'Data: A new direction'
Consultation response from IAB UK

Introduction

IAB UK is the trade association for digital advertising, made up of over 1,200 of the UK's leading media owners, advertising technology providers, agencies and brands. Our Board[1] is comprised of 25 leading businesses in the sector. Our purpose is to build a sustainable future for digital advertising, a market that was worth £16.47bn in the UK in 2020.

The IAB is actively engaged in working towards the optimal policy and regulatory environment to support a sustainable future for digital advertising. We also develop and promote good practice to ensure a responsible medium.

Given the emphasis in the government's consultation on driving growth and unlocking innovation, some context is important. Digital advertising is of huge value to UK businesses and the economy, and is the business model that underpins the ad-funded internet and helps fund technological innovation. In addition to direct media revenue of £16.5 bn generated by digital advertising in the UK 2020, every £1 spent on advertising generates £6 in GDP and UK headquartered ad tech firms attracted over £1bn in investment to the UK between 2013-2019.

Our research with SMEs tells us that digital advertising is important to them given its accessibility and cost-effectiveness. 3 in 5 SMEs are currently using paid-for digital advertising, and 7 in 10 believe communicating with customers is more important than ever in times of crisis. SMEs also benefit disproportionately from using advertising; every £1 spent on advertising by an SME has eight times as much impact on sales as it would for larger firms, according to the Advertising Association.[2]

There are also significant consumer benefits from digital advertising. The ad-funded business model allows people to read the news, search for jobs, use an online map or talk to friends online for little or no cost. Most people rely on digital services, and they are able to access many of these for free because of advertising. Alternative funding models for many digital services or products include paid-for subscriptions or requesting contributions. Some people can afford to pay for multiple subscriptions for news, products or services, but many cannot. Advertising has a

[1] https://www.iabuk.com/member-directory?title=&company_type=All&company_badges%5B%5D=board_member

[2] For more details and sources see https://www.iabuk.com/policy/overview-uks-digital-advertising-industry

democratising impact on the internet; it allows all users access to a limitless breadth of information for free, as well as products and services that are essential to their everyday lives

Consultation response

Note: in our response, we use the word 'cookies' to mean 'cookies and other similar technologies', unless otherwise stated.

We welcome the government undertaking this targeted review of the UK's data protection framework in order to identify and capitalise on the opportunities to develop a more risk-based approach to data protection that both preserves and upholds users' rights and addresses barriers and issues created for businesses by the existing regime.

We have noted some aspects of the proposals where we believe further, focused exploration, including stakeholder engagement, would be beneficial, and have identified these in our response.

1.4 Legitimate interests

Q1.4.1. To what extent do you agree with the proposal to create a limited, exhaustive list of legitimate interests for which organisations can use personal data without applying the balancing test?

Somewhat agree

- We support the aim to give businesses more confidence to rely on legitimate interests as a lawful basis for processing personal data. Given the subjective nature of the LIA process, businesses wishing to rely on LI are obliged to accept the risk that a DPA may challenge the conclusions of a data controller's balancing test. Reducing this risk would therefore be helpful.
- Identifying uses cases which do not require a balancing test - including processing involving cookies and similar technologies, such as in example (d) - is welcome, as it reflects a risk-based approach. It is, however, insufficient on its own. It also requires reconsideration of the consent requirements for those underlying technologies, for example: to refine what is and is not an "essential" cookie, or allow consent to be inferred for cookie uses which are unavoidable as a result of consents already given by the user (for instance, if users consent to personalised advertising, consent may also be inferred for cookie uses required to measure and invoice for the advertising served to those users).

