



AOP Protocol for Advertising Vendors

Guidance Notes

We have inserted various guidance notes throughout the Protocol. The guidance notes do not form part of the terms of the AOP Protocol.

Disclaimer

The guidance notes in this document have not been produced to address specific situations that may arise when a Publisher engages a Vendor. The guidance notes are not intended to be a substitute for legal advice and the AOP strongly recommends Publishers and Vendors to obtain independent legal advice before using the AOP Protocol.

Introduction

The Association of Online Publishers (the “**AOP**”) has consulted with its members to address concerns raised by the recent implementation of the General Data Protection Regulation 2016/679 (the “**GDPR**”).

As a consequence of these discussions the AOP has decided to promulgate the protocol set out below (the “**AOP Protocol**”).

The AOP Protocol is designed for use by publishers (the “**Publisher**”) when engaging advertising vendors (including advertising agencies, ad tech vendors, trading desks bidders and ad servers) (a “**Vendor**”) that deploy, or cause to be deployed, cookies, pixels, tags or similar technologies on a Publisher’s website(s) and other media platforms and/or which process data derived from such cookies.

Where a Publisher engages a Vendor, the terms of the AOP Protocol may, at the election of the Publisher, be incorporated into and form part of the Insertion Order, or other contractual instrument, pursuant to which the Publisher engages the Vendor to provide services to the Publisher.

It is for the Publisher to determine how the AOP Protocol will be incorporated into the legal relationship between it and its Vendors. Therefore, the following suggestions are not prescriptive, and the parties should obtain independent legal advice on their use:

For legacy engagements:

- the Publisher and the Vendor enter into a legally binding variation agreement which incorporates the terms of the AOP Protocol directly or by reference; and/or
- The Vendor signs the declaration set out at Part 1a of Appendix 1 indicating its acceptance of the AOP Protocol; and/or
- The Vendor accepts the declaration set out at Part 1b of Appendix 1 which will be published on the Media Trust platform.

For new engagements:

- the terms of the AOP Protocol are inserted directly into the Publisher’s standard purchasing terms, or equivalent, or into the insertion order or other standard documentation of the Vendor; and/or
- The Vendor signs the declaration set out at Appendix 1a indicating its acceptance of the AOP Protocol; and/or
- The Vendor accepts the declaration set out at Appendix 1b which will be published on the Media Trust platform.

For new engagements:

- the terms of the AOP Protocol are inserted directly into the Publisher’s standard purchasing terms, or equivalent, or into the insertion order or other standard documentation of the Vendor; and/or
- The Vendor signs the declaration set out at Appendix 1a indicating its acceptance of the AOP Protocol; and/or
- The Vendor accepts the declaration set out at Appendix 1b which will be published on the Media Trust platform.

AOP Protocol Terms

The AOP Protocol consists of the following terms:

1. Definitions

“**Affiliate Marketing**” means tracing referrals to a third party’s website(s), including purchases made on the website(s), for the purpose of generating revenue for the Publisher;

“**Attribution**” means the tracking and recording of events arising from a User’s interaction with an advertisement;

“**Analytics**” means the analysis of the data derived from Attribution;

The above definitions of “Affiliate Marketing”, “Attribution” and “Analytics”, together with the definitions of “measurement” and “verification” are designed to set out the range of permitted purposes for which cookies can be used without further terms of use being agreed by the parties where the parties elect to use the AOP Protocol.

“**Approved Vendor Cookie**” shall have the meaning defined in clause 2.2;

The above definition applies to cookies which fall within one or more of the 5 Permitted Purposes and where sufficient transparency information about such cookies has been supplied by the Vendor to the Publisher.

“**Data Controller**” shall have the same meaning as defined in the GDPR;

“**Data Privacy Laws**” shall mean the following as amended, extended, re-enacted or replaced from time to time.

- (i) EC Directive 1995/46/EC on the protection of individuals with regard to the processing of personal data and on the free movement of such data;
- (ii) EC Directive 2002/58/EC on Privacy and Electronic Communications;
- (iii) EC Regulation 2016/679 (the “**GDPR**”) on the protection of natural persons with regard to the processing of personal data and on the free movement of such data;
- (iv) all local laws or regulations implementing or supplementing the EU legislation mentioned in (i)-(iii) above, including the Data Protection Act 2018; and
- (v) all codes of practice and guidance issued by national regulators relating to the laws, regulations and EU legislation mentioned in (i)-(iv) above.

