

Balance of Competences Review between the United Kingdom and the European Union: IAB UK submission to the Call for Evidence on Information Rights

1. Introduction

The Internet Advertising Bureau (IAB) is the trade body for digital advertising in the UK. It represents approximately 900 businesses engaged in all forms of online and mobile advertising, including advertisers, agencies, advertising technology businesses, media owners and publishers.

The IAB exists to support the long term growth of the market, as well as to work to ensure that practices within the sector are responsible. It does so by supporting existing self-regulatory approaches, and developing industry good practice to help a fast-paced innovative market to continue to grow. It works with other IABs across the world to support global market consistency in these approaches and to give consumers a uniform experience where possible. Find out more about the IAB at www.iabuk.net.

The IAB believes that the concept of smart regulation – i.e. rules that enable the greatest possible benefits to people and businesses in the most pragmatic and effective way – should be at heart of any legislative measure. Our response therefore assesses the balance of competences between the UK and the EU in the area of information rights on the basis of this understanding and focuses on its relevance to the digital advertising industry.

2 The UK digital advertising landscape

Advertising plays a pivotal role in the development of the internet. It is the lifeblood of the digital economy in the UK, EU and globally. As in traditional media, it is the business model for making (non-publicly funded) content and services widely available to UK citizens for little or no cost: from search, webmail, social networking websites and price comparison sites, to productivity suites, blogs, video/photo and sharing and the majority of news, information and video / entertainment sites.

Data sits at the heart of this system, fuelling the continuous innovation that has been made available by the constant evolution of consumer technology. Harnessing the power of data has reduced the barriers to market entry for businesses of all sizes, allowing the richest mixture of content and services to be made widely available to consumers and offer them a more relevant and reciprocal interactive experience.

The UK is an exemplar of successfully embracing these new opportunities, leading Europe in digital advertising with a record high £6.3 billion spent in the medium in 2013¹. This makes digital advertising the fastest growing marketing platform in the UK outstripping all other advertising sectors with a year-on-year growth of 15.2%². Importantly, in no other country in the world is the share of digital advertising (online and mobile) as a proportion of all advertising expenditure higher than in the UK (36.1%)³.

The growth of digital advertising and data-driven business models is inextricably linked to the rise of the UK to being the world's ecommerce powerhouse. Recent Ofcom research shows that per capita spend on online

¹ IAB / PwC Digital Adspend 2013

² Ibid.

³ warc.com

purchases at £1,175 is higher in the UK than in all other comparator countries (France, Germany, Italy, USA, Japan, Australia and Spain)⁴. The overall UK ecommerce market was recently valued at £91 billion in 2013⁵.

Consumer trust is a key element in sustaining the success of this sector. IAB research indicates that consumer understanding of the value of digital advertising is relatively high, but understanding of technology and use of data is low⁶. The IAB believes that industry innovation and education are the way to address consumer privacy concerns. With that in mind, the IAB and the wider EU advertising and media sector has established a pan-European self-regulatory initiative to increase transparency and consumer control in digital advertising.

Whilst still in its developing stages in Europe, this programme aims to provide greater transparency and control about data collection and use for customised advertising based upon previous web browsing activity. This initiative has a proven track record and has been developed with the support of the UK Government and in consultation with the European Commission itself. To find out more, please visit the [IAB website](#) and the [European Interactive Digital Advertising Alliance \(EDAA\) website](#).

3 Answers to specific questions

I. What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

II. What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) strikes the right balance between individuals' data protection rights and the pursuit of economic growth?

III. What evidence is there that the EU's competence and the way it has used it (principally the Data Protection Directive) is meeting the challenges posed by the increasing international flow of data, technological developments, and the growth of online commerce and social networks?

