

## *Comment:*

# Advertising Association response to the Government's review of the Balance of Competences between the United Kingdom and the European Union

**27 June 2014**

## **Information Rights**

### **1. Introduction**

- 1.1. The Advertising Association (AA) is the single voice in the UK for all sides of the advertising and promotions industry worth £17.9bn in 2013 – advertisers, agencies, and media. A list of AA members can be found here: <http://www.adassoc.org.uk/Members>.
- 1.2. We welcome the opportunity to respond to this consultation and to provide input to HMG's thinking and understanding of the value of EU membership, how it affects the UK, how access to information from the EU can be improved, and how data can be most effectively regulated.
- 1.3. It is extremely important to ensure the right balance of competences between national and EU legislation, responsibilities, and powers. The right balance will ensure that the national advertising ecosystem is supported or in the least protected from unhelpful EU rules that may hinder the sector, and that cross-border commerce, media and advertising is encouraged through a true single market in these services.
- 1.4. This response will focus on two themes: the advantages of the current data protection regime and balance of competences, the risks of the proposed regime and a general comment about the transparency of EU decision making and access to documents.

### **2. Advertising and the Creative Industries**

- 2.1. The creative industries, and marketing and advertising within that, are a key UK sector. The January 2014 statistical report by the Department of Culture Media and Sport<sup>1</sup> found that 1 in 12 jobs in the UK is in the Creative Economy. 'Advertising and marketing' remains the second highest employer within the Creative Economy, making up 18% of the Creative Economy. In 2012, employment growth in the Creative Industries (8.6%) was 12 times that of the wider economy (0.7%). The rate of export growth for the Creative Industries, from 2009-2011, increased by 16.1% compared to 11.5% for total UK exports.
- 2.2. As was found by research carried out by Deloitte: "The advertising industry is central to the creative industries. It provides a third of all TV revenues and two-thirds of newspaper revenues; it supports sectors from photography to film production. We estimate that over 550,000 people work in jobs that are funded by advertising revenues, or involved in the commissioning, creation and production of advertising across the relevant supply chains."<sup>2</sup> The UK advertising industry is recognised across Europe for its leadership in adspend, creativity and its effective system of self-regulation.

### **3. Information rights - Access to EU documents**

<sup>1</sup> Creative Industries Economic Estimates: January 2014 Statistical Release. DCMS. Available [here](#).

<sup>2</sup> Advertising Pays: How advertising fuels the UK economy. Deloitte. 2012. Available [here](#).



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*Q5: What evidence is there that the right to access documents of the EU institutions has been advantageous or disadvantageous to individuals, business, the public sector or any other groups in the UK?*

Access to EU documents is not always easy and straightforward. Particularly Council discussions and the “trilogue” process are closed and lack transparency. This enables haggling, political trade-offs and policy outcomes that are neither evidence-based nor proportionate. We would recommend making Council proposals public in advance of meetings, and encouraging – even requiring – greater consultation between national Government representation and stakeholders to ensure that those negotiating in Council are informed by evidence in their discussions.

The Parliament’s policy-making process is perhaps the most open and transparent. However, decisions are often driven by politics not evidence or technical knowledge, and following the progress of proposals as they approach plenary debates and votes can be very difficult given that texts which consolidate amendments adopted are not made available. This makes it difficult both for policy-makers and stakeholders to analyse the impact and consistency of the provisions in a text.

#### **4. Data Protection Framework**

##### **a. Existing framework**

*Q1: 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?*

*Q2: 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?*

*Q3: 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?*

The current Data Protection Directive has provided a good balance between the interests of businesses and consumers. Although it was written in a pre-internet era, its technology-neutral approach has provided a framework which has been flexible enough to accommodate immense innovation and exponential growth and value in both the generation of data and its processing. The E-Privacy Directive complements the 1995 Data Protection Directive and also addresses issues around new technologies, browsers and cookies.

The principles underpinning the Directive have helped to strike a workable balance between the value of data and the protection of personal information, despite being written in a very different world. Its principles remain applicable, though the recent judgement against Google on the right to be forgotten demonstrates the need for some revision so as to prevent the European Court interpreting the 95 Directive in ways which were not intended when the Directive was passed.

The Directive and its implementation did of course create new burdens upon business, new obstacles to supply of information and new layers of regulation far beyond the requirements of its predecessor: The Data Protection Convention and Data Protection Act 1984.

In the UK, the Directive represented even more of a legal and cultural challenge. It was a measure predicated upon privacy insofar as it applied to protection of personal data. It was grafted onto a legal system which did not recognise any dedicated privacy law, and which predated the Human Rights Act

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1998 as well as any requirement to take the ECHR into direct account in domestic courts and the Freedom of Information Act 2000. However, the combination of the Directive's approach, a variety of express exemptions and pragmatic implementation by the UK Government and ICO's office has enabled some balance to be struck in practice. This has allowed a successful business environment to flourish here.

