

Data protection briefing

Just in time! UK ICC releases guidance on use of cookies

With a May deadline looming, website operators should be taking urgent steps to implement the revised E-Privacy Directive¹ or face potential enforcement action from the UK Information Commissioner's Office (ICO). The amended rules require businesses that use tracking cookies to obtain user consent to their use of those cookies, i.e. an "opt-in", rather than the "opt-out" mechanism permitted under the previous legislation, except where the cookies are necessary for the website's operation. We considered these changes in our [July 2011 IP/IT newsletter](#).

Helpfully, the UK International Chamber of Commerce (ICC) has just released its April 2012 Cookie Guide (ICC Cookie Guide) to assist website operators to come to terms with the changes. It is reassuring to see that the ICC's view is that in many cases consent can be obtained by relatively straightforward means which should not be overly burdensome for the website operator.

What help does the guide provide?

The ICC Cookie Guide, which is subject to change, aims to assist website operators by identifying four categories of cookies and recommended approaches to obtaining user consent relevant to each. The guide also seeks to assist website operators in informing their visitors about the website's use of cookies, an important pre-requisite to valid consent. Website operators are encouraged to use standard language when communicating cookie information in order to expose users to a consistent approach. The hope is that such consistency will facilitate increased user understanding of the use of cookies and decrease the time it takes for users to learn to deal with cookie consent across websites.

The ICC's four categories of cookies:

- strictly necessary cookies;
- performance cookies;
- functionality cookies; and
- targeting or advertising cookies.

Where a cookie does not fit into any of the four categories, the ICC Cookie Guide encourages website operators to devise their own description of the cookie and appropriate method of obtaining informed consent. Where a cookie fits into multiple categories, consent should be sought in the ways applicable for all the relevant categories.

The ICC Cookie Guide also encourages the use of layered information, with the layers becoming progressively more detailed. The layered approach is intended to allow website users to access as much or as little information as they would like, without being overwhelmed.

Category 1 – strictly necessary cookies

What type?

This category of cookie is narrowly defined and such cookies must relate to a website service that has been explicitly requested by the user.

ICC's suggested user notice

"These cookies are essential in order to enable you to move around the website and use its features, such as accessing secure areas of the website. Without these cookies services you have asked for, like shopping baskets or e-billing, cannot be provided."

Consent?

While consent is not required for such cookies, the ICC recommends that users are given information to assist them in understanding why such cookies are used.

Category 2 – performance cookies

What type?

This category of cookie gathers data in order to enhance website performance or to track the effectiveness of certain website features.

ICC's suggested user notice

"These cookies collect information about how visitors use a website, for instance which pages visitors go to most often, and if they get error messages from web pages. These cookies don't collect information that identifies a visitor. All information these cookies collect is aggregated and therefore anonymous. It is only used to improve how a website works."

Consent?

The ICC suggested method of obtaining consent depends on the nature of the website and the function of the cookies. For example – after the user notice, the following could be included: *"By using our website, you agree that we can place these types of cookies on your device."*

Category 3 – functionality cookies

What type?

This category of cookie covers where customer selections are remembered and affect the look or behaviour of the website.

ICC's suggested user notice

"These cookies allow the website to remember choices you make (such as your user name, language or the region you are in) and provide enhanced, more personal features. For instance, a website may be able to provide you with local weather reports or traffic news by storing in a cookie the region in which you are currently located. These cookies can also be used to remember changes you have made to text size, fonts and other parts of web pages that you can customise. They may also be used to provide services you have asked for such as watching a video or commenting on a blog. The information these cookies collect may be anonymised and they cannot track your browsing activity on other websites."

Consent?

The ICC recommends that the right method of obtaining consent depends on the nature of the website and the function and intrusiveness of the cookies. There is therefore a range of approaches. For example, where information collected by cookies is anonymised and does not impact on user privacy, the approach to consent could follow that used for category 2 cookies. So, in such cases, after the user notice, the following could be included: *"By using our*

website, you agree that we can place these types of cookies on your device."

Alternatively, where website users actively select website settings or personal preferences, the storage of such settings may be considered more intrusive. In such circumstances, a more definitive statement of a user's informed consent may be more appropriate. For example, consent could be obtained by including a notice where the user selects its desired settings, such as: *"When you choose this option, you agree that we can place these types of cookies on your device."*

Category 4 – targeting or advertising cookies

What type?

This category of cookie benefits the website operator or a third party and is relevant for purposes such as behavioural advertising and market research.

ICC's suggested user notice

User notices are to be adapted to suit the actual use of such cookies.

"These cookies are used to deliver adverts more relevant to you and your interests. They are also used to limit the number of times you see an advertisement as well as help measure the effectiveness of the advertising campaign. They are usually placed by advertising networks with the website operator's permission. They remember that you have visited a website and this information is shared with other organisations such as advertisers. Quite often targeting or advertising cookies will be linked to site functionality provided by the other organisation."

Consent?

These cookies collect the most user information so informed consent is key. This is likely to require active consent, such as an opt-in tick-box, before a cookie is set. If a third party sets the cookie, as opposed to the website operator, the user must also be informed of the relationship between the parties. It is up to the website operator, or the third party, to decide on an appropriate method of consent, which must, in any case, allow the user to make an informed choice.

Act immediately!

Whilst the ICC Cookie Guide is not authoritative or approved by the ICO, website operators will welcome it and its approach to four cookie categories (you can read the full ICC Cookie Guide here http://www.international-chamber.co.uk/components/com_wordpress/wp/wp-content/uploads/2012/04/icc_uk_cookie_guide.pdf).

The ICO indicated that it would not take remedial action against non-compliant websites for a year following implementation of the revised E-Privacy Directive. That term comes to an end on 26 May 2012. Website operators must therefore act immediately to ensure they are compliant.

Further information

Our team has extensive experience in data protection matters. If you would like further information on any of the above, please speak to any of the contacts listed below.

Notes

- 1 Article 5(3) of the European Directive 2009/136/EC (the E-Privacy Directive) regulates the use of third-party tracking cookie

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