Written evidence submitted to the Public Bill Committee on the Data Protection and Digital Information (DPDI) Bill (No.2)

5th May 2023

The UK Internet Advertising Bureau (IAB UK) is the industry body for online advertising, representing 1,200 members including media owners, agencies and advertising technology companies across the UK. We actively engage with our members to develop and promote good practice, ensuring that the UK represents a gold standard in digital advertising.

Online advertising is a successful, innovative and growing sector and it is the backbone of our free internet. For every £1 spent on advertising, £6 is generated in GDP. The UK digital advertising market is world-leading both in terms of its size - £26.1bn in 2022 which was more than the combined amount of the top 4 European markets including Germany and France[1] – and in terms of its innovation and dynamism. The sector is a key part of the UK's success in becoming a digital-first economy.

Summary of our position

- IAB UK welcomes the Government's Data Protection and Digital Information No.2 (DPDI) Bill and its core principle to create a pro-innovation data framework that will reduce compliance costs for British businesses by clarifying the GDPR without undermining the UK's adequacy status with the EU. We are however, concerned about the specific issue of cookie consent, due to both the missed opportunity in the short term to fix a problem affecting UK advertising businesses, and the lack of provision for consultation or parliamentary scrutiny of some of the wide-ranging powers in the Bill to change to how cookie consent is managed in the future.
- The Bill could be improved by amending two problematic areas in **Clause 79, which amends Regulation 6 of the Privacy and Electronic Communications Regulations (PECR):**
  a) **The absence of functional cookies from the category of cookies that are exempted from consent.** We support the Government's approach to reducing unecessary consent requests by identifying a set of non-intrusive cookies that would not require user consent. However, we believe that functional cookies that are used to measure and verify the performance of

[1] According to published adspend figures for 2021 showing the top 5 European markets: UK, Germany, France, Russia and Spain https://iabeurope.eu/wp-content/uploads/2022/06/IAB-Europe_AdEx-Benchmark-2021_REPORT_V3.pdf

advertising and to measure online audiences should be in the opt-out category that does not require consent.

b) **The potential for damaging centralised opt-out controls to be implemented without safeguards.** The Bill gives the Secretary of State poorly defined and controlled powers to implement future systemic change and set the requirements for consent management technologies with insufficient consultation and parliamentary scrutiny.

1. The absence of functional cookies from the category of cookies that are exempted from consent (Clause 79, Paragraph (2))

Why cookies are important

- Cookies are the small files of code that are downloaded on to a computer when an individual visits a website and serve a wide variety of functions. The DPDI Bill proposes some seemingly small but potentially significant changes to the law that governs cookie use, in Clause 79.
- Cookies and related technologies are essential to verify the delivery of online advertising, itself a vital means for UK businesses, small and large, to reach their audiences online. It's a critical source of revenue that enables the provision of many free-to-access online services, from local and national news sites to jobs boards to navigational apps. These services and the companies they partner with to deliver ads online depend on the use of cookies or similar technologies for a range of functions – including targeting, measurement and frequency-capping.[2]

The current system

- Under existing law, people must be asked if they consent (opt-in) to the use of cookies or equivalent technologies for certain purposes. When you see a 'cookie banner' on a website, it is there to meet this obligation. The current regime is not ideal: consent must be sought for each purpose (unless they are one of the very few types that is specifically exempt). The digital ad industry warned EU legislators when they introduced this regime that it would create a poor user experience and lead to 'consent fatigue'.

Cookies exempted from consent

- We support the Government's approach to addressing this issue which is to identify a set of non-intrusive cookies to be exempted from the consent requirement, rather than being subject to an opt-in requirement. This risk-based approach that distinguishes between types of cookies is better for users and for businesses. However, we believe two further purposes should be added to this list.

[2] A mechanism to control the number or frequency of ads delivered to a user within a given time frame, to avoid over-exposure.

- First, if people withhold consent for the use of cookies to measure audiences, then media owners and audience measurement providers cannot measure online audiences and traffic to websites, which are essential to determine consumption of content and to price advertising space for advertisers. Measurement is the 'currency' of the market. An inability to measure reduces the value of the advertising inventory of ad-funded services and content providers, and undermines their ability to generate advertising revenue based on their audiences.
- Audience measurement data can also be used to inform responsible advertising strategies and targeting, for example, to help advertisers comply with audience restrictions for age-restricted advertising. It is important to also note that that such measures are used by BBC to properly account for reach across the whole UK public as per their Charter obligation and by content planners to enrich British culture and boost pluralism of information and entertainment, so this is not only an advertising-related concern.
- Second, we believe that functional cookies that are used to verify the delivery and measure the performance of advertising should be considered essential and no longer require consent. Under the current system, consumers can decline consent for cookies required for this purpose, for example to record that an ad has been served or presented to a user and how many users clicked on it - and this prevents the correct invoicing of advertisers and payment of revenue due to publishers on whose sites the ad appears. We do not believe this is what legislators intended.
- In addition, some UK digital advertising business models are performance-based, which means that payment (by the advertiser to the publisher) is not made on the basis of an ad being served or presented to the user; instead, it is based on the user taking an action (for example, clicking on a link in a website article to buy a product). This business model is contingent on being able to measure the interaction with, or resulting from, the ad. Again, if a user does not give their consent to the cookie necessary for this measurement, the business cannot receive revenue. This risk applies to all ads including those placed by the public sector so it has the potential to impact government as well as commercial advertising.
- As it stands, the Bill introduces a new exemption that permits cookies to be used for 'statistical purposes' by those running online services, websites, etc. but only by them directly (not third parties who provide services to them) and only for the purpose of improving the service or the website.
- We urge the Committee to seize this opportunity and exempt functional cookies (n.b. not targeting cookies) used for advertising and audience measurement from the consent requirement, and to do so in the Bill. Delaying this decision until further regulations can be brought forward, if and when the Bill becomes law, would waste the opportunity to implement a straightforward

