

Cookie opt in requirements: EU implementation at a glance - Last updated 22 August 2011

EU Member States were obliged to bring into force opt-in consent requirements for the use of website cookies by May 2011, but only seven (including the UK) have done so. The European Commission [announced](#) on 19 July that it is commencing legal action against the other 20 Member States for failure to fully implement the relevant changes to the EU telecoms package (which in addition to the cookie consent requirement, include a range of other measures). We summarise the state of play in the UK and other key European jurisdictions.

The official text of the 2009 Directive which sets out the new cookie requirements is available [here](#). See Recital 66 and Article 2 (5). An unofficial consolidated text of amended Directive 2002/58/EC provided by the UK Department for Business Innovation and Skills is available [here](#).

Jurisdiction	New rules in force?	Best practice guidance?	Risk of enforcement action?
<p>Belgium</p> <p>c.dekeersmaeker@olswang.com matthias.vierstraete@olswang.com</p>	<p>Not yet.</p> <p>On 1 July 2011 the Council of Ministers agreed on a new draft, providing that consent is necessary (instead of the "prior and written consent" as required in a first draft).</p> <p>The draft (which is not publicly available) is likely to be discussed in Parliament in September 2011.</p> <p>Belgium was one of 20 Member States to receive a "letter of formal notice" from the Commission in July over late implementation.</p>	<p>No guidance yet.</p> <p>During the coming months, the Belgian Institute for Postal Services and Telecommunications ("BIPT") will work with telecoms companies and consumer organisations to develop a "practical framework" for consumers. Consumers should determine whether they want to accept each cookie individually or whether they automatically wish to accept cookies from certain websites. BIPT will however not propose concrete solutions. The BIPT expects businesses to self regulate.</p>	<p>The Directive has not yet been transposed into Belgian law. Besides, the BIPT has not provided its opinion regarding this issue.</p>
<p>Czech Republic</p> <p>robert.nespurek@havelholasek.cz richard.otevrel@havelholasek.cz</p>	<p>Not yet.</p> <p>The proposed legislation is still subject to parliamentary discussions. On 15 June the Chamber of Deputies approved it on 1st reading and it is scheduled for discussion by the Chamber Committee on Economy. Two further readings in the Chamber will then be necessary followed by one reading in the Senate, signature by the President and publication.</p> <p>The Czech Republic was one of 20 Member States to receive a "letter of formal notice" from the Commission in July over late implementation.</p>	<p>No guidance.</p> <p>The regulator has not given any official guidelines nor has it given any indication of how it will interpret the law once it comes into force.</p>	<p>Currently low.</p> <p>The Cookie Directive has not yet been implemented and there are questions as to whether it will be properly implemented once the Act comes into force. The lack of certainty as a result of potential improper implementation is thought to make the risks difficult to judge.</p>
<p>Germany</p> <p>viola.bensinger@olswang.com carsten.kociok@olswang.com</p>	<p>Not yet. The Federal Government takes the view that current data protection laws are sufficient. Also, the Federal Ministry of Economics says that it wants to await self regulatory rules by advertising industry before initiating legislative steps.</p> <p>Germany was one of 20 Member States to receive a "letter of formal notice" from the Commission in July over late</p>	<p>Self-regulatory rules are currently being negotiated.</p> <p>The Bundesverband Digitale Wirtschaft (representing the interests of companies in the field of interactive marketing, digital content and interactive added value) offers information for users about cookies at http://www.meine-cookies.org</p>	<p>As there are no new rules planned, there is only the risk of not being in compliance with <u>existing</u> rules.</p> <p>Under current data protection laws, consent (or specific statutory authorisation) to cookies is only required if personal data are collected, processed or used. However, if personal data are collected that only pertain to the Cookie-ID and not to a name or</p>

