Written evidence submitted by The Advertising Association. To the DATA PROTECTION AND DIGITAL INFORMATION (No. 2) Public Bill Committee, (DPDIB12).

About the Advertising Association

1. The Advertising Association promotes the role and rights of responsible advertising and its value to people, society, businesses and the economy. We bring together companies that advertise, their agencies, the media and relevant trade associations to seek consensus on the issues that affect them. We develop and communicate industry positions for politicians and opinion-formers, and publish industry research through advertising's think-tank, Credos, including the Advertising Pays series which has quantified the advertising industry's contribution to the economy, culture, jobs and society.

2. The membership of the Advertising Association is very broad and includes the associations representing industry sectors, such as the advertisers (through the Incorporated Society of British Advertisers), the agencies and advertising production houses (through the Institute of Practitioners in Advertising and the Advertiser Producers Association), all the media (from broadcasters and publishers, cinema, radio, outdoor and digital), advertising intermediaries and technology providers (through the Internet Advertising Bureau UK), market research (through the Market Research Society) and marketing services such as direct marketing (through the Data & Marketing Association) and promotions.

Context

3. Advertising and marketing are important. They play a crucial role in brand competition, drive product innovation and fuel economic growth. Many industries such as the arts, sport and culture depend on it for their revenues and it also funds a diverse and pluralistic media enjoyed by consumers of all ages, including children and young people.

4. Advertising is a driver of economic growth and competition. We have estimated that every pound spent on advertising returns up to £6 to GDP through direct, indirect, induced and catalytic economic effects. The Advertising Association/WARC Expenditure Report estimates UK ad spend will grow by 3.8% to £36bn this year[1]. This would mean a contribution of approximately £216bn to the economy supporting 1 million jobs across the UK.

5. According to Deloitte research carried out on behalf of the Advertising Association, the one million jobs supported by advertising can be broken down as follows:

[1] https://adassoc.org.uk/advertising-spend/

- 350,000 jobs in advertising and the in-house (brands) production of advertising.
- 76,000 jobs in the media sectors supported by revenue from advertising.
- 560,000 jobs supported by the advertising industry across the wider economy.

6. We are grateful for the opportunity to contribute this inquiry as we believe that advertising and marketing is a significant stakeholder in privacy legislation. Please contact Konrad Shek (konrad.shek@adassoc.org.uk) for any questions regarding this response.

Executive Summary

7. The introduction of the Bill has been broadly welcomed by advertisers and marketers:
   - It clarifies aspects of GDPR and aims to reduce unnecessary burdens on business without lowering the high standards of data protection that the UK currently enjoys.
   - It addresses the overreliance on consumers' consent to their data being used as a legal basis and clarifies that "legitimate interests" – an equally valid legal basis under GDPR – can apply to processing that is necessary for the purposes of direct marketing.
   - It incorporates "scientific research carried out as a commercial activity" into the definition of scientific research.

8. However, we believe there is room for further improvements.
   - The newly introduced exemptions for cookies requiring consent omits important activities such as audience and ad measurement analytics (Clause 79).
   - One of the stated aims of the Bill is to reduce consent fatigue. In doing so, it attempts to legislate (new Regulation 6B) for the future introduction of technology that provides for the automated signalling of pre-determined consent or objection to the use of cookies. However, this raises several issues because:
     a) it intermediates the relationship between a publisher and their consumers and creates friction with how publishers meet their GDPR obligations.
     b) there is the potential for creating a new set of internet gatekeepers which could affect competition in digital markets.
     c) The power provided for in new Regulation 6B is not linked to a corresponding change to consent requirements.
   - PECR is the key legislation that protects the confidentiality of communications and applies to all "electronic communication networks". However, the Government has proposed to narrow the scope of consent exceptions to "information society services" (ISS) only (Clause 79). This could have a significant impact on the interplay between UK GDPR and PECR.
   - Survey research is a quantitative method to collect information from participants by using questionnaires, etc. Statistical research is a broader term covering all research methods. Hence, we recommend that the reference in the Bill to "statistical surveys" be replaced with "statistical research (Clause 2).
   - We do not support the inclusion of a new exemption for direct marketing provision used for the purposes of democratic engagement (Clause 83) and we

would recommend the removal this clause due to the risk of increased poor practice. If that is not possible, we suggest embedding the relevant ICO guidance into the Bill.