fix to a known problem for UK businesses and to increase the beneficial impact for users of reduced cookie consent requests.

IAB UK recommends the committee support the following amendments to the Bill:

Audience measurement:

Clause 79, paragraph (2)(a), subsection (2A) page 101, line 19 after point (b)(ii) insert:

> *(iii) for the sole purpose of audience measurement, provided that such measurement is carried out by (i) the provider of the service requested by the end-user, or (ii) an authorised third party, or by third parties jointly on behalf of or jointly with the provider of the service requested by the end-user and provided that for both (i) and (ii), where applicable, the conditions laid down in Articles 26 or 28 of UK GDPR are met.*

Ad measurement:

Clause 79, paragraph (2)(d), page 103, line 41 after point (5)(e) insert as new sub-paragraph:

> *(f) to measure or verify the performance of advertising services delivered as part of the operation of the information society service to enable billing for the advertising services.*

2. The potential for centralised opt-out controls to be implemented without sufficient safeguards.

<u>The policy intention</u>

- The Government's goal is to enable UK consumers to set their cookie choices centrally, e.g. in a browser, software or device. They state that the changes to PECR made by the DPDI Bill are intended to 'pave the way for the removal of irritating banners for...cookies' when there is 'sufficient availability of technology which enables subscribers or users to effectively express their consent preferences'.[3] The Bill empowers the Secretary of State to implement this systemic change in the future via regulations.
- However, our members have significant concerns about this approach, which poses serious legal and commercial risks for the ad-funded internet. While the provisions in regulation Clause 79(3) look innocuous, that is because they contain scant detail.
- The Data Reform consultation that preceded the Bill did not consult on any specific proposals, but asked broad questions about different ways that

[3] https://questions-statements.parliament.uk/written-statements/detail/2022-07-18/hcws210#:~:text=Reforms%20to%20the,are%20sufficiently%20developed and https://publications.parliament.uk/pa/bills/cbill/58-03/0143/en/220143en.pdf (para 565).

consent mechanisms might work. The final policy was not discussed with the affected industries before being included in the Bill, and while the consultation asked about the risks of centralised controls, no plan has been put forward for mitigating them. There is no clear explanation of how the policy might work anywhere and there is no transparency about the eventual decision-making by the Secretary of State.

Challenges and risks

- Changes in this area are not straightforward and require a full assessment of the likely practical, legal, economic and competition implications for the digital advertising sector. While annoying to people online, cookie banners will remain a legal requirement and have a legitimate function in enabling data controllers to record valid consent and demonstrate that they have met their transparency and consent obligations under the law – both PECR and UK GDPR – which needs to be taken into account in developing possible alternative approaches and balanced against the desire to improve people's online experience. It is also crucial that any changes do not undermine the provision of ad-funded content and services.
- It is also important to note that there are two 'consent' regimes that typically operate together. PECR requires consent to be sought to access or store information on a device (unless an exemption applies). The UK GDPR requires a legal basis to be established to process personal data which often happens in conjunction with the use of PECR-regulated technologies. One such legal basis is consent. 'Pop ups' or 'banners' on websites support both of these requirements.
- Put simply, making changes to the PECR consent regime in isolation may help to remove 'pop ups' for some websites in simple use cases but in many cases, legal obligations will mean that people will still have to receive information and make choices at the point of access.
- Without a more fully-developed proposal it's not possible to understand if the policy of centralised opt-out controls for cookies will actually improve people's online experience. There is a risk that the pressure for people to make a single choice to apply everywhere online would be overwhelming and may undermine people's ability to make informed choices or understand the consequences of those choices. They may simply switch off all cookies/similar technologies which would severely inhibit the functioning of online services.
- Additionally, making these mechanisms available via private companies (i.e. the owners of browsers, software, etc.) disrupts the relationship between the individual and the service they're using and creates risks around liability for legal compliance. There needs to be strong safeguards attached to third parties assuming this role, in order to protect consumers and UK businesses and due consideration also needs to be given to national security and data

