

## Cookies Update: Consent Now Needed

### Introduction

New rules on cookies came into force on 26 May 2011. Consent is now needed in relation to most cookies placed on a user's PC (or mobile device) by UK websites. Similar rules are coming into force throughout Europe.

Prior to this change, websites only had to tell users how they used cookies and that they could 'opt out', usually providing such information in a privacy policy. Now, however, a website can only put cookies on a user's device if the user has given his or her consent. The one exception to this rule is if the website's use of the cookie is "strictly necessary" for a service requested by a user.

The new rules—required by a European Directive—are implemented in the UK by means of an amendment<sup>1</sup> to the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the 'PEC Regs'). Guidance<sup>2</sup> on these rules from the UK data protection regulator, the Information Commissioner's Office ('ICO'), had been highly anticipated and has now been published (the 'ICO Guidance').

### What Is a Cookie?

A cookie is a small file downloaded onto a user's device when the user accesses a website which then allows the website to recognise the user's device. Cookies are used for a variety of purposes such as remembering the user's name (to display when the user visits the website) or remembering the date of a user's last visit.

### What Do Businesses Need to Do?

Organisations should now take the following three steps:

- **Check what type of cookies and similar technologies are used and how they are used.** Businesses should analyse which cookies are used. Many may be redundant and could be dispensed with.
- **Assess the intrusiveness of the cookies' use.** The more intrusive the use of a cookie is, the more likely it is that it will need to change. ICO advice is that more information and detailed choices will need to be provided to users for more intrusive cookies—for example, cookies that create detailed profiles of an individual's browsing activity.
- **Decide the best solution for obtaining consent.** There are a number of solutions, some of which are discussed in the ICO Guidance (summarised below). Businesses need to bear in mind that consent does not need to be obtained repeatedly for the same person each time the same cookie is used (for the same purpose) in the future.

### Potential Solutions

**Browser settings.** There has been much discussion of browser settings and whether they will be sufficient to indicate consent by only allowing certain types of cookies. The new PEC Regs recognises that browser settings can in some circumstances be used. However, the ICO's and the Government's view is that the functionality available through current browsers is not sophisticated enough for businesses to assume consent has been

given. The UK government is separately working with browser manufacturers (Microsoft, Google, Apple) to change that position. In the meantime, the ICO is therefore currently advising that consent is obtained in other ways.

**Pop ups and similar techniques.** Well-designed pop ups could be used to inform users of the choices they have but create the problem of potentially ruining a website experience; in particular if a website uses many cookies.

**Terms and conditions.** It may—depending on intrusiveness of a cookie—be possible to obtain consent through terms and conditions (such as may be agreed to by users when registering on a website). A business would need to make existing users (who have already registered under old terms) aware of the changes in those terms and that they concern the use of cookies.

**Settings-led consent.** It may be possible to obtain consent through the process by which users confirm what they want to do or how they want the site to work, for example, where users indicate which language version of a site they want to access.

**Feature-led consent.** Similarly, if a user takes action to tell a webpage what the user wants to happen then it may be possible to obtain consent by making it clear to the user that by choosing that option, a certain action will take place. This can then be interpreted as consent.

**Functional uses.** Collecting information about how people use a site—for example, which pages they visit on a website—still requires consent. The ICO suggests a solution of footer/header text that becomes highlighted when a cookie is going to be set. This seems to be the approach the ICO has adopted for its own website.

## Third Party Cookies

A third party cookie is one which a website sets (or allows to be set) on behalf of another business. They are commonly used in online behavioural advertising (OBA) activities. The ICO's view on third party cookies is that "everyone has a part to play in making sure that the user is aware of what is being collected and by whom". If a business uses or allows third party cookies it should do everything it can to help users make informed choices.

## Enforcement

There is going to be a phased approach to implementation of the changes. The ICO has stated that if it receives a complaint about a particular website, it would expect an organisation to explain how it had considered the new rules and to show that it had a realistic plan to achieve compliance.

The ICO has advised that organisations will be given a grace period of one year (ending in May 2012) before enforcement powers will be used.<sup>3</sup> From May 2012, the Commissioner will be able to look at the impact of any breaches on privacy and other rights of website users in determining whether to take enforcement action—he will not just look at whether there has been a technical breach.

The ICO has the power to impose civil penalties of up to £500,000 for serious breaches, i.e., in cases where substantial damage or distress is likely to be caused. Guidance on this will be issued after October 2011.

## Further Government Guidance

In addition to the ICO Guidance, the Department for Culture, Media and Sport published an open letter on 24 May 2011<sup>4</sup> addressing some outstanding concerns. The letter clarifies that consent to cookies does not have to be "prior" consent—it is possible that consent may be given after or during processing. It also says that (at some stage) it will be possible to signify consent by choosing not to amend browser settings, although current browser settings are not sufficient.

## Conclusion

Businesses have one year to get their cookies policies and procedures in order. They should start now by taking a stock check of what cookies are being used and how intrusive they are. Once this is complete, businesses can start to think about the best ways to get consent for different uses of cookies, whilst monitoring the advice being given on browser settings. For assistance and further guidance on this process, please get in touch with our named contacts below.

- <sup>1</sup> The full name of the legislation is the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (SI 2011/1208)—available at <http://www.legislation.gov.uk/ukxi/2011/1208/contents/made>.
- <sup>2</sup> [http://www.ico.gov.uk/for\\_organisations/privacy\\_and\\_electronic\\_communications/~media/documents/library/Privacy\\_and\\_electronic/Practical\\_application/advice\\_on\\_the\\_new\\_cookies\\_regulations.pdf](http://www.ico.gov.uk/for_organisations/privacy_and_electronic_communications/~media/documents/library/Privacy_and_electronic/Practical_application/advice_on_the_new_cookies_regulations.pdf).
- <sup>3</sup> ICO: Enforcing the revised Privacy and Electronic Communications Regulations (PECR) [http://www.ico.gov.uk/~media/documents/library/Privacy\\_and\\_electronic/Practical\\_application/enforcing\\_the\\_revised\\_privacy\\_and\\_electronic\\_communication\\_regulations\\_v1.pdf](http://www.ico.gov.uk/~media/documents/library/Privacy_and_electronic/Practical_application/enforcing_the_revised_privacy_and_electronic_communication_regulations_v1.pdf).
- <sup>4</sup> [http://www.dcms.gov.uk/images/publications/cookies\\_open\\_letter.pdf](http://www.dcms.gov.uk/images/publications/cookies_open_letter.pdf).

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## Practice group contacts

If you have questions regarding the information in this legal update, please contact the Dechert lawyer with whom you regularly work, or any of the lawyers listed.

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