- For a list-based approach to truly yield benefits for business, it needs to be drafted so that it is future proof and adaptable; as it stands, some of the suggested activities are very narrow and would only benefit businesses that engage in very specific activities, or would only enable limited aspects of wider connected processing to be undertaken without a balancing test, meaning that the data controller would still need to establish a legal basis (whether by carrying out a balancing test to establish whether they can rely on LI, or selecting an alternative basis) for the rest of the processing. For example, activity (d): 'Using audience measurement cookies or similar technologies to improve web pages that are frequently visited by service users' could be better framed to cover wider uses of both audience and advertising measurement cookies, and for both improving content and services (not only frequently-visited pages), and providing business-to-business services (such as accounting and billing for advertising services). Additionally, audience measurement should include in scope the audience measurement delivered to the UK industry standard set and governed by UK Online Measurement (UKOM).[3]
- The ICO's interpretation of the interaction of PECR and GDPR is a barrier to organisations in the digital advertising sector being able to rely on legitimate interests for processing personal data where the processing is dependent on the action of a cookie or other similar technology being set or accessed, and that action requires prior consent under regulation 6 of PECR. The government could usefully clarify the distinction, which is implicit elsewhere in the consultation, and would help give data controllers more confidence to rely on LI in these cases.
    - For example: ICO guidance[4] states '*If you have obtained consent in compliance with PECR, then in practice consent is also the most appropriate lawful basis under the UK GDPR. Trying to apply another lawful basis such as legitimate interests when you already have UK GDPR-compliant consent would be an entirely unnecessary exercise, and would cause confusion for your users.*' And '*The fact that consent is also required under PECR means that in most circumstances, legitimate interests is not considered to be an appropriate lawful basis for the processing of personal data in connection with profiling and targeted advertising.*'.
    - These interpretations are overly broad, and do not take into consideration the very broad range of types of personal data processing that could take place 'in connection with…advertising' that is linked to a cookie and

[3] https://ukom.uk.net/ We understand that UKOM, which is co-owned by industry trade bodies including IAB UK, is providing its own response to this consultation

[4] https://ico.org.uk/for-organisations/guide-to-pecr/guidance-on-the-use-of-cookies-and-similar-technologies/how-do-the-cookie-rules-relate-to-the-gdpr/

interpret the law and its practical application in a very particular and narrow way.
    - The UK GDPR (or its basis, the EU GDPR) does not restrict the potential availability of LI as a lawful basis to particular types of processing, or stipulate that consent is the only available lawful basis where processing is linked to a cookie that is subject to prior consent under PECR.
    - There are a number of different types of data processing associated with RTB, from targeting to analytics, and consent may not be the most appropriate legal basis for all of these activities. It is important that each data processing purpose is considered separately, and an appropriate legal basis determined and established for each – which may be consent, but may also be legitimate interests (subject to the relevant conditions and requirements for using this legal basis).
    - The guidance wording also suggests that the consent for the cookie ('you already have GDPR-compliant consent') can serve as consent for subsequent data processing, which is not the case.

- The mechanism for establishing and maintaining a list would need to be sufficiently agile to keep up with change and innovation so as to support and give businesses the confidence to rely on it
- It would be beneficial for businesses or sectors to be able to propose in advance new and innovative ways of processing personal data as potential candidates for inclusion on such a list
- Given that the proposed list will necessarily only apply to certain kinds of activities, we encourage the government to consider additional ways (i.e. that could be implemented as well as the proposed list) in which the appropriate use of LI as a lawful basis for other activities could also be encouraged, to help achieve the same objective. Some initial suggestions include:
    - collective sector/supply chain-based balancing tests for common processing activities, particularly where collective action between supply chain partners is necessary to comply with GDPR obligations to users
    - adjusting the requirements of the balancing test for processing activities that meet certain criteria (e.g. for processing that is demonstrably low risk, low intrusion, low privacy impact and would be reasonable to expect, from a consumer point of view)

Q1.4.2. To what extent do you agree with the suggested list of activities where the legitimate interests balancing test would not be required?

Somewhat disagree

Please explain your answer, indicating whether and why you would remove any activities listed above or add further activities to this list.

- We welcome the intention behind the proposed list. As noted above, we believe that further work is needed to refine the list to ensure that it is sufficiently flexible and future-proof for fast moving markets like digital advertising.
- Use cases that we believe could be candidates for a list-based approach include audience measurement (including for the purpose of industry standard measurement delivered under UKOM5) and analytics; advertising measurement and analytics; advertising frequency-capping; advertising integrity and security (i.e. linked to detection and prevention of ad fraud, managing advertising placement and misplacement, malware, etc). These activities do not involve 'tracking' users or intrusive activities, are essential to the operation of the open demand supply chain and do not have material impacts on users' privacy. Through the Transparency and Consent Framework policies (see Annex for background information), the digital advertising industry has identified a set of typical data processing purposes.[6] Based on that, we propose that the following activities are considered for inclusion on the list (note – not exhaustive):
    - Purpose 7: measure ad performance
    - Purpose 8: measure content performance
    - Purpose 9: apply market research to generate audience insights – (n.b. aggregated data only)
    - Purpose 10: develop and improve products (n.b. with an appropriately-limited scope)
    - Special Purpose 1: ensure security, prevent fraud, and debug;
    - Special Purpose 2: technically deliver ads or content
- There should be alignment between the types of activities on the list and the types of cookies where the consent requirement may be reduced or removed (as set out in section 2.4 of the consultation). Please also see our response to the questions in that section, later in this document.
- If a list-based approach is taken forward, the government should undertake a further, separate exercise to establish the criteria for inclusion (both now and in the future), and sector-specific stakeholder engagement to identify appropriate candidate use cases for inclusion on it.

