Data protection

Compliance with the new rules on Cookies
Smart Cookies – New Rules on the use of cookies came into force on 26 May 2011

The rules on using cookies and similar technologies to store information on a user's equipment changed on 26 May 2011.

Why has this happened?

The rule change is the result of implementation of an EU Directive. The new rules are contained in Regulation 6 of the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011.

What do the Regulations cover?

The Regulations cover the use of cookies - small files downloaded onto a device when the user accesses certain websites, allowing the website to recognise the user’s device. They also apply to similar technologies for storing information – including locally stored objects (flash cookies).

What has changed?

Prior to 26 May 2011, if you used cookies to store information, you had to provide clear and comprehensive information to users about your use of cookies and give users the right to opt-out. Many websites complied with this rule by including information about cookies in a privacy policy.

From 26 May 2011, cookies can only be placed on a user's equipment if the user has given their consent. The requirement to provide clear and comprehensive information remains in place.

Does the new rule apply to all cookies?

Yes – except for one limited exception. Consent does not need to be given where the cookie is “strictly necessary” for a service requested by the user. This is a very narrow exception. For example, it could apply to a cookie used to ensure that where a user clicks “proceed to checkout” when purchasing online, the site remembers the items chosen on a previous page.

This exception is very narrow. The EU Directive on which it is based refers to a service “explicitly requested” by the user and the Information Commissioner, who will enforce these Regulations, will bear this in mind in deciding whether or not the Regulations have been complied with.

Also, the requirement to provide information about a cookie and obtain consent is only required the first time it is set for a particular user. You do not have to do this again for the same person provided that it is the same cookie and is used for the same purpose.
What do you have to do and when?

The government believes there should be a phased approach to implementing these Regulations. However, this does not mean that you should do nothing. The Information Commissioner’s Office has issued initial guidance on the new Regulations which are a starting point rather than a definitive guide. The guidance contains practical steps for you to take now.

- **Check what type of cookies you use and how you use them** – this may be a comprehensive audit or a simple check of the data files placed on user terminals. Analyse why you use the cookies and decide which are “strictly necessary” and might not require user consent. Use this as an opportunity to clean up your website. The Information Commissioner strongly advises in-house teams to carry out this audit and clean-up exercise in order to demonstrate compliance.

- **Assess how intrusive your use of cookies is** – the more intrusive your use of cookies, the higher priority you need to give to considering changing how you use them and to obtaining proper meaningful consent from users.

- **Decide the best way of obtaining consent for your circumstances** – the more intrusive your activities, the more you need to do to get proper meaningful consent. One of the suggestions in the EU Directive and the Regulations is to obtain consent through browser settings. However, the Information Commissioner’s opinion is that, as most browser settings are not currently sophisticated enough to allow you to assume that a user has given specific consent, organisations need to obtain consent another way.

Remember that the Information Commissioner’s Office has made it clear that they are primarily interested in the information gathered through the use of cookies and what organisations do with that information, rather that the cookies themselves.

How do we obtain consent?

- **Browser settings** – browser level solutions are being worked on at the moment, but the Information Commissioner believes that browser settings are not currently sufficient for users to give consent.

- **Pop-ups** – this would be acceptable but even the Information Commissioner thinks this might become annoying for users!

- **Terms and conditions** – there is no reason why consent cannot be included within terms and conditions. However you would need to make users aware of the changes to the terms and conditions and make it explicitly clear that these changes refer to your use of cookies. You would also need the user to positively indicate that they understand and agree to the changes by use of a tick box or something similar. This process must be completely transparent and easily understandable by a user. If you gain consent through users’ ignorance then you will not be compliant with the new rules.

- **Settings-led consent** – for certain cookies it might be convenient to obtain consent when a user changes the settings for a site. For example, if a user chooses to always access a site in
the English language version, consent could be obtained at the point where the user makes this choice.

- Feature-led consent – similarly, if cookies are stored when a user wants to use a particular feature of a site and the user has to take some action in order to activate that feature, consent can be obtained at that point. If the feature is provided by a third party, you will need to tell users and provide information as to how the third party may use cookies, in order that they can give meaningful consent.

- Functional uses – analytical cookies which collect information about how people access and use your site need user consent, even if they are not so obvious and appear not to be so intrusive. Careful thought will need to be given to the information to be provided and the method for obtaining consent. The Information Commissioner's guidance suggests the use of highlighted text in the footer or header or a web page, or a scrolling piece of text when you want to set a cookie. This could link to the privacy policy on the site which should set out the choices available to the user. Where information about website use is given to third parties, this needs to be made absolutely clear and you should know how the third party uses this information. The Information Commissioner strongly encourages organisations to review their contractual arrangements with third parties concerning the use of such data.

- Third party cookies – this is a difficult area. The Information Commissioner acknowledges that this is the most challenging area for compliance and is working with other bodies, including industry, to try and find the right solutions. However, in the meantime, you will need to work with third parties to ensure that the users are absolutely clear about cookies being set, and that they are able to give meaningful consent.

What next?

More guidance will be issued by the Information Commissioner over time. In particular, guidance on enforcement is expected to be published. Keep an eye on the Information Commissioner’s website for this guidance.

The Information Commissioner will also provide guidance giving examples of methods for obtaining consent and is keen to receive examples from industry. Given the difficulties in obtaining consent, he has stated that he is unlikely to take enforcement action in the first 12 months provided that organisations have taken the steps set out in the guidance. Therefore the current guidance should be followed in order to demonstrate, if any complaint is made, that you have done all you can to comply with the new rules.

Where can I find more information?

The Information Commissioner’s website should be checked regularly for updated guidance

The Initial Guidance from the Information Commissioner

All about Cookies – a website for consumers and marketers which explains the issues surrounding the use of cookies.
Gillian Cordall is an IT, intellectual property and commercial lawyer who advises on commercial arrangements and the protection and exploitation of intellectual property. She has extensive experience in technology, digital media and marketing services contracts and particular expertise in IT and business process outsourcing, software development and licensing and issues affecting online businesses. Gillian is recognised for her work in interactive media, particularly videogames. She is a Trustee of the Society of Computers & Law and Chair of their Media Board.

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