

UK Laws Relating to Cookies

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Executive Summary

If a cookie is strictly necessary (e. g. an authenticated session cookie) to provide a service then no further action need be taken. If a cookie is not necessary (an anonymous session cookie) or for purposes other than direct provision of the service (e. g. statistics gathering) then informed consent is required before storage.

Summary of Changes in 2011

“The revised rules replace the requirement of the 2003 Regulations that users must be given an opportunity to refuse cookies (an “opt out”) with a requirement for user consent. The requirement to also provide users with clear, comprehensive information on the use of cookies remains. In fact these requirements do not only apply to cookies. They apply to any means of storing information or gaining access to information stored on a user’s terminal equipment. *They do not apply where the storage or access is strictly necessary for a service requested by the user.*”¹

Strict Necessity

“The only exception to this rule is if what you are doing is ‘strictly necessary’ for a service requested by the user. This exception is a narrow one but might apply, for example, to a cookie you use to ensure that when a user of your site has chosen the goods they wish to buy and clicks the ‘add to basket’ or ‘proceed to checkout’ button, your site ‘remembers’ what they chose on a previous page. You would not need to

¹http://www.ico.gov.uk/~media/documents/library/Privacy_and_electronic/Practical_applications/enforcing_the_revised_privacy_and_electronic_communication_regulations_v1.pdf

get consent for this type of activity. This exception needs to be interpreted quite narrowly because the use of the phrase “strictly necessary” means its application has to be limited to a small range of activities and because your use of the cookie must be related to the service requested by the user. Indeed, the relevant recital in the Directive on which these Regulations are based refers to services “explicitly requested” by the user. As a result our interpretation of this exception therefore has to bear in mind the narrowing effect of the word “explicitly”. The exception would not apply, for example, just because you have decided that your website is more attractive if you remember users’ preferences or if you decide to use a cookie to collect statistical information about the use of your website.”²

Compliance for Unnecessary Cookies

Executive summary:

- tell people how you use cookies, and
- obtain consent before storing or retrieving cookies.

For an in-depth discussion relating to mechanisms and enforcement see:

http://www.ico.gov.uk/~media/documents/library/Privacy_and_electronic/Practical_application/advice_on_the_new_cookies_regulations.pdf

Relevant Legislation

Electronic Communications (EC Directive) Regulations 2003

Original

6.—(1) Subject to paragraph (4), a person shall not use an electronic communications network to store information, or to gain access to information stored, in the terminal equipment of a subscriber or user unless the requirements of paragraph (2) are met.

(2) The requirements are that the subscriber or user of that terminal equipment—

(a) is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and

(b) is given the opportunity to refuse the storage of or access to that information.

(3) Where an electronic communications network is used by the same person to store or access information in the terminal equipment of a subscriber or user on more than one occasion, it is sufficient for the purposes of this

²“Does this consent rule apply to every type of cookie?”

http://www.ico.gov.uk/~media/documents/library/Privacy_and_electronic/Practical_application/advice_on_the_new_cookies_regulations.pdf

regulation that the requirements of paragraph (2) are met in respect of the initial use.

(4) Paragraph (1) shall not apply to the technical storage of, or access to, information—

(a) for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network; or

(b) where such storage or access is strictly necessary for the provision of an information society service requested by the subscriber or user.

Amended

6.—(1) Subject to paragraph (4), a person shall not store or gain access to information stored, in the terminal equipment of a subscriber or user unless the requirements of paragraph (2) are met.

(2) The requirements are that the subscriber or user of that terminal equipment—

(a) is provided with clear and comprehensive information about the purposes of the storage of, or access to, that information; and

(b) has given his or her consent.

(3) Where an electronic communications network is used by the same person to store or access information in the terminal equipment of a subscriber or user on more than one occasion, it is sufficient for the purposes of this regulation that the requirements of paragraph (2) are met in respect of the initial use.

(3A) For the purposes of paragraph (2), 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.³

(4) Paragraph (1) shall not apply to the technical storage of, or access to, information—

(a) for the sole purpose of carrying out the transmission of a communication over an electronic communications network; or

(b) where such storage or access is strictly necessary for the provision of an information society service requested by the subscriber or user.

Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011

³However, see “I have heard that browser settings can be used to indicate consent – can I rely on that?” from

http://www.ico.gov.uk/~media/documents/library/Privacy_and_electronic/Practical_application/advice_on_the_new_cookies_regulations.pdf

6.—(1) In regulation 6—

(2) In paragraph (1) for “use an electronic communications network to store information, or to”, substitute “store or”.

(3) For paragraph (2)(b) substitute “(b) has given his or her consent”.

(4) After paragraph (3) insert—

“(3A) For the purposes of paragraph (2), 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.”

(5) In paragraph (4)(a) omit “or facilitating”.