2.4 Privacy and electronic communications

[5] See https://ukom.uk.net/, and footnote 3

[6] For a full list and related descriptions see https://iabeurope.eu/iab-europe-transparency-consent-framework-policies/#Appendix_A_Purposes_and_Features_Definitions

Note: changes are taking place to the use of third-party cookies in relation to digital advertising and alternative ways of identifying users while respecting privacy requirements are being developed.[7] The government should ensure that its policy development and any related legislative change in relation to cookies takes account of these changes, and is sufficiently principles-based and flexible to be future-proof and able to accommodate other identity solutions that may be used in the future.

Q2.4.1. What types of data collection or other processing activities by cookies and other similar technologies should fall under the definition of 'analytics'?

- The term 'analytics' should be interpreted flexibly and take into account a broader range of activities, including measurement. See our response to questions 1.4.1 and 1.4.2 for further details. It is also important that the definition of 'analytics' is not inappropriately narrowed so that it hinders essential (cookie-based) processing that is required to deliver other processing activities – such as personalised advertising – which consumers consent to (see response to question 2.4.2. for practical examples).
- It would be sensible to ensure alignment between the types of activity envisaged under section 1.4 (for which an LI balancing test may not be required) and the relevant types of data collection and other processing that fall under the definition of 'analytics', to ensure that the risk-based approach is applied consistently. This would better align the concept of legitimate interests across both UK GDPR and PECR, and would avoid a situation where any potential benefit of being able to rely on LI cannot be realised if the cookie that facilitates the processing still requires consent, which can be refused (again, our response to question 2.4.2. provides more detail).
- Specifically in relation to digital advertising, we suggest that the following activities should be in scope of 'analytics':
    - measure ad performance
    - measure content performance
    - apply market research to generate audience insights – (n.b. aggregated data only)
    - develop and improve products (n.b. with an appropriately-limited scope)
    - ensure security, prevent fraud, and debug;
    - technically deliver ads or content

Q2.4.2 To what extent do you agree with the proposal to remove the consent requirement for analytics cookies and other similar technologies covered by Regulation 6 of PECR?

[7] For more information see https://www.iabuk.com/user-identity

Strongly agree

- Cookies in and of themselves are simple, basic pieces of code and are not inherently privacy-intrusive. They can have many uses that have no or minimal impact on users' privacy.
- We welcome a review of the PECR consent requirements in relation to regulation 6. While this has links to the proposed modifications to the legitimate interests balancing interest test as noted in 1.4.2 above, it also has benefits as a stand-alone proposal.
- If this approach is taken forward, the government should undertake further work to establish the criteria to be used to determine which activities should fall within the scope of a revised provision, supported by sector-specific stakeholder engagement and consultation.
- A more nuanced, risk-based approach to cookie consent will prioritise consumer choices about activities that have a material impact on privacy and the delivery of meaningful control that was envisaged by the existing legislation and thus improve the user experience online. At the same it, that approach would also allow businesses to carry out legitimate and essential processing activities that use or rely on cookies but do not involve incremental intrusions of privacy.
- As noted in the consultation document, the CNIL in France already considers a wider (although still very limited) range of cookies as 'strictly necessary' and not requiring prior user consent. It is unclear why the ICO has adopted a different interpretation under PECR.
- Removing the consent requirement for analytics related to measurement and performance would address an issue that the current regime has created for digital media owners and their digital advertising partners. The granular nature of the consent required and the separate compliance requirements of PECR and GDPR have created a situation where activities that are inherently linked by design and necessity are required to be artificially separated for the purpose of obtaining user consent. For illustrative examples, see the groupings of purposes set out within the TCF policies[8] at https://iabeurope.eu/iab-europe-transparency-consent-framework-policies/#___E_Stacks__.

