

# Global Regulatory Enforcement

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## Cookies – The Heat Is On: Grace period to comply with new cookies law to expire soon!

It is almost a year since the new European rules on website cookies hit the UK. The new rules are significant and impact upon practically all businesses with a website, not just those that operate an e-commerce site. Largely for this reason, the Information Commissioner's Office ("ICO"), granted website operators a twelve month grace period to work towards compliance with the new rules. That grace period comes to an end on 26 May 2012, although there are still many businesses which have not yet taken steps to comply with the new rules.

### New Rules

The new rules were brought in as a result of amendments to the E-Privacy Directive (2002/58/EC). The UK was one of the few member states to implement these changes by the stipulated deadline and this was done by amending the Privacy and Electronic Communications (EC Directive) Regulations 2003 (the "Regulations").

Section 6 of the Regulations contains the key provision of the new rules. This provides that website operators must not store or gain access to information on a person's equipment (i.e. must not use cookies), unless such person: (a) is provided with **clear and comprehensive information** about the purposes of the storage of, or access to, that information; and (b) has given his or her **consent**. It is the requirement of consent and how this has been interpreted that is likely to be most burdensome for businesses as explained further below.

### ICO Guidance

In December last year, the ICO issued guidance on how organisations and businesses which run UK websites should comply with the new law. While this is less prescriptive than some might have hoped, it does provide some clarification on the requirements, although most businesses may not deem this clarification to be helpful!

**a) Clear and comprehensive information:** The ICO advises that the information on cookies should be full and provided in plain language that can be understood by non-technical users. Some businesses seem to have interpreted this as requiring a comprehensive list of each cookie that is used and a summary of its function, although such a requirement is not specifically contained in the Regulations. The ICO also advises on steps website operators should take to bring the new cookies information to the attention of users. It will not be enough to bury the information somewhere on the website, but operators will need to take steps to give the information sufficient profile.

**b) Consent:** The ICO has made clear in its guidance that it will not be sufficient to get implied consent to the use of cookies (as seems to be a common approach within most privacy policies). The ICO advises that consent "must involve some form of communication where the individual knowingly indicates their acceptance". This will require some form of positive "opt in" consent.

This clearly raises a significant issue for a lot of websites who rely significantly on persistent cookies and also websites that are generally concerned with interrupting user enjoyment. The ICO has suggested certain methods by which the consent requirement can be satisfied as follows:

- Pop ups, splash pages, header or footer bars which include a tick-box for users to 'opt-in' to cookie use.
- Terms and conditions on sign up where the user accepts the use of cookies.
- Utilising site settings options to highlight cookie utilisation – such as when inviting a user to choose remember preferences.

None of the above methods are straightforward and they all involve an element of disruption to the user's use of the website.

Website operators should be wary of implementing cookies as soon as a user enters their website, before they have had the chance to view the information and give consent. However, the ICO recognises that many websites function on this basis and suggests that in practice, 'prior consent' cannot be obtained in relation to a cookie, the operator would be expected to take additional steps to ensure that information is provided to the user and his consent obtained as quickly as possible.

The new rules do not apply to cookies that are "strictly necessary" for service provision, which is an important exception to section 6 of the Regulations. However, this exception will be narrowly construed and relates to essential, rather than reasonably necessary, storage of or access to information. The guidance deems cookies which enable online shopping functions (such as 'add to basket' or 'proceed to checkout') to be strictly necessary, as opposed to analytical cookies which count website visits, or first and third party cookies enabling targeted advertising. Using cookies to personalise a user's website experience for aesthetic reasons may be desirable, but it will not be seen as strictly necessary.

## Enforcement

With the grace period now expiring, the ICO's enforcement arm will be in action. The ICO has a number of regulatory powers at its disposal to enforce the Regulations. These include issuing Enforcement Notices, Information Notice and in the most serious of cases, fines up to £500,000.

## What next?

**Step One: Cookie Audit** – For businesses that have not already done so, the first stage is to check what cookies and similar technologies are being used, what type they are and how they are used. Some cookies may not require consent, or some may be dated and no longer needed. As part of this review, businesses should also consider how intrusive each cookie is. For example, consider factors such as what information each cookie holds, how detailed a picture it creates of user browsing, whether it is a first party or third party cookie, whether it is a session or persistent cookie (does it expire at the end of a browsing session or does it persist beyond this time). This will determine the level of information that needs to be given and what type of consent should be obtained.

**Step Two: Compliance Steps** – Based on the audit, the next step is to ensure both the information and consent requirements are satisfied. While the new rules apply to all cookie types, their purpose ultimately is to maximise user privacy. The more intrusive a cookie, the more likely proper consent must be sought to avoid any run-in with the ICO.

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