On the other hand, however, differences in implementation and issues around consistency across borders has meant that a true single market for data has not existed. Organisations wishing to collect and process data across borders have therefore had to adapt to the 28 different regimes. Guidance issued to clarify discrepancies has been helpful but the intention of the new proposals is understood within this context.

Data is not limited by EU borders and it is important to have consistency in principles more broadly than just at EU-level. The new draft Regulation seeks to address this but, unlike the principles-based 95 Directive, the current proposals are too prescriptive and do not balance the interests of business and consumers, and so it risks stifling businesses. This is not in the best interests of consumers.

The reality is that full harmonisation exists only in theory. Even full harmonisation measures such as Regulations can be implemented and enforced differently and nonetheless create barriers between borders on the flow of data – especially when extra-EU territories are considered. Given the pace of change of both technology, use of data, citizens' and regulatory understanding of the value and risks of data collection and processing, a principles-based approach that is clear and implemented consistently, would ensure that legislation written today remains fit for purpose.

Regulatory standards are important but so is effective industry self-regulation. This has been shown to be particularly well-suited to fast-changing and dynamic environments. One such example is the extension of the CAP Code to Online Behavioural Advertising, providing consumers with recourse to the ASA.

## 5. Data Protection Framework

### a. Proposed Framework

*Q4: 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 current proposals are both broad in their impact, diverse in their wording between the current European Parliament text, the original Commission proposal and the Council work in progress, and likely to change before final text is agreed in the trilogue process. While there may be savings to business from a single data protection regime in theory, the requirements set out in the proposals increase burdens on business significantly. This is because the draft does not contain a balance between the interests of business and consumers. We commend the MOJ for their efforts in trying to assess the impact of the proposals in their Regulatory Impact Assessment. We have outlined some key concerns in the proposals as they currently stand, and the fall-out that will be felt by business and consumers alike.

### Definitions

IP addresses and cookies are integral to the smooth running of the internet, and key to many business models online including publishing and e-commerce as well as advertising (and therefore advertising-funded content). While it is data which is identifiable, including it in the definition of personal data could undermine these products and services while not generating any

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additional protection of personal data. A risk-based approach which either excludes this data from being considered personal or defines it as 'pseudonymous', would be more proportionate.

### Consent

Moving to an explicit consent regime for all types of data is not practical and not a risk-based approach. Sensitive data should have more stringent requirements for consent. The broad application of explicit consent risks undermining the very same protection it is expected to create by de-sensitizing users to the need to consider whether consent should be granted or not, rather than responding automatically through a tick-box (or similar) exercise.

It is about creating a workable environment for business and consumer. This applies as regards online, where explicit consent for cookies would require constant pop-up consent boxes, ruining the consumer experience. It also applies to postal marketing. If this became opt-in, organisations would resort to unaddressed and untargeted door drops instead, which would not be in the interests of the consumers, nor the advertising and marketing industry.

### Impact on SME's and start-ups

Moving postal marketing to an opt-in/subscribe channel would also have a particular impact on SME's as they would not be able to promote new products and services in a business to business and business to consumer context. The bureaucratic and financial burden on businesses, especially SMEs, is likely to be significant and stifle innovation. SMEs are key economic drivers in getting the economy out of recession. The burdens in the proposals currently include, to name but a few:

- hiring a Data Protection Officer
- processing much larger data as 'personal'
- managing the 'right to be forgotten'
- managing 'explicit consent' requirements.

The UK Government's own impact assessment concluded that the proposed Regulation would have a net cost to the UK economy of £100-£360 million per annum.

### Right to Object

The open-ended proposal from the European Parliament which allows for objection without grounds, and which furthermore over-rides any balancing test of legitimate business, would entirely undermine the purpose of the proposals. Data subjects, despite any form of previous consent, and irrelevant of any balancing test carried out by the data processor, can object to processing of their data. This is disproportionate to the intentions of the regulation and does not balance citizen's rights against the benefits of the use of data.

## 6. Conclusion

Data protection:

The proposed regulation on data will create a balance of competencies that is overly prescriptive at European level and will neither achieve full harmonisation nor a framework which both protects consumers and business interests appropriately.

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A framework of principles reflected in international agreements outside of the EU and implemented by guidance and self-regulation would be likely to offer a better balance of power to achieve the aims of the rules.

However, there is merit in competencies being at EU level as this enables the EU to negotiate global agreements with the US and APEC as one voice rather than 28 individual countries.

Access to information:

More should be done to enable greater transparency in Council discussion and during trilogue and to facilitate the publication of consolidated texts as proposals pass through the European Parliament.

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