access concerns as well as how cookies are categorised

- The inclusion of a regulation-making power for this purpose is clearly an issue, especially given the concerns raised by the House of Lords Delegated Powers and Regulatory Reform Committee and the Secondary Legislation Scrutiny Committee in their November 2021 reports criticising the government's use of delegated powers. They highlighted that bills which are subject to robust scrutiny in their passage through Parliament often leave the detail that will have a direct impact on individual members of the public to secondary legislation.
- While the content of any regulations brought forward under this power would be subject to prior consultation, and the regulations themselves to the affirmative resolution procedure, there are no checks and balances attached to any decisions that precede publishing the draft regulations.
- While the Government has said that it wants to implement centralised controls as part of an opt-out regime, which the Bill also contains powers to create, the two are not directly linked in legislation. If clearer controls about when and how the powers in regulation 6B can be exercised, it is possible for centralised cookie controls to be introduced, and services required to respect the signals they send, while an opt-in regime exists for some cookies.
- This creates risks:
    a) Enabling cookie consent to be given via a third party intermediates the important relationship between service providers and their customers. It is possible that consent given via a third party could override valid consent previously given to a service a consumer values and trusts.
    b) The legal obligation to obtain and record valid consent will remain on the data controller(s) and/or the provider of the service and it is not clear which party is liable if that consent is not deemed valid and how it would be remedied.
    c) The legal obligation to obtain consent for each applicable purpose would also remain so there would be limited scope for a third party to improve the user experience.
    d) Other parties in the supply chain may rely on these consents, and the insertion of a third party to collect consent creates legal risk for those other parties.

- **In summary, we have serious concerns about Clause 79(3) of the Bill because:**

  a) It gives the Secretary of State poorly defined and open-ended powers to implement future systemic change and set the requirements for consent management technologies with insufficient safeguards and parliamentary scrutiny.

  b) There is a serious and significant risk that, as they stand, these changes could undermine the ability of providers of content and services to be able to use cookies and similar technologies, causing

damage to UK businesses that rely on advertising, and to people's access to ad-funded services.

- The content of any regulations brought forward under such powers must be subject to prior consultation, and the regulations themselves to the affirmative resolution procedure. However, there are no checks and balances attached to any processes or decisions that precede publishing the draft regulations, or determining the policy, including in these areas:
    - The Government has stated that cookie banners will be removed 'when browser-based or similar solutions are sufficiently developed', but this is alarmingly vague. There is no information about what constitutes 'sufficient availability', how this will be judged, including what criteria such a decision would be based on; how such criteria will be agreed upon; and how affected stakeholders will be involved in this decision.
    - No proper assessments were published (or undertaken, to our knowledge) before this policy was announced, of:
        a) the potential competition impacts of a move to centralised consent management controls.
        b) the potential impacts of removing cookie banners on the services provided by ad-funded business models.
        c) the potential impacts of centralised control mechanisms on the user experience, particularly given that GDPR standards of transparency and consent (where applicable) will still need to be met, including where personal data is being processed via or alongside the user of cookies/similar technologies.

    - The Bill does not require such assessments to be conducted prior to the exercise of the powers by the Secretary of State. This is something we strongly believe should be addressed.
- Given that no consultation was undertaken on the specific provisions for centralised opt-out controls to be implemented, and the extensive concerns raised above, they should be omitted from the Bill entirely.
- If this does not happen, then to mitigate the extensive risks described above, the following safeguards should be implemented to ensure that the exercise of the powers in new Regulation 6B of PECR achieves the stated policy goal and does not create unintended consequences. Please note this is not necessarily an exhaustive list – the Committee may also wish to consider additional safeguards:
    a) The powers in new Regulations 6B(1) and 6A(1) should be linked. Powers to implement centralised cookie controls should only be able to be used if and when most or all cookies are within the scope of an opt-out regime. Then, those centralised controls should be applied to those

cookies only. This would help to manage some of the risks described above.

b) The requirements intended to be set via Regulations brought forward under new Regulation 6B should be subject to consultation prior to the draft Regulations being published (new Regulation 6B(6) does not explicitly require this). This will allow for proper scrutiny of the workability of the new regime for people and UK businesses.
c) The Secretary of State should be required to publish an assessment and statement of readiness of the technology to which Regulation 6B applies as part of the consultation process (Reg 6B(6)), and to publish an impact assessment (taking into account competition and economic impacts, among other things) of moving to an opt-out regime that is facilitated by centralised controls prior to such a move being legislated for. This should include an assessment of the interplay of any new PECR regime with the UK GDPR consent regime.
d) The statutory consultees listed in Regulation 6B(6) should include the Competition and Markets Authority.

- Thank you for the opportunity to respond to the call for written evidence. Please contact Christie Dennehy-Neil, Head of Policy & Regulatory Affairs, IAB UK christie@iabuk.com if you have any queries regarding this written evidence.