Whilst the AOP Protocol contains several references to the GDPR and defined terms used in that legislation, such as “Data Controller”, adherence to the AOP Protocol by Publishers and Vendors will not discharge all compliance obligations of Publishers and Vendors under the GDPR or the Data Privacy Laws generally.

In particular, it should be noted that the engagement by Publishers of Vendors may give rise to significant compliance requirements such as the implementation of:

- a data protection impact assessment;
- due diligence on the Vendor by the Publisher;
- data sharing terms; and/or
- data processing terms.

Publishers and Vendors should seek independent legal advice to identify their respective compliance obligations.

“Data Processor” shall have the same meaning as defined in the GDPR;

“Measurement” means measuring the delivery of an advertisement to a User including the number of impressions and the duration of a User’s viewing of the advertisement;

“Permitted Purposes” means the purposes of Affiliate Marketing, Attribution, Analytics, Measurement and/or Verification;

“Personal Data” shall have the same meaning as defined in the GDPR;

“Processing/Processed” shall have the same meaning as defined in the GDPR;

“Publisher Data” shall mean data derived from an Approved Vendor Cookie;

The above definition of “Publisher Data” covers all data stored and/or accessed from cookies approved by the Publisher for the deployment on a Publisher Property, including that part of any derivative data sets created from such data.

“Publisher Property” means the website(s) pages and/or other electronic media owned by the Publisher and the advertisements served to a user when he/she visits such website(s) or electronic media;

“Relevant Agreement” means any agreement between the Publisher and the Vendor which concerns, directly or indirectly, the use of a Vendor Cookie(s) on a Publisher Property and/or the Processing of Publisher Data by the Vendor;

The above definition of “Relevant Agreement” covers insertion orders, MSA’s, standard terms of business, purchase order terms and any other legal terms and conditions governing the use of Vendor Cookies on Publisher Properties and/or the processing of data derived from Vendor Cookies that are approved by the Publisher.

“Supervisory Authority” shall have the same meaning as defined in the GDPR;

“Services” means the services to be supplied by the Vendor to the Publisher under the terms of a Relevant Agreement;

“Transparency Information” shall have the meaning defined in clause 2.1;

“User” means a user of a Publisher Property;

“Vendor Cookie(s)” means cookies, pixels, tags or similar technologies deployed directly or indirectly by the Vendor;

“Verification” means the verification of the data derived from the Attribution and the Measurement of an advertisement, together with data relating to the presentation and placement of an advertisement, against the performance metrics agreed by the Publisher and the Vendor in a Relevant Agreement.

2. Selection of Vendor Cookies

2.1 The Vendor shall disclose to the Publisher a complete and accurate list of all Vendor Cookies the Vendor proposes to deploy and/or use on each Publisher Property, together with all of the information required to ensure that the deployment and use of such Vendor Cookies on each Publisher Property and the Processing of the Publisher Data by or on behalf of the Vendor complies with Data Privacy Laws, including without limitation, the following information:

- (a) which of the Permitted Purposes is conducted by each Vendor Cookie;
- (b) the duration of the data stored by each Vendor Cookie; and
- (c) the privacy policy applicable to each Vendor Cookie

(such information shall be collectively defined as the **“Transparency Information”**)

Whilst the GDPR recognises that the processing of personal data for direct marketing purposes may be regarded as the legitimate interest of a data controller, the legitimate interest ground cannot be used for the deployment of cookies. In the UK, the use of cookies is governed by the Privacy and Electronic Communications (EC Directive) Regulations (**“PECR”**).

In particular, PECR provides that unless a cookie is necessary for the provision of a service requested by the user (such as cookies used to remember the content of an online shopping cart), the use of cookies requires a user’s consent. In addition, the quality of the consent required by PECR is the same as that required by the GDPR; namely the freely given, specific and informed consent of a user.