Our response

9. The introduction of the Bill has been broadly welcomed by advertisers and marketers:

    - It clarifies aspects of GDPR and aims to reduce unnecessary burdens on business (Clause 15) without lowering the high standards of data protection that the UK currently enjoys. It means that record-keeping conducted by SMEs is proportionate to the risk associated with the processing of data.
    - It addresses the overreliance on consumers' consent to their data being used as a legal basis and clarifies that 'legitimate interests' – an equally valid legal basis under GDPR – can apply to processing that is necessary for the purposes of direct marketing (Clause 5). This is not a new concept as UK GDPR already references it (Recital 47); however, moving it to the operative text provides crucial legal certainty and clarity for direct marketers.
    - It incorporates "scientific research carried out as a commercial activity" into the definition of scientific research (Clause 2). This reform will bring clarity and legal certainty to the market research community, which forms a part of our membership, and means that they can benefit from the privileges the regime already affords to scientific research.

10. However, we believe there is room for further improvements in the Bill.

Cookies not requiring consent

11. Section 79 (2A) of the Bill helpfully permits the use of non-intrusive cookies without consent for 'statistical purposes'. 'Statistical purposes' infers the collection of quantitative data to present the static state or trend of the subject data. However, 'statistical purposes', as a term, is overly narrow. The exemption as drafted appears to only to relate to the first party use of cookies, and only "for the sole purpose of…" service/site improvement. Secondly, it omits important activities such as audience and ad measurement analytics.

12. For example:
    - Audience measurement is an important function for media owners to determine consumption of content and to price advertising space for advertisers. Such metrics are crucial to assess the effectiveness of a media channel.
    - For sites that carry advertising, cookies are used to verify the delivery and performance of a digital ad i.e., confirmation that an ad has been served or presented to a user, and whether it has been clicked on. This information is essential to accurately invoice an advertiser for the number of ad impressions in a digital ad campaign. Due to the way the consent mechanisms for GDPR and PECR interact currently, legal guidance requires media owners to seek separate consents for each purpose and consumers can decline these important cookies and render the ads to that user worthless. Put simply, if the

advertiser isn't given evidence that the user has interacted with the ad, due to the user declining cookies that measure ad performance, the advertiser cannot be invoiced for it and the publisher does not get paid.

13. This anomaly is not addressed in the No 2 Bill even though it is particularly important for subscription-free content offered by publishers which is principally funded by advertising.

14. We suggest the following legislative amendments to address these anomalies:

Clause 79, Paragraph 2, 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.

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

(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.

Centralised cookie controls

15. One of the stated aims of the Bill is to reduce consent fatigue and Clause 79(3) (6B) attempts to legislate for the future introduction of technology for the automated signalling of pre-determined consent or objection to the use of cookies. The language in the Bill is problematic for several reasons.

16. Allowing consent to be expressed via other technology intermediates the relationship between a publisher and their consumers and creates friction with how publishers meet their GDPR obligations. As the underlying legal framework and would remain unchanged, this also raises serious legal questions about liability for obtaining valid consent for processing and what should happen if a consent obtained by a third party is ever legally challenged. The direct relationship between publishers and end users should be paramount and any consent expressed by users directly to publishers should not be overridden by alternative consent management platforms.

17. The Bill does not specifically require the Secretary of State to consult with the CMA/DMU on aspects of competition and leaves this question open-ended. This is important as centralised cookie controls incorporated in browsers (such as Safari, Google Chrome, Edge etc.) or other access-enabling technology could effectively create a new set of gatekeepers. By this we mean creating the ability to (a) conflict

with or override existing consent preferences expressed by the user to individual publishers; or (b) prompt users to authorise the technology to act as a first party in the publisher/user relationship.

18. Given that consent to the processing of personal data is important to the business model of the open web, there is no guarantee that a centralised cookie control would reduce the number of cookie pop-ups. Information society services may still try to seek user consent directly to bypass and override any centralised controls.

19. We have previously expressed these concerns about legislating for an automated consent management mechanism, but they do not appear to have been addressed in this latest draft of the Bill.

20. We also have wider concerns about the wording in the Bill as the power provided for in new Regulation 6B is not linked to a corresponding change to consent requirements. This creates a problem for:
    - services dependent on the use of cookies that are subject to consent will not be able to function if users choose not to opt-in via those centralised controls.
    - personal data processing that is dependent on consented cookies (e.g. for advertising purposes) may not be able to take place.
    - meeting the conditions for consent in the UK GDPR (freely given, specific, informed and unambiguous)
    - assigning controller/processor liability. Assigning liability may become uncertain depending on the technology and how the technology processes the automated consent or objection.