  This can lead to a situation where consumers might, for example, give consent for cookies to be used to show them ads, but not for measuring the performance of those ads. That creates a perverse outcome where the intermediaries hosting or involved in delivering the ads cannot undertake the activities necessary in

[8] See Annex for background information

order to bill advertisers accurately, including (but not limited to) where the business model means that payment is contingent on the performance of the ad in terms of the consumer's response to it (such as payment made on a 'cost per acquisition' basis). This, in turn, can reduce the value of advertising inventory of ad-funded service and content providers and undermine their ability to generate advertising revenue based on their audiences. We do not believe this is what legislators intended when deliberating and amending GDPR rules.

- A more flexible interpretation of PECR would allow linked processing activities to be deemed lawful where users have given consent to the personalised advertising. Such an interpretation would help sustain the open demand ecosystem, which the CMA has noted requires interventions to address competition concerns, and competing firms are already disadvantaged by the challenges of obtaining consent and passing consent signals between entities in the supply chain. The CMA has also noted important indirect consumer benefits because open demand supports UK news providers, and sustaining a diverse media is a policy priority for the government.
- We recommend specific engagement with privacy and consumer groups on the wider – more indirect - benefits to consumers of a more flexible and future-looking approach to cookies and consent. It is a growing concern that repeated cycles of litigation aimed at requiring ever-more granular controls for consumers are creating barriers for legitimate business operations and the provision of services which are valued by consumers. It is important that the government acknowledges in its response to this consultation that targeted amendments to UK data protection law can be in consumers' long-term interests, in terms of promoting greater competition, choice and diversity of online services.

Q2.4.3. To what extent do you agree with what the government is considering in relation to removing consent requirements in a wider range of circumstances? Such circumstances might include, for example, those in which the controller can demonstrate a legitimate interest for processing the data, such as for the purposes of detecting technical faults or enabling use of video or other enhanced functionality on websites.

Strongly agree

- We support the government looking more widely at removing consent requirements, in certain cases, which would better align the concept of legitimate interests across both UK GDPR and PECR. As noted in our response to the questions in section 1.4, the ability for data controllers to rely on the legitimate interests lawful basis, where appropriate, would be significantly

improved by an equivalent ability to store or access the cookies that are necessary for such processing to happen in practice, without requiring consent (see our response to question 2.4.2 for examples of activities that are inherently linked). Improving that alignment would also help bring more consistency in communicating to data subjects about the different ways in which their data may be used (and potentially, a better understanding of the purposes of that data use) and in distinguishing between processing that does and does not have a material effect on their privacy.

- Please see our comments in response to earlier questions in relation to relevant kinds of activity that could be considered suitable for a 'legitimate interests' or 'no consent required' approach to cookies.

Q2.4.4. To what extent do you agree that the requirement for prior consent should be removed for all types of cookies?

Neither agree nor disagree

- We believe that there is merit in exploring this option further to understand what may be possible in practice and how a balance can be achieved between increasing business freedoms in this context while retaining and respecting data subjects' rights. However, we believe government should focus first on the targeted revisions of cookie rules outlined above before considering broader changes. As noted above, it is important that the benefits of these changes for consumers are understood and do not merely serve as a trigger for new waves of litigation.
- While 'pop-up' notices can create friction or annoyance for users, they have a legitimate function in enabling data controllers to record and demonstrate that they have met their transparency and consent obligations, which needs to be taken into account in developing possible alternative approaches.
- As with earlier parts of our response, given the nascent thinking in this space about how this approach might work in practice, we recommend that the government undertakes further, specific work to research and explore the possibilities for a different approach, including engagement with different business sectors and other relevant stakeholders.
- We would welcome the opportunity to explore this option more fully in further dialogue with government to better understand what might be envisaged under a future framework where the consent requirements for cookies are entirely removed, and what implications that might have in practice for digital advertising companies in relation to other UK GDPR and PECR requirements.

Q2.4.5. Could sectoral codes (see Article 40 of the UK GDPR) or regulatory guidance be helpful in setting out the circumstances in which information can be accessed on, or saved to a user's terminal equipment?

