

Updated guidance on storage and access technologies consultation

Submitted on 2025-09-26 18:10:19

Your views on our proposed regulatory approach

1 How far do you agree that the draft guidance's new chapter 'what are the exceptions?' provides clarity on new exceptions under the Data

(Use and Access) Act?

Agree

Please explain your answer:

The guidance is clear and well set out.

The sentence: "An exception means that the purpose you want to store or access is exempt from the prohibition" could be clarified to say: "An exception means that the purpose of your storage or access may mean it is not prohibited".

Under the "communications" exception, it would be helpful to clarify the ICO's understanding of "network management purposes" and some examples of common device fingerprinting techniques solely for these purposes.

The explanation of "strictly necessary" exception as it relates to fraud could be developed (i) for example, click fraud detection in adtech falls outside the exception while reconciliation for affiliate marketing/loyalty accreditation arguably falls within it; (ii) stating that fraud detection must be necessary "in connection with the provision of the service requested", not more generally [this also applies to other exceptions in para 4 of new Annex A1]; (iii) by explaining how fraud detection allies with the principle of complying with legislation applicable to service providers, since there are cases where fraud detection is commercially useful without being a legal requirement.

A further consideration is whether the revised cookie provisions are sufficiently future-proofed for emerging technologies, particularly AI-driven detection and measurement tools.

In particular, the scope of the new fraud-prevention exception would benefit from clarity. For example, should 'fraud' be read broadly enough to cover enhanced device fingerprinting and behavioural profiling that are increasingly used to verify authentic human interactions (e.g. bot mitigation and invalid-traffic filtering), and if so, what necessity/proportionality limits need to apply to fall within the scope of the exception?

2 Do you understand our interpretation of the statistical purposes exception?

Disagree

If you disagree, please explain what we can include to provide further clarity? :

There is some uncertainty about the extent to which the statistical purposes exception will apply to profiling for the purposes of service improvement. It is clear that profiling in order to target advertising or content at particular users or groups is outside the exception. However, it is unclear whether providers require consent to analyse groups of users in order to make website content more relevant generally, outside the advertising sphere. The guidance permits the use of coarse geolocation data, but it is unclear whether or not other profiling activity (for example, based on another metric which implies a demographic profile) would be acceptable. If it is not, it would be helpful to make this clear and explain the basis of the distinction from geolocation data.

Any guidance which the ICO can give on the meaning of “simple and free means to object” would be helpful. In particular, a view on how this should be presented in practice, how this should relate to existing consent mechanisms, and associated timing issues.

We understand that a key driver for moving “statistical purposes” into an opt-out-based exception is that such activity has a low-risk impact on individuals.

We note that statistical tracking can underpin dynamic pricing and other practices the type of which have clear potential for consumer harm. Consequently, the ICO wish to consider explicitly clarifying that such uses are not covered by the exception e.g., by reference to price, service availability, or access to content. The ICO may also wish to consider providing supplementary examples that delineate low-risk, aggregated analytics from use cases that influence individual outcomes (such as price discrimination or content gating).

3 Do you understand our interpretation of the 'appearance' exception?

Agree

If you disagree, please explain what we can include to provide further clarity? :

N/A

4 Do you understand our interpretation of the 'emergency assistance' exception?

Agree

If you disagree, please explain what we can include to provide further clarity? :

N/A

5 Relating to the new exceptions only, are there any other use cases of storage and access technologies that you think the final guidance should refer to?

Please provide details:

It is clear that the technologies covered by the guidance can apply to a broad range of technologies, including vehicles and wearables (which receive a light-touch treatment in the current guidance). The guidance would benefit from specific examples covering these specifically, particularly where the applicability of the requirements (and exceptions) may require additional considerations in the context of those types of devices e.g. in relation to how the availability of an exception is assessed or the manner in which consent is obtained.

About you and your organisation

6 Are you responding to this consultation on behalf of an organisation?

Yes

About you and your organisation

7 (If an organisation) Is your organisation:

A private sector organisation

Other (please specify) :

8 What is the name of your organisation?

Organisation:

Shoosmiths LLP

9 What is the size of your organisation?

1,000 to 2,499 members of staff

10 Approximately what percentage of your staff are based in the UK?

81% - 100%

Questions to assess the impact of our approach

11 Do you think the updates to the draft guidance for storage and access technologies will result in additional costs or benefits to your organisation? (These could be financial or non-financial and might include staff time)

Both

Please describe any types of additional costs or benefits you might incur::

Shoosmiths LLP is a law firm providing advice on privacy and data protection matters to a wide range of affected clients. New guidance on an issue of fundamental importance to all digital platforms will likely result in requests for advice in relation to the same. At the same time, Shoosmiths will have to consider its own internal compliance in light of the changes.

Please provide a rough estimate of any additional costs or benefits you are likely to incur and briefly explain how you have calculated these:

These are not known and/or commercially confidential.

If there is any other evidence or information on the potential impacts of the guidance or our impact assessment that you would like us to consider, please provide it in the box below. (This could include a description, links to other sources, or contact details where we can reach you to discuss further) :

We have not been able to locate an impact assessment relating specifically to updates in the guidance.

Final comments

13 Before completing this consultation, do you have any final comments you have not made elsewhere?

Final comments:

The guidance refers to the Data (Use and Access) Act “coming into law on 19 June 2025”. While technically correct, this may mislead as the provisions on storage and access technologies will not apply to organisations until Commencement Regulations for the DUAA enter into effect. Could the ICO add a note at the end of the orange box which heads the guidance along the following lines: “The guidance will only apply in full once the relevant parts of the Data (Use and Access) Act are in force”? This will alert readers to the issue without requiring the ICO to provide detailed legal advice on commencement.

The guidance states that “if you say your use of a particular technology is strictly necessary because of the purpose (eg security), you must ensure that you only use it for this purpose. If you use it for any other purpose as well, the exception does not apply and you must then get consent.” The guidance would benefit from clarifying that a) if the other purpose is also strictly necessary or otherwise excepted, then consent is not required; and (b) that the consent that must be obtained relates to the use of the technology for non-essential purpose(s) and not for the entire cookie including the strictly necessary purpose(s), as in practice the latter is often unworkable.

Contact details

14 If so, please provide your name and email address

Name:

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15 We may publish in full the responses received from organisations or a summary of the responses. If so, we would like your permission to publish your consultation response. Please indicate your publishing preference:

Publish response

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