Clause 2.1 is designed to ensure that where a User is invited to consent to the use of Vendor Cookies on a Publisher Property, the Vendor provides the Publisher with sufficient information to enable the Publisher to obtain the informed consent of the User on behalf of the Vendor. In the absence of the Transparency Information any consent obtained from Users to the use of Vendor Cookies is likely to be invalid on the basis that such consent would not amount to informed consent.

2.2 On receipt of the Transparency Information the Publisher shall notify the Vendor in writing which of the Vendor Cookies have been approved for deployment and use on each Publisher Property. Once approved by the Publisher such cookies shall be designated as **“Approved Vendor Cookies”**.

2.3 Where the Vendor proposes the deployment and use of a Vendor Cookie on a Publisher Property which is not limited to one or more of the Permitted Purposes then, without prejudice to the Vendor’s obligations in clause 3, the Publisher and the Vendor shall discuss and agree the terms upon which such cookies may be deployed and used on a Publisher Property.

Any cookies intended to be deployed by a Vendor on a Publisher Property which facilitate additional purposes to the 5 Permitted Purposes, require the specific approval of the Publisher and may be subject to additional terms of use.

3. Vendor’s Obligations

3.1 The Vendor shall:

3.1.1 ensure that it only deploys, or causes to be deployed, Approved Vendor Cookies on such Publisher Properties as are identified by the Publisher and the Vendor in the Relevant Agreement;

3.1.2 subject to clause 2.3, be entitled to:

(a) deploy, or cause to be deployed, and/or use Approved Vendor Cookies on the applicable Publisher Properties for the Permitted Purposes only;

(b) Process, or cause the Processing, of the Publisher Data for the Permitted Purposes only;

Clauses 3.1.1 and 3.1.2 are designed to give the Publisher control of two key activities:

- which cookies are deployed on the Publisher’s electronic media; and
- the subsequent processing of data that is stored in and/or accessed from the cookies deployed on the Publisher’s electronic media.

3.1.3 where the Publisher is required to obtain the User’s consent under clause 5.1.3, not deploy, or cause to be deployed, any Approved Vendor Cookie until the Publisher has obtained the User’s consent;

Clause 3.1.3 reflects the provisions of PECR which state that cookies for which consent is required cannot be deployed until the user has given a valid consent.

3.1.4 subject to the fulfilment of the Publisher’s obligations in clause 5, ensure that the:

(a) deployment and use of the Approved Vendor Cookies on the applicable Publisher Properties complies with applicable Data Privacy Laws;

(b) Processing of the Publisher Data by, or on behalf of the Vendor, complies with applicable Data Privacy Laws;

Clause 3.1.4 reflects the ICO’s published guidance which states that acquiring a valid consent from a user for the use of third party cookies is a shared responsibility of Publishers and Vendors.

As stated elsewhere in the guidance notes, Publishers and Vendors should seek independent legal advice on the extent of their obligations to comply with the Data Privacy Laws generally.

3.1.5 promptly advise the Publisher of any proposed changes to:

(a) the list of Approved Vendor Cookies (in which case the Vendor shall also comply with its obligations in clause 2.1 in respect of any new Vendor Cookies); and/or

(b) the Transparency Information;

3.1.6 seek the Publisher’s prior written approval to any of the proposed changes referred to in clause 3.1.5 and, on receipt of the Publisher’s approval, the existing Transparency Information and the existing list of Approved Vendor Cookies shall be deemed to incorporate such approved changes; and

Clauses 3.1.5 and 3.1.6 are designed to ensure that any changes proposed by a Vendor to the list of Approved Cookies (whether by deletion, addition and/or change in the Permitted Purposes) are communicated to the Publisher and are subject to the Publisher’s consent.

3.1.7 ensure that all third parties engaged by it who deploy, or cause to be deployed, cookies on a Publisher Property, or which process data derived from such cookies:

(a) are engaged on terms that incorporate the AOP Protocol; and

(b) comply with those terms of the AOP Protocol that apply to Vendors.

Clause 3.1.7 is designed to provide a flow down of the Vendor’s obligations in the AOP Protocol to any third party engaged by the Vendor where that third party is either:

- assisting in the deployment of cookies on the Publisher’s electronic media; and/or
- processing the data that is stored and/or accessed from the cookies deployed on the Publisher’s electronic media.