- In principle, we would welcome sectoral consideration of the circumstances in which information can be accessed on, or saved to a user's terminal equipment. Codes or guidance, if appropriately-designed, are likely to have the flexibility and adaptability that is needed to keep pace with fast-moving digital markets.
- We note that, anecdotally, it appears to be extremely challenging and onerous for industry organisations to successfully develop codes of conduct under the GDPR, and have them approved under the process set out in the GDPR (and the preceding legislation), and so a more bespoke approach to sectoral codes may be more appropriate and beneficial for this particular topic. It could also be helpful in clarifying how controllers and processors work collaboratively in compliance with GDPR.

Q2.4.6. What are the benefits and risks of requiring websites or services to respect preferences with respect to consent set by individuals through their browser, software applications, or device settings?

and

Q2.4.7. How could technological solutions, such as browser technology, help to reduce the volume of cookie banners in the future?

We would welcome the opportunity to discussion this option in more detail with government as it develops its policy. However, Government should bear in mind the following points:

- It has long been apparent and recognised that the compliance requirements of ePrivacy legislation have led, in practice, to an undesirable user experience that is cited by users as one of the most annoying aspects of being online9, and industry sectors (in particular, digital advertising) warned of these impacts before the GDPR came into effect. However, care needs to be taken in identifying potential alternatives.
- Our concerns about centralised privacy controls include:

[9] 14% of respondents said that cookie/GDPR boxes were the most annoying thing when they were online
'Which of the following is the most annoying to you when you're online?', Q27, Consumer attitudes towards digital advertising, 2018, IAB UK https://www.iabuk.com/research/consumer-attitudes-towards-digital-advertising

- Potentially obstructing providers of ad-funded content and services in communicating with their users about why and how they use their personal data, and the value exchange. Having the relationship with the consumer intermediated by a browser, operating system or device hinders a service provider from building a trusted relationship with their user base.
- Whether centralised, 'general' choices (e.g. granting or withholding consent) and the insertion of an independent third party can meet the specificity requirements on data controllers to obtain consent under the GDPR. If not, then means users would still face specific consent requests in addition to the general consent of the browser/software layer.
- As a matter of principle, it is important that legislation does not dictate which technologies must or can be used to capture and set users' choices. It would need to be clear that software, browsers etc. would be neutral in the user relationship. For example, they could prevent the processing of personal data or use of cookies. which would hinder a service provider's ability to lawfully collect or display information. Browsers and other software are not able to distinguish between, for example, data processing purposes that (under either the current or a future framework) do or don't require consent; is lawful or unlawful; etc.
- There may be competition implications of centralising controls through software and tools provided by private companies and these need to be fully explored and understood. The CMA is investigating the deprecation of third-party cookies in Chrome and the potential impacts for competition in digital advertising and the ecosystems that rely on it.

- We note that the ICO's response[10] to this consultation strongly supports such an approach to managing data preferences. Its response says:

  The consultation's inclusion of the use of browser and non-browser based solutions is a good one. This is where people can say once how they would like their data to be used and have this respected across the online services they visit. This would allow people to choose to go pop-up free
- In our view, the ICO's narrative vastly over-simplifies the practical, legal, economic and competition implications that would result from a move away from transparency and consent notices, that online services are in effect required to use in order to comply – and demonstrate compliance – with UK GDPR and PECR, to centralised controls via browsers or other means. 'Pop-ups' are a consequence of the design and compliance requirements of the current regime which we believe, as we have set out earlier in our response, has not fully

[10] https://ico.org.uk/about-the-ico/consultations/department-for-digital-culture-media-sport-consultation-data-a-new-direction/

achieved its objectives and has created unintended consequences. The focus should therefore be on how to enable a more effective, risk-based and proportionate approach to data protection and cookie consent, taking into account the rights and responsibilities of both data subjects and businesses. More importantly, the ICO has not, to our knowledge, consulted with affected industry sectors nor provided any detailed information about its work or thinking in this space beyond broad public statements.

- The ICO's response also suggests that this approach could address concerns identified in the CMA's Market Study. However, there are obvious overlaps with the CMA's current work to examine the operation of certain browsers and the impact they could have on competition in the digital advertising market. This is a priority project in the DRCF's work programme and this is important context for this proposal, noting government's proposal (in this consultation) to require the ICO to have regard to competition when discharging its functions.

Q2.4.8. What, if any, other measures would help solve the issues outlined in this section?

