have on individuals. In the context of existing rules, the ICO’s own ‘cookie notice’ provides a good level of detail and control that is appropriate to the use of data on the ICO’s website and avoids being unnecessarily disruptive. The IAB currently recommend the following language¹ for the digital advertising industry:

We use technologies, such as cookies, to customise content and advertising, to provide social media features and to analyse traffic to the site. We also share information about your use of our site with our trusted social media, advertising and analytics partners. [See details]

For the avoidance of doubt, it’s important to note that the above examples are not an exhaustive list of possible methods to obtain consent under the current rules as exemplified by the ICO’s existing guidance on the rules on use of cookies and similar technologies.

4. Does the guidance cover the right issues about consent under the GDPR?

Yes

No

If not what do you believe is missing?

IAB UK would like to seek clarification on the ICO’s interpretation of the following components pertaining to consent in the GDPR.

¹ See more details here:

https://www.iabeurope.eu/files/1414/3650/6858/IAB_Europe_Guidance_-_Five_Practical_Steps_to_Comply_with_EU_ePrivacy_Directive.pdf

Unambiguous

We would argue that the ICO's suggestion that the GDPR introduces a new requirement for consent to be 'unambiguous' to be considered valid is incorrect (p.6 of the draft). Article 7 of the European Data Protection Directive (95/46) states that (emphasis added):

Member States shall provide that personal data may be processed only if:

(a) the data subject has unambiguously given his consent; or [...]

As such, the current, very widespread practice of getting implied consent using various forms of 'cookie banners' – including on the ICO's own website – can therefore meet this 'unambiguous consent' test (see more under point 5).

Specific

The IAB disagrees with the newly introduced requirement to name all third parties (rather than categories of third parties) in cases where first parties obtain consent on behalf of the third parties they work with.

The ICO's view on this issue seems to hinge on the fact that consent has to be 'specific'. However, specificity of consent is already needed under 95/46 and no ICO guidance to date has stipulated the requirement to name all third parties a business interacts with and with which consent is shared. Importantly, the ICO's interpretation also seems to go beyond relevant provisions of the GDPR. Articles 13, 14 and 15 of the GDPR set out certain rights afforded to individuals. In each case, the GDPR deems the disclosure of 'categories of recipients' appropriate (see 13 1(e), 14 1(e) and 15 1(b)) to comply with the necessary provision.

Beyond these legal considerations, a requirement to name all third parties who will be relying on consent would pose very significant practical challenges for the digital advertising industry.

In recent years, advertisers have increasingly made use of 'programmatic advertising' in an effort to improve the effectiveness and efficiency of their digital campaigns. Programmatic advertising automates the buying and selling of digital advertising placements. In 2015, 60% of total UK display advertising was traded

programmatically.² Advertisers (buyers) can use programmatic advertising to place ads in an automated way with publishers (sellers) they have a direct relationship with (44% of display advertising was sold this way in 2015).

However, advertisers can also use technology to target audiences through a process known as real-time bidding (RTB) during which advertisers 'bid' in real time to show their ads to audiences who meet their target criteria (16% of display advertising was sold this way in 2015).

RTB allows advertisers to reach audiences on any number of publisher sites openly through an auction even if they may not have a direct relationship with the publisher, therefore broadening the reach of their campaigns. This auction is triggered when a user visits a site or app and takes place in milliseconds. The seller signals to prospective buyers that an opportunity to show an ad has become available and describes what that opportunity is, based on data such as demographic information and/or inferred categories of user interests, e.g. female between 25-34 interested in cars.

Advertisers then decide whether they want to bid for the chance to show their ad, based on this information. Buying advertising this way can involve a complex supply chain often involving multiple advertising technology businesses which facilitate programmatic advertising³ by connecting buyer and seller through dedicated marketplaces.

In reality this means that it is very challenging in practice to name all third parties who may be relying on consent in advance – if this is the appropriate legal basis in this scenario. As described above, the outcome of the consent request cannot be determined prior to the auction taking place and companies potentially joining and leaving the auction before a final bid is accepted.

Informed

Related to the requirement for naming all third parties who will be relying on consent, Recital 42 of the GDPR states that (emphasis added):

For consent to be informed, the data subject should be aware at least of the identity of the controller and the purposes of the processing for which the personal data are intended

² <https://iabuk.net/research/library/2015-full-year-digital-adspend-factsheet>

³ <https://iabuk.net/video/the-evolution-of-online-display-advertising>

We believe that the Recital should be read to mean that the data subject has to know the identity of the controller for consent, rather than all subsequent controllers who may want to rely on the consent which – as explained above – would be difficult to achieve in practice.