Data is global by nature and the free flow of data across borders is fundamental to the proper functioning of the data-driven economy. The most sensible solution to regulating the protection of personal information would therefore be a common set of standards that apply on a worldwide level. In reality a multitude of reasons led to the emergence of different data protection regimes even before the EU proposed the Data Protection Directive. In this context, using EU competence to aim to harmonise the data protection frameworks across Member States was a laudable decision.

As described above, the digital advertising industry has grown at a breath-taking pace since 1995 when the Directive was adopted. Numerous factors have made this growth possible and while it would be difficult to accurately attribute the Directive's contribution (and the UK's implementation of it) to this development, two distinctive features of the current data protection regime stand out as important elements:

- **Principles-based approach** – The Directive devised a set of principles that have enabled a flexible framework with a focus on regulating behaviour and has therefore – by and large – been able to stand the test of time. These principles also serve as a prerequisite for important arrangements on international data transfers such as the US-EU Safe Harbour agreement.

⁴ Ofcom International Communications Market Report, December 2013

⁵ IMRG Capgemini e-Retail Sales Index, 2014

⁶ IAB UK / ValueClick Consumers and online privacy, 2012

- **Technology-neutrality** – The Directive was drafted in a technology-neutral way which has ensured that the comprehensive nature of the rules have longevity in light of rapid and often unpredictable technological evolution.

The ability for data-driven business to succeed in the UK in a regulatory environment shaped by EU legislation has also been a result of the realistic attitude taken by the UK Government in implementing EU Directives in this area, and a pragmatic regulator that adopts a risk-based approach to enforcement in the form of the Information Commissioner's Office (ICO). In both cases, this has assisted in the creation of a suitable commercial environment.

Evidence for the effectiveness of this complementary effort can, for example, be found in the implementation of Article 7 (f) of the Data Protection Directive (the legitimate interest condition) which – in contrast to the UK – was transposed into Italian and Spanish law in an overly restrictive fashion, undermining the practicality of this particular ground for processing data.

Further evidence for this approach is provided by the transposition of the revised ePrivacy Directive 2009/136/EC – an obvious example where EU competence in the area of privacy laws has led to unsatisfactory results. UK Communications Minister, Ed Vaizey, at the time called the Directive “well-intentioned but [...] this new law is not an easy one for business to implement, it is potentially both disruptive and costly”⁷.

Thanks to the elevated commitment by the UK Government as well as the ICO to explore a range of solutions to respond to challenges posed by the new rules – particularly around the consent requirements as set out in Article 5 (3) – businesses and consumers in the UK were able to avoid the extensive difficulties that other EU Member States, such as the Netherlands, have had to go through. First enacted in a very restrictive manner, backlash by consumers as well as politicians, echoing the views and frustrations of their constituents over a burdensome digital experience, has led to a lengthy process of readjusting the initial implementation. Through the willingness of the UK Government and the ICO to consider innovative options to regulatory challenges this situation was prevented in the UK. This approach is also a central anchor in the UK Government's support for the pan-European self-regulatory programme for Online Behavioural Advertising (OBA) (see above).

The IAB believes the revision of the ePrivacy Directive as well as the current draft General Data Protection Regulation (GDPR) have exposed that the greatest weakness of the EU lies in its lack of digital understanding and technical expertise. This is reinforced by an underinvestment in inclusive stakeholder engagement platforms through which technologists, businesses, civic society groups and policymakers can come together in a meaningful way throughout the entirety of the policy-making process. A sound knowledge of user behaviour and technology precipitates endeavours to regulate the digital world. Laws do not exist in a vacuum; they have to be relevant to the people and businesses they seek to govern. The fact remains that being short of technical prowess significantly circumscribes and continues to undermine the EU's necessary competence to create future-proof rules for the digital age.

In summary, endeavours to harmonise data protection regimes at global level are sensible and the EU is in a unique position to make significant contributions to these efforts. The Data Protection Directive generally achieved this aim with its principles-based outlook which also underpins important agreements to allow for the free flow of commercial data outside the EU. However, a more consultative approach substantially involving stakeholders from across the spectrum would considerably strengthen the EU's ability to use its competences more effectively and avoid regulations that are neither in the interests of individuals nor businesses such as the revised ePrivacy Directive.