- We consider that this question, given its broad and open nature, would warrant further, focused exploration and discussion and stakeholder engagement as part of the policy development process.
- We would welcome the government setting out in more detail what it envisages its role to be in exploring non-legislative approaches to identify alternative ways in which online users can exercise choices about the use of their data by individual data controllers.

5. Reform of the Information Commissioner's Office

Q5.2.4. To what extent do you agree with the proposal to introduce a new duty for the ICO to have regard to economic growth and innovation when discharging its functions?
Strongly agree

Q5.2.5. To what extent do you agree with the proposal to introduce a duty for the ICO to have regard to competition when discharging its functions?
Strongly agree

Q5.2.6. To what extent do you agree with the proposal to introduce a new duty for the ICO to cooperate and consult with other regulators, particularly those in the DRCF (CMA, Ofcom and FCA)?
Strongly agree

We have grouped our response to these questions:

- We agree with the Government that the ICO's remit is increasingly important for competition, innovation and economic growth. The ICO itself has taken steps in this direction by recruiting a team of economists to begin assessing the economic impact of options for the interpretation and enforcement of data protection law. The Information Commissioner has also acknowledged the benefits of joint working with other regulators, including the CMA, in the DRCF and how that has positively challenged the ICO to think more broadly about how it carries out its duties. We support a new duty for the ICO to have regard to economic growth and innovation, and to competition, and the underlying objective of bringing more transparency to how those matters are considered by the ICO. The government should consider this together with the proposal to create a duty to consult between DRCF regulators, to ensure that no individual regulator can act in isolation or ignorance from others and that they work collectively towards shared goals, including the government's economic goals and the desire for regulation to support competition, growth and innovation. The government should also consider how it can design these new duties in a way that encourages and supports the ICO to apply them retroactively to significant ongoing workstreams, and existing guidance, including draft and existing Codes of Practice published under the Data Protection Act 2018, etc., in order to ensure a coherent approach to the discharge of its functions and regulatory coherence more broadly.
- These new duties would be strengthened by other proposals outlined in the consultation such as modernising the governance of the ICO to align it with other regulators, requiring the ICO to demonstrate and report on how it delivers its statutory duties and setting KPIs to measure the performance of the ICO.
- We have previously expressed concern about the lack of consideration of the economic and competition impacts of statutory Codes or new guidance from the ICO and others, so we welcome the proposal to introduce new duties for the ICO in this regard; to enhance the ICO's consultation processes; and to require impact assessments for significant new guidance or Codes in advance of draft codes, not after the fact.
- We also welcome the focus on supporting regulatory cooperation and on ensuring that the ICO's guidance is as effective as possible in terms of helping businesses understand how to comply with the law in practice. We have previously welcomed the establishment of the DRCF and provided comments on how the regulators that are part of it could best work together, and engage with industry.[11]

[11] See https://www.iabuk.com/policy/iab-uk-submission-digital-regulation-cooperation-forum

- As noted above, a statutory duty for regulators in the DRCF to cooperate would ensure that no statutory regulator can act in isolation or ignorance of other regulators or government's economic goals. This is essential to deliver regulatory coherence and a predictable and stable regulatory climate for business.

Additional comments:

1. We note that references to digital advertising in the consultation document are limited to describing particular aspects of targeting and ad-serving associated with real-time bidding (RTB). We caution against an over-simplified approach to or depiction of digital advertising activities and urge the government to continue its stakeholder engagement with the sector as it develops its proposals. Thinking in this space needs to build on the evidence base in the CMA's market study and be informed by a full understanding of the broad nature and range of activities involved in digital advertising that are subject to UK GDPR and PECR requirements and how they intersect. This includes examining the nature of the processing involved and the varying privacy impacts of that processing, all of which is necessary to enable digital advertising to function and, by extension, to support the ad-funded internet (which in turn supports digital media, and technological innovation).
2. We are concerned that the ICO's response to the consultation recommends

   '*...that Government go further and consider the pros and cons of legislating against the use of cookie walls. This is where people have to 'accept' being tracked as the price they pay for being allowed to access and participate in an online service. This would reduce the incentive for organisations to put in place barriers that undermine how people have said they would like their data to be used.*'

   In adopting GDPR and PECR, legislators did not intend to change business models. Likewise, the government has set out its desire to promote market-led innovation and growth through targeted modernisation of digital regulation, including data protection reforms. There are clear consumer as well as business benefits from digital advertising, as set out in our introduction to this response.