Aside from this practical challenge, we believe that individuals would receive a greater benefit from being presented with information about the types of companies with which consent is shared at the point where a consent request is made. It is unlikely that users will profit from seeing names of individual businesses – often B2B companies – they are likely to be unfamiliar with in a digital environment in which ease of use plays a critical role in the value users attach to services. This approach would also be more in line with the ICO's guidance on privacy notices.

Unbundled

The draft guidance mentions that '[c]onsent should not be a precondition of signing up to a service unless necessary for that service'.

On the point of necessity, it goes on to say that (emphasis added):

In some limited circumstances you might be able to overturn this presumption and argue that consent might be valid even though it is a precondition and the processing is not strictly necessary, but this would be unusual. You might, for example, be able to argue that consent should still be considered freely given if:

- **there is a legitimate reason for the processing that is consistent with the underlying purpose of the service on offer;**
- **it is reasonable for it to be bundled with the service;**
- **there is a minimal privacy impact;**
- **consent is clearly specific, informed and unambiguous;**
- **you would stop the processing altogether if the individual withdrew their consent; and**
- **there is no alternative to consent.**

We welcome the ICO's view on this issue, in particular in situations in which there simply is no alternative for a business to opt for a more appropriate legal basis – as is the case under PECR – and

would argue that economic interests should be considered necessary for processing personal data subject to other consent requirements being met (see more under point 5).

5. Please provide any further comments or suggestions on our draft guidance.

The ICO's draft guidance rightly acknowledges 'the tension between ensuring that consent is specific enough and making it concise and easy to understand.' However, we would disagree with the ICO's conclusion that '[i]n practice this means you may not be able to get blanket consent for a large number of parties, purposes or processes. This is because you won't be able to provide prominent, concise and readable information that is also specific and granular enough.'

In a similar vein, we support the ICO's view that '[t]he idea of an affirmative act does still leave room for implied consent in some circumstances', and would agree with the ICO's subsequent verdict that 'implied consent would not extend beyond what was obvious and necessary' only to the extent that digital advertising should be considered 'obvious and necessary' for the running of services online.

We therefore believe that the ICO should consider implied consent to be valid for the digital advertising industry under the GDPR in situations where consent is relied upon as the legal ground for processing personal data and where this does not extend to circumstances in which explicit consent is required. We believe that prominent notice – taking the [ICO's guidance on privacy notices into account](#) – coupled with an affirmative action⁴ can constitute valid consent that satisfies Recital 32 of the GDPR both in light of offering a higher standard of consent than the current Data Protection Directive as well as PECR, and, importantly, ensuring that users aren't unnecessarily disrupted.

In addition, we would find it very helpful if the ICO could provide further guidance in related areas. Specifically, we would welcome more guidance in the context of Article 22 and automated decision-making where such a decision produces legal effects concerning the data subject or similarly significantly affects him or her. We would find it very helpful if the ICO could provide clarity on the meaning of 'legal effects' and 'similarly significantly effects', in particular, confirmation that automated decision-making, including profiling

⁴ As long as the affirmative action equates to a 'conduct which clearly indicates in this context the data subject's acceptance of the proposed processing of his or her personal data.' (GDPR, Recital 32)

carried out within a digital advertising context, would be unlikely to produce such effects.

Finally, we would also encourage the ICO to produce further guidance on the issue of 'legitimate interest'. The ICO is right in pointing out that legitimate interest can often provide a more suitable legal basis for the processing of personal data. To that end, it would be very helpful to get more clarity from the ICO on how legitimate interest applies to the digital advertising industry.

For more information about this response, please contact Yves Schwarzbart, Head of Policy and Regulatory Affairs at yves@iabuk.net

Section 2: About you

Are you:

A member of the public who has used our service?	<input type="checkbox"/>
A member of the public who has not used our service?	<input type="checkbox"/>
A representative of a public sector organisation? Please specify:	<input type="checkbox"/>
A representative of a private sector organisation? Please specify:	<input type="checkbox"/>
A representative of a community, voluntary or charitable organisation, or of a trade body? Please specify: Internet Advertising Bureau UK (IAB UK)	<input checked="" type="checkbox"/>
An ICO employee?	<input type="checkbox"/>
Other? Please specify:	<input type="checkbox"/>

**Thank you for completing this consultation.
We value your input.**