3.2 For the avoidance of doubt nothing in clause 3.1 shall prohibit a Vendor from using its own data to target Users, provided that the Vendor ensures that such targeting complies with Data Privacy Laws.

3.3 In the event that the Vendor wishes to withdraw from the AOP Protocol it shall give the Publisher not less than 3 months' notice, in accordance with the provisions of Appendix 1.

4. Audit Rights & Remediation

4.1 During the term of the Relevant Agreement, the Vendor acknowledges and confirms that the Vendor will cooperate with any audit, inspection or enquiry made of it by a Supervisory Authority that concerns the subject matter of the AOP Protocol

4.4 Where the Publisher has reasonable grounds to suspect that the Vendor is in breach of its obligations under the AOP Protocol then, without prejudice to its other rights and remedies under the AOP Protocol and any Relevant Agreement, the Publisher shall be entitled but not obliged to remove all Approved Vendor Cookies that the Vendor deployed or caused to be deployed on the Publisher Property.

5. The Publisher's Obligations

Clause 5 reflects the ICO's published guidance which states that acquiring a valid consent from a user for the use of third party cookies is a shared responsibility of Publishers and Vendors. In particular, Clause 5 recognises that the Publisher is uniquely positioned to facilitate, on behalf of the Vendor, the acquisition of a valid consent from users of the Publisher's electronic media. Clause 5 also recognises that the validity of any consent obtained is conditional upon the Vendor's obligation to provide the Transparency Information to the Publisher under clause 2.1.

5.1 The Publisher shall:

5.1.1 publish the Transparency Information for each Approved Vendor Cookie on the applicable Publisher Property;

5.1.2 notify Users of each Publisher Property of the Permitted Purposes applicable to the Processing of Publisher Data by the Vendor and/or the Publisher on that Publisher Property;

5.1.3 where required by Data Privacy Laws, obtain, on behalf of the Vendor, the User's consent to the deployment and use of the Approved Vendor Cookies;

5.1.4 where the Publisher Data is supplied by the Publisher to the Vendor, the Publisher shall ensure that the Publisher has complied with its obligations in this clause 5.1 prior to the Vendor's processing of the User Data on behalf of the Publisher for the Permitted Purposes.

Clause 5.1.4 addresses the situation where a Publisher provides a Vendor with previously acquired data derived from Vendor cookies. However, in most cases the Publisher Data will be received directly by a Vendor from the deployment of the Vendor's own cookies.

6. Mutual Acknowledgements, Obligations and Indemnification

6.1 The Publisher and the Vendor hereby acknowledge and agree between themselves that the Publisher Data Processed for any of the Permitted Purposes may constitute Personal Data. In the event that a party considers the Publisher Data Processed for any of the Permitted Purposes does constitute Personal Data it shall promptly notify the other party and the parties shall then discuss and agree any further steps to be taken by either party, including their respective status as a data controller and/or data processor and any additional steps to be taken by the parties to ensure compliance with Data Privacy Laws.

Clause 6.1 anticipates that the Publisher Data may constitute Personal Data as that term is defined in the GDPR. If that possibility arises then the AOP Protocol is only one element in a wide scope of compliance activity that the parties will need to engage in, both individually and collectively.

6.2 The Publisher and the Vendor hereby acknowledge and agree that all proprietary rights in the Publisher Data shall vest in and remain vested in the Publisher.

6.3 The Publisher and the Vendor shall provide each other (at the cost of the assisting party) with reasonable assistance in the exercise of their respective rights and obligations under the AOP Protocol.

6.4 The Publisher shall be entitled, but not obliged, to publish a public register of Vendors who have agreed to the terms of the AOP Protocol and who are in good standing with their obligations in the AOP Protocol.

Addendum 1

Declaration

To:

This declaration is made by _____ (the "Vendor") for the benefit of the above Publisher and in consideration of the Publisher's engagement of the Vendor for the supply of advertising services. The Vendor hereby agrees to be bound by all of the terms of the AOP Protocol dated _____ that impose obligations on the Vendor, subject to the Publisher complying with the obligations imposed on the Publisher by the terms of the AOP Protocol. The Vendor shall give the Publisher not less than 3 month's notice in writing of the Vendor's withdrawal from the AOP Protocol.

Signed:

For and on behalf of:

.....

.....