⁷ Ed Vaizey MP Speech to Internet Advertising Bureau, 3 November 2011

IV. What evidence is there that proposals for a new EU Data Protection Regulation will be advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?

The proposals introduce a number of prescriptive changes which could significantly impact digital advertising. Amongst these, three stand out as the most imminent threats to the sector:

- **The extended scope of ‘personal data’ to – in effect – cover all forms of information:**

The proposed definition makes no distinction between personally identifiable information like someone’s name or address and non-directly identifiable data, such as that used by today’s digital advertising businesses. The result is a blanket approach that makes the latter type of data subject to unworkable and disproportionate compliance obligations. Coupled with a requirement to obtain explicit consent (see below) this could make many existing advertising business models unworkable.

- **Requiring organisations to obtain the ‘explicit’ consent for the processing of this data:**

Were this to be the only legal basis available to digital businesses, it would require consumers to navigate through numerous hurdles to access the content or service they are interested in. It would threaten the viability of many existing digital business models and potentially compromise the viability of future ones.

- **Article 20 on profiling potentially (and unhelpfully) includes some forms of behavioural advertising.**

The IAB believes this needs clarification as it is clear that other aspects of the Article refer to discrimination (such as on price) as a result of profiling as well as the use of sensitive information. We believe the boundaries should be clearer so that businesses can continue with activities that serve ‘legitimate interests’.

The IAB believes that different data classes pose different privacy risks and that the law should reflect this by lessening the regulatory burden for lower-risk data processing. To that end, the IAB has proposed the introduction of a subset of personal data – ‘pseudonymous data’. This additional category recognises the less intrusive nature of certain data which can ‘single out’ and treat a user differently based on his/her preferences or interests but not actually directly identify an individual. This can therefore add much needed flexibility and balance into the rules whilst preserving the aim of minimising the collection and use of data.

Importantly, the concept of ‘pseudonymous data’ has to be accompanied by a workable legal basis to provide data controllers the necessary legal certainty. If explicit consent is to become the standard for processing all data, then alternative legal bases, such as the legitimate interest condition, must be explored. Crucially, this must be balanced against the right to object in a realistic way so as not to undermine the practicality of relying on this ground of processing.

The Potential Implications:

The IAB believes the above issues – as drafted - may have a significant impact on the growth of digital advertising as well as the UK’s status as one of the world’s leading knowledge economies.

The following case studies outline how the existing proposals may affect digital businesses:

Ad Innovation Supporting the Creative Industries



A global technology business that derives 100% of its revenue from advertising developed an innovative way of providing relevant ads at a household level (ie across all devices being used in a home – TV, smartphone, tablet, desktop, games consoles), providing new opportunities for brands by connecting them to a multi-screen home as well as providing additional sources of revenue for publishers / content-producers. The new-product, pioneered in the UK market and being used by the likes of leading brands such as John Lewis, has also been rolled out globally. It works by clustering all devices into a single household unit, using a unique identifier – the IP address. The identities of the people in the households are never known. However, the requirement of explicit consent for this data under the proposed EU General Data Protection Regulation (GDPR) would cause serious disruption to the product and impinge on the ability of online publishers and other web site owners to gain the necessary revenue to

invest in their content and service offerings.