   The digital advertising industry would welcome a clear unqualified endorsement of the right of private publishers and other ad-funded online services to decline access to their content and services where users do not allow storing and/or accessing information on their devices for advertising purposes (subject to appropriate controls and relevant legal requirements). The government should, as a minimum, ensure that its reforms do not interfere with the ability of private providers of media, news and other online content and services to continue to evolve advertising revenue streams and not – directly or indirectly – constrain

the freedom of these businesses to choose the best revenue model to sustain their business. Such interference would have negative consequences for consumers ,who benefit from digital advertising (as set out in our introduction to this response), and risk an increase in pay-to-access services which are self-evidently restricted to those who are willing or able to pay.

We urge the government to ensure that it engages with the CMA as it develops its proposals to understand the impact they may have on competition in digital markets, in line with the principles set out in the government's Plan for Digital Regulation[12] and the complementary goals of the DRCF.

3. The government should also be alive to the risk that some stakeholder groups may seek to use the opportunity of reform to the UK's data protection framework to seek to limit data processing or cookie use in digital advertising in order to address broad 'advertising harm' issues. These matters are best considered by the DCMS' Online Advertising Programme with time and space to undertake the necessary evidence gathering and analysis. The data reform work should avoid overlapping or conflicting with that workstream.

4. Paragraph 170 of the consultation says: '*The government wants to encourage a more proactive, open and collaborative dialogue between organisations and the ICO on how to identify and mitigate risks, especially for high risk processing activities*.' Building on this, we believe that there is merit in looking at whether and how a more formal mechanism could be established that allows businesses or sector organisations to access ICO guidance and advice on potential on changes, innovations, novel ways of working, etc. in a safe space (not limited to high risk processing) – adopting the same theory behind the ICO's 'Regulatory Sandbox' approach, and behind the provisions in article 36 of the UK GDPR, but giving organisations a more accessible, widely-available route to the ICO's advice and guidance.
   This would encourage businesses to engage with the regulator in advance of making decisions about data processing, which would help to give them confidence about compliance with the law and would help to manage and avoid potential risks. It would, however, need to include appropriate safeguards so that data controllers can be confident that information shared with the ICO will be treated confidentially, not be subject to disclosure, and – crucially – so that information provided by them for the purpose of proactively seeking guidance and advice is 'ringfenced' and is not able to be used as a basis for regulatory action. Without such protections, the objective to support proactive engagement and collaboration would be undermined.

[12] https://www.gov.uk/government/publications/digital-regulation-driving-growth-and-unlocking-innovation/digital-regulation-driving-growth-and-unlocking-innovation

5. Equivalency and adequacy: it is critical to the UK digital advertising sector that any reforms do not jeopardise the adequacy status of the UK's regime with the EU. This remains important to the digital advertising market as firms require scale to thrive and therefore need to be able to operate seamlessly across all European markets.

IAB UK
November 2021

Annex: The Transparency and Consent Framework (TCF)

The Transparency and Consent Framework is the global cross-industry effort to help publishers, technology vendors, agencies and advertisers to comply with the principles of the GDPR – including lawfulness, fairness and transparency, purpose limitation and data minimisation – and with the consent requirements of the ePrivacy Directive (ePD) (PECR in the UK). It was developed by IAB Europe (the European trade association for digital advertising) in collaboration with organisations and professionals in the digital advertising industry, from both national IABs and corporate members.

The TCF is a protocol comprising a set of policies and technical specifications, and underpinned by terms and conditions for registered companies. It was conceived as an open-source, cross-industry standard to support organisations that process personal data in order to deliver advertising on their sites or to personalise content. The TCF provides a mechanism that enables first parties (digital media and other websites) and third parties (vendors acting as data controllers or processors) to establish a GDPR legal basis for that processing, and (in accordance with PECR requirements) to obtain prior consent to store information on a user device or access already stored information.

The TCF creates an environment where website publishers can tell visitors what data is being, or may be, collected, and how they and the companies they partner with intend to use it. The TCF gives the publishing and advertising industries a common language with which to communicate consumer consent for the delivery of relevant online advertising and content. Among other things, the TCF aims to standardise descriptions of data processing 'purposes', in a granular and user-friendly way, to help consumers to make and exercise informed choices.

For more information see https://iabeurope.eu/transparency-consent-framework/