

## UK Implementation of Article 5.3 of the revised ePrivacy Directive (2002/58/EC): Memorandum

***This IAB UK memo is intended as an aid for the affiliate marketing sector and seeks to help them understand the new law and ongoing work towards compliance. It is not legal advice on this matter.***

### 1. Background: What is the revised ePrivacy Directive?

The revised ePrivacy Directive is part of a broader piece of European legislation – the EU Electronic Communications Framework - that comprises a total of five Directives and was required to be implemented into all national laws by 25 May 2011. To date just over half of the 27 Member States of the EU have actually transposed the new Directive into national laws. This includes the UK.

The revised ePrivacy Directive amends the existing Directive, replacing the existing ‘notice and opt out’ provisions with a requirement to obtain consent for *“the storing of information or the gaining of access to information stored in the terminal equipment of a subscriber or user... having been provided with clear and comprehensive information”* (Article 5.3).

Article 5.3 therefore applies to all technologies used for this purpose, including cookies, and impacts upon a wide range of online services, including affiliate marketing. The only exemption the revised Directive makes is when uses are *“strictly necessary”* for the service explicitly requested by the user but the Information Commissioner’s Office (ICO) believes this exemption is narrow (see below).

The new law came into force in the UK on 5 May 2011. However, the UK Government and the ICO - the data protection authority that will enforce the UK law - have agreed a phased approach whilst businesses explore compliance solutions. The ICO is expected to take a less relaxed approach come the end of May 2012.

### 2. What is the UK approach to the new law?

The UK Government recognises that the revised Directive is a *“well-meaning regulation that will be very difficult to work in practice”*<sup>1</sup>. It takes a pragmatic view and this is confirmed in an ‘open letter’ clarifying its approach. The letter was drafted in full consultation with the ICO and a copy is at [www.dcms.gov.uk/images/publications/cookies\\_open\\_letter.pdf](http://www.dcms.gov.uk/images/publications/cookies_open_letter.pdf).

The letter confirms that the new law does not mean ‘prior consent’ is required to achieve compliance and that the UK approach is not *“prescriptive about measures to meet the requirements of the Directive and [our] drafting [of the legislation] enables this.”* This approach was reinforced by Communications Minister, Ed Vaizey, at a speech to IAB Engage on 3 November. At the event the Minister recognised the importance of digital advertising to the UK economy and said that *“the UK is*

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<sup>1</sup> Speech by UK Minister for Culture, Communications and Creative Industries, Ed Vaizey MP, to the CBI – 29 March 2011 [www.culture.gov.uk/news/ministers\\_speeches/7997.aspx](http://www.culture.gov.uk/news/ministers_speeches/7997.aspx)

*in a position to take a lead role and provide a sensible, pragmatic framework for implementation that I hope will be replicated across the EU.*<sup>2</sup>

The UK Government's approach is based upon an 'ecology of [compliance] solutions'. It is in advanced discussions with major web browser manufacturers (Microsoft, Apple, Mozilla, Google) about enhancing existing privacy settings at browser level to make them more prominent to web users and to exert greater control over the likes of cookies if required. The UK Government expects these to start to be available from the spring of 2012 (but in line with product cycles). Further details to follow but the approach should not be viewed as a 'silver bullet'.

### **3. What do I need to be doing?**

The ICO issued initial guidance on the new law in May 2011. On 13 December 2011, it issued revised guidance, accompanied this with a 'half term report' encouraging businesses to 'do more' work towards compliance. A copy of the revised guidance and the 'half term report' can be found at: [www.ico.gov.uk/news/latest\\_news/2011/must-try-harder-on-cookies-compliance-says-ico-13122011.aspx](http://www.ico.gov.uk/news/latest_news/2011/must-try-harder-on-cookies-compliance-says-ico-13122011.aspx).

The revised guidance is not very different to the initial guidance in May 2011 and re-iterates the key message of 'being transparent'. It encourages the following steps:

#### **A. Conduct a comprehensive audit of cookies (and other technologies) and how they are used:**

The IAB Affiliate Marketing Council advised businesses to do this in August 2011, as part of the Council's proposed Five Point Plan to work towards compliance. See [www.iabaffiliatemarketing.com/reminder-of-the-ico-advice-do-a-cookie-audit-start-planning](http://www.iabaffiliatemarketing.com/reminder-of-the-ico-advice-do-a-cookie-audit-start-planning).

#### **B. Assess intrusiveness:**

As part of the audit, the ICO advises businesses to make an assessment on how intrusive cookie (or other technology) use is. The ICO recognises that many cookie uses – such as for functional or analytical purposes - do not have an impact upon user privacy and should therefore not be considered intrusive.

#### **C. Be Transparent:**

The ICO includes some guidance on how information can be made more transparent and prominent on a website. This includes theoretical examples of good practice, such as displaying the information more prominently on a website (rather than tucked away in a privacy policy). In practice, some publishers are already working to make this information more prominent and transparent.

