

Intellectual Property & Information Technology

New Cookies Law - One Year On

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The European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (the "Regulations") came into force on 1 July 2011. The Regulations were introduced in order to transpose Directive 2009/136/EC (the "E-Privacy Directive") as part of the transposition of the Telecoms Regulatory Reform Package. Just over a year on, there is still some uncertainty as to how businesses should comply with the Regulations and what users should expect.

The Regulations apply to any entity which uses electronic communications networks to connect and/or communicate with their customers. Some of the provisions specifically apply to electronic communications providers such as telecommunications companies and internet service providers; other provisions will apply to any business which communicates with its customers using the internet, telephone, email or fax. Thus any business with a website or which uses email mailshots needs to be mindful of the Regulations.

The Regulations contain some significant changes including an obligation to notify the Data Protection Commissioner (the "Commissioner") and/or individual users or subscribers of data breaches as well as a change to the law regarding the consent requirement for retrieval and storage of personal and other information on users' devices ("cookies"). Additionally, there are a number of new requirements for consent with relation to retention and processing of traffic data and location data as well as a more strict approach to direct marketing over the phone, by email and by fax.

This article will look in particular at Regulation 5 - Confidentiality of Communications (primarily covering cookies).

Confidentiality of Communications - "Cookies"

Cookies are small files which contain information about the user/visitor of a web site, mobile application or other media, stored on the particular device being used by the visitor to the website, application etc. They allow the operator to remember the user and his or her preferences, thus making for a better experience for the user on his return and allowing the operator to keep track of how many new or return visitors are coming into contact with their product or service.

The information gathered by cookies can be very valuable to an operator as it can be used to sell behavioural advertising on its site by demonstrating to marketers that a certain demographic visits the site on a certain amount of occasions every week, month or year and that the product or service can gain exposure to a certain number of people each month for example. This type of cookie is known as a "third-party" cookie and is used in the marketing sphere for behavioural advertising - something which has become a hugely profitable business, with vast amounts of information available in ways it never was before on sites such as Facebook, tracking the location, habits, age, interests etc. of almost a half a billion active users daily on the site.

Regulation 5 introduces some new more stringent measure in relation to the use of cookies, and seeks to bring the legislation up to date with new methods of processing and storing data. Regulation 5 provides that information, including but not limited to personal data, may not be stored on or retrieved from a person's terminal equipment (PC, laptop, mobile phone, tablet etc.) unless the user has given his consent to that use, and been provided with clear and comprehensive information, prominently displayed and easily accessible, explaining the purpose of retaining the information. This could be provided by a notice on the website informing users of the presence of cookies on the site, giving them the option to read further information and/or the option to continue browsing or not.

Exceptions to the notice requirements are provided for, most notably that information which is strictly necessary to facilitate the transmission of a communication or to provide an "information society service explicitly requested by the user" is not subject to this advance consent requirement, e.g. a cookie used to remember items in a shopping cart where the web site is selling goods, or for a web site to remember details for e-billing.

Compliance

Over a year on from their introduction, there has been little guidance in terms of how businesses should attempt to comply with the new cookies rules, although it does appear that the Commissioner will place some reliance on web browser operators to implement the required changes and to give users the opportunity to "opt-in". In his most recent annual report published earlier this year the Commissioner has stated:

"The scale of the consent, in our view, is relatable to the intrusiveness of the cookie. For instance there is a need to capture a specific consent in relation to so called behavioural advertising cookies which collect information on websites visited by a user to allow for the provision of more targeted advertising as they surf the web. In other cases the provision of information on the home page of a site may go a long way to meeting the requirements. Our law specifically envisages that browser settings can be considered to provide a means of capturing consent. There is therefore a continuing opportunity for browser providers to assist in solving this problem¹."

It remains to be seen how stringently the rules will be enforced or whether browser providers will take up the "opportunity" to assist in resolving the issue in a sufficient manner; however there appears to be an ever-increasing number of websites adopting a notice on their homepage, indicating a growing level of compliance.

It is noteworthy that in the UK, the Information Commission Office (an independent body similar to the office of the Commissioner) had rowed back somewhat from its earlier position of requiring "opt-in" consent and has issued a recent guidance note² which recommends that implied consent or "opt-out" is sufficient to comply with the Regulations. However questions have been raised as to the extent to which such an approach is consistent with implementation of the E-Privacy Directive.

There appears to be a move towards recommending tailoring the level of consent to the specific type of cookie - if the cookie is merely storing the information for an easier experience for the user, the level of consent required will be lower than where the cookie is being utilised to store information which is being sold to a third party).

¹ Twenty-Third Annual Report of the Data Protection Commissioner 2011 (20 April 2012): <http://www.dataprotection.ie/documents/annualreports/AnnualReport2011.pdf%20at%20p%2017-18>

² http://www.ico.gov.uk/for_organisations/privacy_and_electronic_communications/the_guide/~media/documents/library/Privacy_and_electronic/Practical_application/cookies_guidance_v3.ashx

The ultimate goal of Regulation 5 is to ensure that users have more information on how cookies operate, and there does appear to be greater awareness amongst consumers and users, but it remains to be seen how the Regulations will impact on businesses in a difficult market place.

The Regulations as a whole introduce a number of significant changes which will alter the way businesses must operate. As a result there may be an element of increased costs for affected undertakings and they must ensure that they are seen to be protecting their customer's privacy in a cost efficient manner. With regard to cookies, this might be done by introducing a pop-up window, banner or other type of notice on the home page and, as mentioned above, the information and consent sought should be appropriate to the specific type of cookie and the level of intrusion.

Mr Gary Davis, Deputy Data Protection Commissioner, while speaking at a seminar organised by the Law Society on 8 September 2012, indicated that the Commissioner intends to increase its focus on whether companies are complying with the Regulations.

This note is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. It is given wholly without any liability or responsibility on the part of Eugene F. Collins Solicitors and does not replace the necessity to obtain legal advice.

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