21. To address this issue, we recommend an amendment to the legislative text along the lines of:

Clause 79, paragraph 3, new regulation 6A (1) page 104, line 13 after "The Secretary of State" insert ", with due regard to the principles of technology neutrality,"

Clause 79, paragraph 3, new regulation 6B (1) page 104, line 37 after "requirements" insert "and does not distort competition in digital markets."

Clause 79, paragraph 3, new regulation 6B (2), page 105, line 2 after "website." insert "However, consent directly expressed by an end-user in accordance with Article 6 of the UK GDPR shall prevail over any automatic settings, and any consent requested and given by an end-user to a service shall be directly implemented by such technology."

Clause 79, paragraph 3, new regulation 6B(6), page 105, line 15 after "Commissioner" delete "and" and insert a new point –

(b) the Competition & Markets Authority, and

and amend the current point (b) to become point (c).

22. Additionally, it is worth highlighting that we are unclear on what basis a decision about what constitutes 'specified requirements' (Clause 79, new regulation 6B, page 104, line 37) of automatic consent management technology will be made, including what criteria such a decision would be based on; how such criteria will be agreed; and how affected stakeholders will be involved in this decision.

23. We also strongly recommend that prior to draft secondary legislation being introduced under Clause 79, paragraph 3, new regulation 6B, that an impact assessment should be undertaken of:
    - the potential competition and economic impact of a move to automatic consent management controls.
    - the potential impact of removing cookie banners for ad-funded business models.
    - the interaction of an 'opt out regime' for cookies with data controllers' PECR and UK GDPR obligations, including the standard that must be met for 'consent' under either legislation to be valid.

To that end, we would recommend adding the following amendments to the legislative text along the lines of:

> *Clause 79, paragraph 3, new regulation 6B, page 105, line 17, at end insert –*
>
> *(7) Before making regulations under paragraph (1), the Secretary of State must carry out and publish an assessment of the likely impact of implementing the regulations statement of readiness of the technology.*
>
> *(8) An assessment under paragraph (7) must set out how, in the Secretary of State's opinion, making regulations under paragraph (1) would impact competition and its legal effect on PEC Regulations and UK GDPR.*
>
> *and amend the current point (7) to become point (9), amend current point (8) to become point (10).*

24. To our knowledge, these impact assessments have not been undertaken or published and the current draft Bill does not require that to happen prior to the exercise of the power in Clause 79 new regulation 6B.

Definitions established by the Privacy & Electronic Communications Regulations (PECR)

25. PECR is the key legislation that protects the confidentiality of communications and applies to all "electronic communication networks". However, Government has proposed to narrow the scope of exceptions to "information society services" (ISS) only (Clause 79).

26. This is significant as an information society service would include a service like Gmail, but ironically an email being sent using Gmail likely would not be. Additionally, services such as the 'Live TV' section on BBC iPlayer would not fall under an ISS and would require consent for audience measurement cookies but 'VOD sections' of BBC iPlayer would not have to obtain consent for the same

cookies. The original scope of “electronic communications networks” should apply here, otherwise this could result in a significant impact on the interplay between UK GDPR and PECR.

Meaning of research and statistical purposes

27. Survey research is a quantitative method to collect information from participants by using questionnaires, etc. Statistical research is a broader term covering all research methods, which aligns with the intention stated in paragraph 3 lines 25 to 27 and Recital 159 of the UK GDPR.

28. Hence, we recommend that the reference to "statistical surveys" be replaced with "statistical research" (Clause 2, paragraph 6, page 4, line 14).

Direct marketing for the purposes of democratic engagement

29. Overall, we do not support the inclusion of a new exemption for direct marketing provision used for the purposes of democratic engagement. There has been several issues with political parties not following the current data protection requirements (see: the ICO website: https://ico.org.uk/about-the-ico/media-centre/news-and-blogs/2020/11/uk-political-parties-must-improve-data-protection-practices/).

30. We are concerned that the option for the Secretary of State to offer such an exemption will result in an increase in poor practice. One of our members, the Market Research Society, has rules prohibiting such poor practices referred to colloquially as "plugging" which is political lobbying under the guise of research. For example, a telephone call which seeks an individual’s political opinions and then urges support, invites contact, provides promotional material or uses that data to identify those people likely to support the political party or campaigner at a future date, in order to send them marketing material.

31. Therefore, we would recommend the removal of Clause 83. If that is not possible, we suggest embedding ICO guidance (see: https://ico.org.uk/for-organisations/guide-to-data-protection/key-dp-themes/guidance-for-the-use-of-personal-data-in-political-campaigning-1/) in the legislative text.

9 May 2023.