Driving eCommerce

A small UK based performance marketing group – employing 60 people in the UK - uses an 'affiliate marketing' model where their technology allows advertisers to place advertising and content on multiple online publishers. The company records when a website visitor completes an action, such as a sale, to enable the advertiser to pay the publisher an agreed fee. Effective targeting of online advertising helps attract more views and 'click-throughs' which extracts better value for publishers and enhances the consumer experience through non-intrusive, relevant advertising suited to their interests and needs. In order to place advertisements and ensure advertising is relevant to consumers; the company needs to run analytics processes to capture data to determine performance. The

explicit consent requirements under the GDPR would be impossible to meet given the millions of records processed and non-availability of details which would have to be requested separately. This business would also not have an SME exemption under the GDPR as the data processing would not be ancillary to their main business. The business would need to employ a data protection officer to carry out Data Protection Impact Assessments and provide free rights of access to consumers to their data. All of these measures are largely unworkable and extremely costly to the business. The performance marketing industry was estimated to be worth £14 billion in sales in 2013, representing circa 0.8% of UK GDP⁸. This business model would collapse under the proposed GDPR due to the excessive regulatory compliance costs, requirement for explicit consent and punitive sanctions.



⁸ IAB UK / PWC The Value of Online Performance Marketing in the UK, January 2014

Evolving From Print to Digital



A popular UK news brand increasingly uses data as it evolves its businesses from a print world to a digital era to find new sustainable revenue sources to continue investing in quality content for people to enjoy. Data powers its advertising model(s), critical revenue in its evolution, and it has invested in innovative news ways for brands to reach their target audiences as well as focussing on the building of trusted relationships with its readers. These ad models do not need to know the identities of individuals to be effective and a disproportionate GDPR (including a provision to obtain explicit consent for the processing of this data) would make these approaches unworkable and reduce the incentive to invest in its own business as well as external start-ups thereby diverting money away from growth in the digital

economy.

Empowering a Diverse Internet

A global radio streaming site is a unique music platform with channels to suit every taste, from solo guitar music to the sounds of 'soul kitchen'. The site receives over 60% of its revenue from advertising, delivered by third party advertising technology businesses that collect and use non-identifiable behavioural data – using 'cookies' – across the web to provide more tailored ads to people using the service. The tailored nature of the ads makes them more valuable to the site-owner, enabling them to continue to provide and invest in music content, and is more effective for brand advertisers helping them to reach an audience that is more likely to be interested in its product or service. The website does not have the scale to make a 'pay wall' work. By requiring explicit consent for the processing of this data under the GDPR it would restrict the use of advertising to support the business, and it would therefore not be able to exist.

The end result would mean that niche sites such as this would not be economically viable, depriving people of diverse content on the internet.



Supporting Small Business & Enterprise

A start-up app platform for payment cards is set to work with the UK's largest publishers to provide web users with cash back deals, vouchers and loyalty-scheme points through their offline and online purchasing behaviour. The business is able to provide this service by linking a consumer's payment card to their social media profiles as well as online affiliate schemes. In effect consumers that sign up will have their bank card automatically turned into a cash back card for in-store purchases. Consumers that enrol for the service through affiliate sites will provide personally-identifiable information that is only processed and not controlled by the start-up business. A strict data protection regime could potentially damage the third party businesses that the start-up is reliant upon to collect and use the behavioural information. This business is based in the UK, with offices in France and Denmark. It currently employs 15 members of staff and anticipates that it will become one of the most popular forms of providing loyalty / promotional offers in the next 18 months. This technology is especially attractive to retailers with physical 'bricks and mortar' stores as it allows them to leverage the online publishers' customer reach to drive footfall into their stores in a cost-effective manner. A core part of the strategy is also to help address the "decline of the high street" by offering small independent merchants the tools to offer smart loyalty / promotional tools without having to invest in expensive systems. The business plan is based on the current data protection regime.



In conclusion, the proposed EU Data Protection Regulation signifies one of the most important policy developments of the digital age. A revised framework that is robust, balanced and future-proof can boost economic and social growth in the UK and Europe by creating conditions for both privacy and innovation to flourish. However, the IAB believes that the reforms – in their current form – would significantly risk the commercial viability of hundreds of innovative British-born start-ups and seriously undermine digital entrepreneurialism in the UK in times when the digital economy is a key driver of economic growth.

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