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	implementation.	The Duesseldorfer Kreis (conference of regulators from the 16 states (<i>Laender</i>) adopted a resolution regarding the legal framework for the creating of user profiles and the usage of tracking tools such as Google Analytics	<p>other directly identifying information, the collection will be allowed if the user is informed (in the website's privacy policy) about the use of cookies and given the right to object.</p> <p>In the past, Regulators at state (Laender) level have taken action against websites owners using Google Analytics – for example against companies in Schleswig-Holstein.</p> <p>We are not aware of any fines imposed to date for the usage of Google Analytics, although state authorities have commented in the press that "substantial fines" could be imposed .</p>
<p>Spain</p> <p>blanca.escribano@olswang.com ellen.martinez@olswang.com</p>	<p>New rules have not yet entered into force.</p> <p>They will be implemented into Spanish legislation by means of a Bill amending the General Telecommunications Act.</p> <p>The Draft Bill is currently being discussed in the Spanish Congress and it is expected to be enacted at the end of July.</p> <p>Spain was one of 20 Member States to receive a "letter of formal notice" from the Commission in July over late implementation.</p>	<p>A Spanish Code of Conduct adapting the EASA Best Practice Recommendation on Online Behavioural Advertising is expected at the end of the summer.</p>	
<p>Sweden</p> <p>Erica Wiking Häger ewh@msa.se</p> <p>Julia Brugge jub@msa.se</p>	<p>The Swedish Electronic Communications Act (the “ECA”) was amended as of 1 July 2011.</p> <p>Under the ECA all visitors to a website with cookies must consent to their being used (except where cookies are necessary in order to provide a service the visitor has expressly requested).</p> <p>Visitors must have access to information stating:</p> <ul style="list-style-type: none"> • that the website contains cookies; • whether the information comes from or is released to a third party; • the purpose for which cookies are used; and • how cookies may be avoided. 	<p>As the current provision has been only changed as of 1 July 2011, it is not yet possible to say in any detail how the rule will be applied to a particular website.</p> <p>There are currently no recommendations by the supervisory authority, the Swedish Post and Telecom Agency (the “PTS”). However, PTS has expressed that ‘consent’ means conscious approval. It has declined to comment on the exact appearance and function of the technical design required to achieve this consent as it considers that website owners are best able to produce functioning and secure solutions for gaining consent.</p> <p>At this point there is no requirement regarding the form in which consent is to be given.</p> <p>PTS has appointed a self-regulating committee with representatives from the media and advertising/marketing</p>	<p>No enforcement actions have been made in relation to the amendments to the ECA. In the absence of further guidance on the practical implications of the amendments to the ECA, the risk of enforcement actions being taken at this point in time is low.</p> <p>PTS has stated that it will await further guidance until it initiates supervision and possible enforcement actions.</p>

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	<p>Information about cookies should be provided in a clear and simple way that can be understood by Swedes, and contain as a minimum information about:</p> <ul style="list-style-type: none"> • what the various cookies are called; • which domain name they belong to; and • what data is stored in the cookies and how long they are saved in the visitor's web browser. 	<p>market, which will give proposals as to how the consent requirements should be handled in practice. It is likely that consent made in advance, e.g. by using an adopted web reader will be sufficient.</p> <p>The Swedish legislator has pointed out that the purpose of the amendment in the ELC is not to make the use of cookies for legitimate purposes more difficult, but rather to avoid privacy violations and malicious use, e.g. use in the format of spying programs or other applications where the information is being kept or downloaded without the visitors' knowledge. In the absence of further guidance there is still the possibility that in practice consent requirements will be more far-reaching.</p> <p>The following are examples of attempts to comply with the directive:</p> <p>Swedish government: http://www.sweden.gov.se/</p> <p>Swedish Post and Telecom Agency: http://www.pts.se and http://www.pts.se/en-gb/About-the-website/Juridisk-information/Cookies-on-the-PTS-website/Cookies-on-ptsse/</p>	
<p>UK</p> <p>Elle.todd@olswang.com Iain.stansfield@olswang.com claire.walker@olswang.com</p>	<p>Regulations came into force May 2011.</p>	<p>The first version of the UK guidance is here. UK businesses are expected to audit the use and intrusiveness of cookies on their websites, inform users and seek consent via context- appropriate means.</p>	<p>Despite the grace period until May 2012, there is nevertheless the risk of regulatory action if businesses do not take active steps to prepare for compliance. In particular businesses should be using this lead period to "analyse, inform and offer choices" to web users. Websites should also continue to comply with the previous requirement (information plus the opportunity to object to cookies).</p>

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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