Examples include:

- The Department for Culture, Media and Sport – [www.culture.gov.uk/4902.aspx](http://www.culture.gov.uk/4902.aspx)
- British Airways – [www.britishairways.com/travel/cookies/public/en\\_gb](http://www.britishairways.com/travel/cookies/public/en_gb)
- BBC – <http://www.bbc.co.uk/privacy/bbc-cookies-policy.shtml>
- The Guardian – <http://www.guardian.co.uk/info/cookies>

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<sup>2</sup> Speech by UK Minister for Culture, Communications and Creative Industries, Ed Vaizey MP, to IAB Engage – 3 November 2011 [www.culture.gov.uk/news/ministers\\_speeches/8592.aspx](http://www.culture.gov.uk/news/ministers_speeches/8592.aspx)

As part of its Five Point Plan, the IAB Affiliate Marketing Council is drafting some standardised wording as industry good practice for affiliates and advertisers to inform consumers about the use of cookies in affiliate marketing.

#### **D. Working Towards Getting Consent in Practice:**

The ICO does not recommend a 'one solution fits all' approach to consent as this will depend upon the cookie use itself. The ICO recognises that it is difficult to get consent for some functional cookies, particularly where there is no direct relationship with a user. In this case, publishers should ensure that information is displayed prominently.

The ICO's revised guidance report stated that: *"Although the Information Commissioner cannot completely exclude the possibility of formal action in any area, it is highly unlikely that priority for any formal action would be given to focusing on uses of cookies where there is a low level of intrusiveness and risk of harm to individuals, if an organisation can demonstrate they have done everything they can clearly to inform users about the cookies in question and to provide them clear details of how to make choices"*. **The IAB therefore believes that transparency is a fundamental step to achieving compliance.**

Furthermore, measures taken to date by some significant publishers suggests that implementation can be effective both in terms of user transparency around choice as well as ensuring commercial imperatives are taken into consideration. To assist with business implementation, the IAB's Affiliate Marketing Council has published a Five Point Plan (see below) which includes conducting a cookie audit and working with publishers to ensure greater transparency on websites. In addition to this, the Affiliate Marketing Council will produce a simple consumer guide to affiliate marketing – via a website – explaining how it all works, the use of cookies, the benefits to consumers (better deals etc) and how privacy is protected. The Council will also be developing standardised wording as industry good practice for affiliates and publishers to inform consumers about the use of cookies for this purpose. Both initiatives will be launched in 2012.

#### **4. Where do I get more information?**

Feel free to contact Nick Stringer, director of regulatory affairs at IAB UK, at [nick@iabuk.net](mailto:nick@iabuk.net).

## **IAB Affiliate Marketing Council:**

### **Five Point Plan to Enhance Transparency and Consumer Control in Affiliate Marketing**

#### **Introduction:**

Advertisers use affiliate marketing to drive consumers to their website as part of their marketing activities. Affiliates are essentially 'online sales forces' and can use a variety of ways to encourage consumers to a website to make a sale. This includes (but is not limited to) search marketing, social media, vouchers, cashback and price comparison. Affiliates are paid on a Cost Per Acquisition (CPA) basis and sales are tracked back to the relevant affiliate through the use of cookies. For further information on affiliate marketing see <http://www.iabuk.net/disciplines/affiliate-marketing>.

The IAB Affiliate Marketing Council's five point plan aims to make this type of online marketing more transparent for the consumer. It also seeks to work towards compliance with the amended Privacy and Electronic Communications Regulations 2003.

#### **Five Point Plan:**

##### **1. Establish a Policy & Legislation Working Group:**

The IAB Affiliate Marketing Council established a Policy & Legislation Working Group in January 2011. The aim of the group is to develop and implement specific actions, and provide ongoing advice and guidance, to promote transparency and consumer control in affiliate marketing. The Group meets every 6-8 weeks and consists of representatives from affiliates, advertisers, agencies and networks. The Group met with the Information Commissioner's Office (ICO) in late September 2011 to discuss this Five Point Plan.

##### **2. Conduct Cookie Audits:**

In line with the ICO's guidance, the IAB Affiliate Marketing Council has advised that all businesses using cookies for affiliate marketing purposes conduct an audit to see how each is used and to begin analyse ways to make their use more transparent. [www.iabaffiliatemarketing.com/reminder-of-the-ico-advice-do-a-cookie-audit-start-planning](http://www.iabaffiliatemarketing.com/reminder-of-the-ico-advice-do-a-cookie-audit-start-planning).

##### **3. Publish a Consumer Guide to Affiliate Marketing:**

The IAB Affiliate Marketing Council will produce a simple consumer guide to affiliate marketing – via a website – explaining how it all works, the use of cookies, the benefits to consumers (better deals etc) and how privacy is protected. The website will be launched in 2012.

##### **4. Develop standardised wording as industry good practice for affiliates and publishers to inform consumers about the use of cookies for this purpose.**

The Affiliate Marketing Council will draft some standardised wording as industry good practice for affiliates and advertisers to inform consumers about the use of cookies in affiliate marketing. The Council will also recommend where this wording should be used dependent on the business model to ensure clear and comprehensive information for the consumer without disrupting its experience. The AMC aimed to complete this by early 2012.

**5. Working with the UK Government and Web Browser Manufacturers to Enhance Browser Settings:**

The IAB (including the Affiliate Marketing Council) continues to work with the UK Government and web browser manufacturers to enhance existing browser settings to make them simpler and easier to use for consumers, and to help provide consent over the use of technologies such as cookies.