

## HEADLINE ISSUES FROM OLSWANG'S COOKIES BREAKFAST SEMINAR

On 6 July 2011 Olswang LLP hosted a roundtable discussion on the practical impact of the recently introduced requirement for opt in consent to the use of website cookies.

We are grateful to **our panel**:

Dave Evans, Group Manager at the [Information Commissioner's Office](#).

Richard Carman and Chris Mellish from [Pure Innovation](#), a web development agency specialising in bespoke web applications.

[Elle Todd](#), Legal Director and Internet and privacy specialist, Olswang LLP.

Here are some headlines and observations from the morning's discussions.

### **The regulatory perspective: what actions does the ICO expect UK businesses to take now?**

- The [new rules](#) came into force in May, and the ICO's has published this [guidance](#).
- In short, the ICO expects businesses to: "**analyse, inform and offer choices**".
- Businesses should not expect the ICO to produce specific examples for businesses to follow. Each has to decide for itself what is appropriate in the circumstances.
- It expects businesses to start making an assessment of their own websites, the cookies used and the intrusiveness of those cookies. A key point is to consider whether the cookie really affects the privacy of the individual and those are the cookies which should be focussed on first.
- The browser solution – which could take more than a year to emerge anyway – will not be a silver bullet for all scenarios (e.g. mobile apps, users of older versions of IE, etc). Therefore business can not assume that this will replace the need for other forms of consent entirely.
- Depending on the intrusiveness of the cookies used, it might be appropriate to obtain consent in a variety of ways including via the ts & cs, pop ups or feature – led consent, which offers users incentives to consenting (one example given was the provision of local weather forecasts, where a site might ask the user for consent to remember his or her location. A website could use wording like "Do you want us to remember what is interesting to you? We do this by using a cookie" etc).
- It is recognised that the tick box approach currently taken on the ICO's own website is "not for everyone".

- Websites cannot avoid responsibility for third party cookies on their sites. Informing website users about what's happening is essential. The next version of the ICO's guidance will provide further guidance on this issue.

## **What enforcement approach will the ICO take?**

- Version 1 of the ICO's [enforcement policy](#) in relation to the cookie rules was published in May. This includes a 12 month "lead in period" until May 2012 to allow businesses to devise consent solutions (but not 12 months in which to do nothing and wait for a solution to emerge!).
- According to Dave Evans, between 26 May and 6 July the ICO had received approximately 4 complaints about cookies – 3 of these related to the ICO's own website.
- The ICO will be "sensible" in its approach, and recognises the challenge posed by the consent requirement versus the website user's experience.
- Investigating each and every cookie complaint would be resource-intensive, and not in tune with the ICO's risk-driven [regulatory approach](#). The ICO's first response would always be to ask whether the individual had complained to the owners of the website.
- Regulatory action is unlikely where: no privacy detriment is apparent, the user has not set the browser to reject cookies and the organisation has analysed cookie use, informed users and offered choices over accepting cookies.
- The UK Commissioner's enforcement powers only extend to the UK therefore the ICO would not be looking to investigate breaches by entities which do not fall within its jurisdiction.

## **The "geek" perspective:**

- Not all cookies are bad! They range across a wide spectrum of intrusiveness.
- See the Technical FAQs document (go to "Cookies resources" at <http://www.datonomy.eu/>) for more examples of cookies, details of how they work and where different types of cookie sit on the spectrum of intrusiveness.
- The approach taken by some websites (including the ICO's own tick box) contributes to a negative perception, which in turn may make obtaining users' consent more difficult.
- Presenting options and choices in a more user-friendly way will help achieve consent.
- Cookies aren't the only way to track people, and there are several passive techniques that couldn't be reliably detected even manually inspecting all the network traffic.
- IPv6 could ultimately render tracking using cookies obsolete and would be passive.

- Legitimate cookies can be used for illegitimate purposes behind the scenes.

## **The privacy practitioner's perspective:**

- Don't forget about the wider aspects of data protection compliance. For example, cookies also raise issues under the 5<sup>th</sup> Data Protection Principle – that data shall not be retained longer than is necessary for the purposes for which they were collected. Businesses often forget that a lot of information such as this is already available to users who investigate the cookies installed on their device.
- It is also important to make sure that any consent solution or site re-design complies with accessibility standards – see for example the [Web Accessibility Initiative](#).
- Other pending regulatory changes may also impact on the approach taken. In particular, the Data Protection Directive itself is under review with a paper from the European Commission expected later this year. Also, a Best Practice Recommendation in relation to Online Behavioural Advertising is expected to be implemented nationally in April 2012 (including additional notice, information and consent arrangements) and which will fall within the remit of the ASA.

## **The international perspective:**

Colleagues from Olswang's international offices gave the perspective from other EU jurisdictions. [Mattahias Vierstraete](#) from our Brussels office and [Carsten Kociok](#) from Berlin reported on the state of play on implementation in their jurisdictions. Please see our table on "EU cookie law implementation" under "Cookies resources" at <http://www.datonomy.eu/>

**For further information on the practical impact of the news cookie rules please contact Olswang Legal Director Elle Todd [elle.todd@olswang.com](mailto:elle.todd@olswang.com) or Olswang Partner Iain Stansfield [iain.stansfield@olswang.com](mailto:iain.stansfield@olswang.com)**

**The information contained in this update is intended as a general review of the subjects featured and detailed specialist advice should always be taken before taking or refraining from taking any action.**

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