

New Consent Regime for “Cookies” to enter into force in the UK

Directive No 2009/136/EC, generally known as the Citizens Rights Directive (the “Directive”),¹ which amended article 5(3) of Directive No 2002/58/EC (the “e-Privacy Directive”)² by imposing a new consent regime for “cookies” (the “New Consent Regime”), required Member States to transpose the changes it brought into national law by May 25, 2011. One year past this due date, the amended UK Regulation 6 of the Privacy and Electronic Communications Regulations 2003 (“Regulation 6”), transposing the New Consent Regime, will enter into force on May 26, 2012, after the expiry of the one-year transition period granted by the UK legislature.

In view of the entry into force of the New Consent Regime in the UK, this Alert Memo recaps the main issues addressed by the Directive with regard to cookies and focuses on how the Directive is being transposed in the UK and France, as well as what the status of transposition is in certain other Member States.

Importantly, the e-Privacy Directive (including the New Consent Regime) applies not only to web site operators located within the European Economic Area (“EEA”),³ but also to web site operators without an establishment within the EEA when they process personal data through “*the use of equipment, automated or otherwise, situated on the territory of the [...] Member State.*”⁴ The Article 29 Working Party, the EU’s advisory body

¹ Article 2 of Directive 2009/136/EC of the European Parliament and of the Council of November 25, 2009, OJ 2009 L 337/11, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:337:0011:0036:EN:PDF>.

² Directive 2002/58/EC of the European Parliament and of the Council of July 12, 2002, OJ 2002 L 201/37, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:2002L0058:20091219:EN:PDF>.

³ In addition to the EU Member States, the EEA comprises Iceland, Liechtenstein and Norway.

⁴ Article 3 of the e-Privacy Directive; and Directive 95/46/EC of the European Parliament and of the Council of October 24, 1995, OJ 1995 L 281/31, <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CONSLEG:1995L0046:20031120:EN:PDF>, article 4(1)(c).

on data protection and privacy (the “Working Party”), takes the view that the “*use of cookies and similar software devices by an online service provider can also be seen as the use of equipment in the Member State’s territory.*”⁵ If the website operator has an establishment in one of the Member States, the applicable national law is determined based on the location of the establishment.⁶ A website operator with establishments in several Member States must comply, for each of its data processing activities, with the data protection laws of that Member State where the establishment is located that is involved, as data controller, in the specific activity.⁷

Directive requires user’s informed consent to placing a cookie on the user’s device

The Directive requires Member States to ensure that the storing of information or the access to information already stored in the user’s terminal equipment, e.g., computer or mobile device, is allowed only with the user’s informed consent. In this memo, we generally refer to all these technologies for storing and accessing information simply as “cookies”. The Directive replaces the previous consent regime, which only offered the user a right to refuse cookies. According to the Working Party, the New Consent Regime clarifies and reinforces “*the need for users’ informed prior consent*” that “*must be freely given, specific and constitute an informed indication of the data subject’s wishes.*”⁸

However, the wording of the Directive leads to differences in interpretation regarding the requirements of the New Consent Regime, in particular on the following points:

- Firstly, the Directive and most national transposition laws do not expressly provide whether the consent should be obtained under the “opt-out” or “opt-in” approach. Recital 66 of the Directive suggests that the user’s consent may be expressed by using the appropriate settings of a browser. However, the Working Party has expressed the opinion that, in most cases, reliance on

⁵ Article 29 Working Party, Opinion 1/2008 on data protection issues related to search engines, April 4, 2008, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2008/wp148_en.pdf, page 11.

⁶ Article 4(1)(a) and Recital 19 of Directive 95/46/EC of October 24, 1995. See also article 1(2) of the e-Privacy Directive.

⁷ Article 29 Working Party, Opinion 8/2010 on applicable law, December 16, 2010, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp179_en.pdf, Section IV.1.

⁸ Article 29 Working Party, Opinion 2/2010 on online behavioral advertising, June 22, 2010, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf, Sections 4–4.1.

browser settings would not satisfy the informed consent requirement set forth by the Directive.⁹ Despite the position taken by the Working Party, the transposition laws of most Member States allow consent to be given by using the appropriate web browser settings. However, some Member States do not accept consent given through browser settings and require more explicit acceptance, e.g., through accepting the terms and conditions, a pop up or a similar technique.

- Secondly, Member States differ in opinion on whether consent should be obtained before the first cookie is set. Certain Member States recognize that this may be difficult in practice (e.g., the UK). However, this view is again at odds with the opinion of the Working Party, which has made clear that *“consent must be obtained before the cookie is placed and/or information stored in the user’s terminal equipment is collected.”*¹⁰
- Finally, the New Consent Regime provides that informed consent is not required for cookies that are placed *“for the sole purpose of carrying out the transmission of a communication over an electronic communications network”* or are *“strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service.”*¹¹ Member States are likely to hold different views on the scope of these exemptions.

