



Changes to the use of cookies by websites

From Thursday 26 May 2011, amendments to the Privacy and Electronic Communications Regulations 2003 will change the law in relation to 'cookies'. 'Cookies' are small data files which are downloaded from a website on to a user's computer or device, allowing the website to recognise the device and recall information previously inputted by the user. Subject to strict exceptions (where use of cookies is 'strictly necessary') all websites will be required to obtain the consent of their users in order to continue using cookies.

Recent guidance from the Information Commissioner's Office (ICO) suggests that it will not seek to enforce this law in the short term as it recognises that time will be needed for compliance. Nevertheless, website proprietors should take active steps now to ensure that they are compliant with the regulations.

The previous rule on the use of cookies for storing information was that website users had to be informed about how the website used cookies and had to be given the opportunity to opt out of the use of such cookies if they objected. Under the new rules, being enforced to comply with a revised European Directive, the users must actively give their consent before the website can place cookies on the users' machines.

At present, most internet browser settings are not sophisticated enough for website proprietors to confidently rely on a user's previous acceptance of cookies to constitute valid consent to all future use of cookies. Moreover, with ever increasing access to the internet via mobile devices rather than through traditional internet browser software (such as Internet Explorer, Firefox and Safari), users are often unable to modify settings to dictate the downloading of cookies.

Website proprietors are therefore advised to amend their existing terms and conditions, and to make use of pop-ups, tick boxes and other automated methods in order to comply with the new rules. Provisions relating to the old cookie rules should be deleted from any existing terms and these should be updated to reflect the new consent requirements. Such terms should therefore expressly state that in opening an online account, or using the services provided by the website, the user consents to the downloading of cookies to their computer or device. As the ICO's guidance makes clear, proprietors should be 'upfront' with their users and inform them of changes to any existing terms and conditions which are subsequently updated to comply with the new requirements. Therefore, any users who have agreed to the opt-out procedures contained in the old rules will need to re-consent to the updated terms and conditions compliant with the new consent requirement.

However, an update of website terms and conditions in isolation will not satisfy the requirement of informed consent. A positive action or indication from the user is required in order to satisfy the new rules. Tick boxes and/or pop-up banners requesting consent may offer a solution to this need for positive acceptance. One suggested banner or window may read as follows:

"By continuing to use this website you are consenting to our use of cookies and our system will issue cookies when you log on to our site. Please tick this Box [insert tick box] to indicate your consent, or, if you would like further information or do not consent to our use of cookies please see our privacy policy [Note: insert link] for further information about cookies and an explanation of what you should do to reject any cookies that may be issued by our site."

These tick boxes and banners will need to appear prior to the downloading of any cookies. In addition, it is suggested that the use of cookies is specifically referred to (rather than just referring to the terms and conditions), since the ICO has made clear that consent obtained in a manner which relies on users' ignorance of the rules is not likely to be valid.

Website developers and proprietors will clearly need to balance the key requirement for a positive indication of consent to cookie use against the need to ensure that users are not frustrated by too many pop-up banners or tick boxes. It is recommended that website proprietors take this opportunity to consider and/or experiment with such methods as soon as possible, before the ICO decides to enforce the cookie rules in full.

STOP PRESS: The ICO have confirmed they will allow UK websites a grace period of one year to comply with the changes to the law regarding cookies. Further information is on their website: http://www.ico.gov.uk/~media/documents/pressreleases/2011/enforcement_cookies_rules_new_s_release_20110525.pdf. There is also a headline banner on the ICO website with a further example of a solution for positive acceptance of cookies: <http://www.ico.gov.uk/>

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