



“Must try harder”

More guidance on website cookies

March 2012

Has the Information Commissioner's further guidance on the use of cookies on websites provided a clear way forward? Not really, but one point is abundantly clear – doing nothing is not an option.

A quick reminder of the issue

We sent out an update last May explaining new rules about cookies which had come into force. At that time, the Information Commissioner's Office (ICO) promised further guidance on the new rules. This is now available on the ICO website, to help businesses become compliant before the ICO's "grace period" for taking enforcement action expires on 26 May 2012.

What are cookies?

Cookies are small files downloaded to your computer or mobile device when you browse certain websites. They are used for various purposes, sometimes related to identifying the user.

Regulators are concerned because cookies can be used to collect personal data about users without them being fully aware of the implications.

The new UK rules on cookies were brought in to implement an EU Directive, which required that user consent be obtained for the use of all cookies and that clear information about the cookies be provided. The rules affect all uses of cookies – not just those directed at consumers.

What the new guidance adds

- That "consent" needs the user knowingly to indicate acceptance.
- Examples of cookies which are "necessary" to provide the website service (and which are therefore exempt from the new rules), e.g. to make online shopping baskets work.
- That analytical and first/third party advertising cookies, and those recognising returning users, will need to comply.
- That the ICO will focus enforcement on the most "intrusive" cookies.

What should you do now?

If you use cookies, you must find a way to:

- tell users that your site uses cookies;
- explain why you use them; and
- obtain "consent".

The first two are much easier to achieve than the third. In practice, by 26 May 2012 you should address how to provide cookie information and have a realistic plan for how to go about getting consent.

Audit your cookies

The first step must be to carry out an audit of all your cookie usage. Remove any that your business can reasonably live without, and any which are redundant. Through this audit you should decide how "intrusive" you think your cookies are.

How "intrusive" are your cookies?

- Is the cookie used as a marketing tool or is it merely intended to improve the user's enjoyment of the site?
- How personal is the data that the cookie is storing or "remembering"?
- What is the lifespan of the cookie? Could the lifespan be reduced, e.g. to just the user session?

How to provide information

Tell the user what cookies you use or propose to use. Make sure your explanation of cookie usage is readily viewable. The ICO guidance explicitly states that it is not sufficient simply to provide a link to a privacy policy on your homepage; more needs to be done to highlight the new (or expanded) information that the privacy policy should contain about cookies.

The ICO suggests that, amongst other things, the hyperlink to the privacy policy could be made more prominent than the other "small print" links. It also suggests that the word "cookie" should appear in the link.

What about getting "consent"?

This is the really difficult bit.

ICO guidance on consent

The ICO appears to suggest that:

- for the more "intrusive" cookies, a pop-up "tick box" ensures consent, but this may be commercially unattractive;
- you could allow users to enter the site without obtaining consent, but only activate the cookie where a user ticks "yes" to an activity; and
- for some cookies (e.g. a use monitoring or "analytic" cookie where a user is merely browsing the site) it may be possible to imply consent from the fact that the user remains on the site, if the information about cookies that you provide to users is clear and prominently highlighted.

However, it is best to read the ICO guidance to see whether it helps suggest a solution for your site.

What other websites in your sector are doing will set a minimum standard, so you should also monitor these. At present, there doesn't seem to be a generally accepted "right way" to do things, but this will evolve.

What if I do nothing?

Businesses which fail to take adequate steps may face investigation by the ICO, which has the power to impose fines of up to £500,000 for non-compliance. The ICO has made it clear that doing nothing is not an option.

If you would like further information or advice on the law in this area, please ask us.

How we can help

We have considerable experience of advising clients on websites and other online activities. Recent examples include:

Clinton Cards

on arrangements to provide an online service offering personalised greetings cards.

Betclic Limited

on arrangements to provide online betting services.

LK Bennett

on various arrangements relating to the e-commerce side of its retail business.

Times Educational Supplement

on a number of new online ventures in the educational sector.

Shepherd Neame

on a new website designed to promote its pubs and hotels and allow customers to purchase beers online.

“Clear, concise and consistent advice’ is the hallmark of this firm as it deals with a variety of IT matters in a range of industries including media, telecoms, education, industrial, retail and finance.”

Chambers Guide to the UK Legal Profession

“Travers Smith is able to present clients with consistent teams of uniformly excellent lawyers.”

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