UK transposing law

As indicated above, the Directive’s New Consent Regime has been transposed in the UK through an amendment to Regulation 6, which will enter into force on May 26, 2012. As of this date, companies that operate websites using cookies must obtain the user’s consent to store a cookie on the user’s device. Non-compliance with this obligation carries a fine of up to £500,000. As of May 25, 2011, website publishers already have been under an obligation to (i) inform users that they use cookies, (ii) explain how the cookies are used,

⁹ Article 29 Working Party, Opinion 2/2010 on online behavioural advertising, June 22, 2010, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf, Section 4.1.

¹⁰ Article 29 Working Party, Opinion 2/2010 on online behavioural advertising, June 22, 2010, http://ec.europa.eu/justice/policies/privacy/docs/wpdocs/2010/wp171_en.pdf, Section 4.1.

¹¹ Article 5(3) of the e-Privacy Directive.

and (iii) take steps to ensure the swift transposition of the New Consent Regime.¹² In addition, the UK's Information Commissioner's Office ("ICO") has clarified that:

- Firstly, consent involves “*some form of communication where the individual knowingly indicates their acceptance. This may involve clicking an icon, sending an email or subscribing to a service.*”¹³ With this position, the ICO follows the opinion of the Working Party and has determined, in spite of the wording of Regulation 6,¹⁴ that mere changes to browser settings are insufficient to constitute a valid consent, because the public's knowledge of the use and functioning of cookies would currently be too low to deem consent obtained this way meaningful. However, the ICO is currently working with browser manufacturers to develop acceptable solutions.
- Secondly, unlike the Working Party, the ICO acknowledges difficulties in obtaining consent before the first cookie is set and seems to display some tolerance in this respect.
- Finally, as to the scope of the exception to the requirement to obtain consent, Regulation 6 fully reflects the Directive. Pursuant to the guidance issued by the ICO, the exemption is likely to apply to cookies remembering the goods a user wishes to buy when he or she proceeds to the checkout, to cookies providing security essential to meet the security requirements of the seventh data protection principle, and to cookies ensuring that the content of the page loads quickly and effectively by distributing the workload across numerous computers.¹⁵

¹² The ICO indicated that it expected web site operators to plan for the implementation of the New Consent Regime, although no fine would be imposed.

¹³ ICO, Guidance on the rules on use of cookies and similar technologies, December 13, 2011, http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Privacy_and_electronic/Practical_application/guidance_on_the_new_cookies_regulations.ashx, pages 5–6.

¹⁴ Regulation 6 provides that “*consent may be signified by a subscriber who amends or sets controls on the internet browser which the subscriber uses or by using another application or programme to signify consent*”.

¹⁵ ICO, Guidance on the rules on use of cookies and similar technologies, December 13, 2011, pages 8–10.

The French “*Paquet Telecom*” Ordinance

The New Consent Regime has also been transposed into French law through article 37 of Ordinance No 2011–1012 of August 24, 2011 (known as the “*Paquet Telecom*” Ordinance), which amended article 32(II) of the French Data Protection Law. Amended article 32(II) provides that users can express consent through appropriate settings in their connection device or any other device under their control. This provision seems to refer implicitly to web browser settings, however, the CNIL, the French data protection authority, stated in its guidelines of October 26, 2011 that the existing web browsers are not set up in a way that a user can validly consent by adjusting web browser settings. However, it added that a user can consent through a banner at the top of a web page, an overlay on a web page with a field asking for the user’s consent, or boxes to be ticked when subscribing to an online service. The CNIL further indicated that a user might consent through a web browser add-on, or a web platform handling user consents.

Non-compliance with article 32(II) of the French Data Protection Law may give rise to administrative, civil and criminal penalties. Companies found to have violated the French Data Protection Law may be sentenced to a fine of up to €1.5 million, and liable individuals may be sentenced to a fine of up to €300,000 and up to 5 years’ imprisonment.

Other Member States

Unlike France and the UK, around ten Member States are yet to transpose the New Consent Regime into national law, despite the lapse of the deadline for the transposition of the New Consent Regime provided for in the Directive.¹⁶ For example, in Italy, a legislative decree that would transpose the New Consent Regime was discussed by the Cabinet only recently on April 6, 2012. Also Poland and Spain are still in the process of introducing the New Consent Regime.

In contrast, the German Federal Government has taken the position that the New Consent Regime is already part of the existing German data protection laws and, thus, no further transposition of the amended article 5(3) of the e-Privacy Directive is necessary in Germany. According to a representative of the German Federal Ministry of Economics, this view was discussed with the European Commission. Therefore, it is expected that a draft bill introduced by the opposition into the German Federal Parliament in order to expressly transpose the New Consent Regime most likely will not be adopted.

¹⁶ On November 24, 2011, the European Commission issued reasoned opinions to 16 Member States, which failed to fully implement the new EU telecoms rules, including the New Consent Regime: <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/11/1429&format=HTML&aged=0&language=EN&guiLanguage=en>.

As the transposition rules are expected to vary among Member States, companies should closely track, and remain vigilant about, the specific consent requirements for cookies in each relevant jurisdiction.

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For additional information, please feel free to contact any of your regular contacts at the firm if you have any questions.

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