



New EU law creates cookie monster to protect consumers

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The Council of the EU has approved a Directive which will require internet users to consent to internet cookies. The new law has far-reaching – and potentially perverse – implications for consumers and businesses alike.

Internet cookies are as ubiquitous as they are invisible. They are small text files, stored by websites on users' computers, which are all but essential for online advertising and traffic monitoring. They identify users, track movements, record user preferences such as language choices and save shopping cart contents.

The current EU law, contained in the 2002 E-Privacy Directive, states that cookies are allowed if internet users are notified of them and are given a "right to refuse". UK law reproduced these words precisely. However, the Information Commissioner has interpreted the law in a way that is favourable to business and advised that the right to refuse could be given after the delivery of the cookie. Businesses duly avoided the problem by tucking away the right to refuse in their website privacy policy.

The new law, on the other hand, allows no such room for manoeuvre. It states that a cookie can be stored on a user's computer, or accessed from that computer, only if the user "has given his or her consent, having been provided with clear and comprehensive information".

Actively requiring consent may result in users being bombarded at every juncture with pop-up windows or landing pages asking for permission to proceed. Such consequences would inevitably harm the ability of website publishers to raise revenue through online advertising, with users choosing to browse less, browse elsewhere, or simply not provide information used to target advertising.

Businesses will seek refuge in two provisions of the Directive. Firstly, as currently, an exception to the consent rule exists where the cookie is "strictly necessary" for the provision of a service "explicitly requested" by the user. While this will, for example, allow websites to direct a user from a product page to a checkout without consent, it will be harder to prove that

advertising or traffic monitoring are "strictly necessary" to provide services.

Secondly, Recital 66 to the Directive provides that "the user's consent to processing may be expressed by using the appropriate settings of a browser". However, this Recital raises more questions than answers. As a Recital it is only a guide to interpretation and it appears to contradict the body of the Directive which states that users must give consent "having been provided" with clear and comprehensive information.

Various advertising and publishing trade bodies have claimed the Recital rules out the need for prior consent. In a confident statement the Interactive Advertising Bureau said that the Recital "clarifies that websites can rely on browser controls and similar applications to define the acceptance of cookies". Given the wording of the main body of the Directive, this interpretation is an optimistic one.

Member States have until 26 April 2011 to implement the Directive. If UK legislators transpose the Directive wording faithfully, IAB's interpretation will be open to question. With little scope for the Information Commissioner to continue to take a pragmatic view towards compliance, many businesses may be tempted to bend the rules and risk incurring a fine in order to protect their advertising revenue.

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