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## Would You Like a Cookie?

### What is a Cookie?

A cookie is a small data file which is generated by many websites, and accepted on your computer when you access certain sites. Cookies allow your web-browser to navigate through the website, and give your browser a sense of memory. Cookies are vital for many common features such as log-ins, virtual shopping baskets, recognising preferences or website settings.

Cookies are increasingly used to track the behaviour of website users in order to market products directly to them, based on their browsing, previous purchases and perceived interests. This type of targeted approach is known as "behavioural advertising". If you have experienced the déjà vu of being followed around by particular adverts while surfing the web, this is probably because a marketer is using cookies to target adverts at you.

Until now, most responsible commercial websites have relied on individual users to manage how they deal with cookies, and whether to accept them or not. This can be done via settings on the web browser. It is common for this to be explained in an online privacy policy, often with a link to further explanations of what cookies do (e.g. at [www.allaboutcookies.org.uk](http://www.allaboutcookies.org.uk)).

### New Rules

An amendment to the EU Directive on Privacy and Electronic Communications, (the "Directive") came into force in the UK on 25 May 2011. The effect of the amendment is to limit a website's freedom to place cookies and similar files on a user's computer without the user's consent. The Directive covers all devices for accessing the internet, including smart-phones and tablet-PCs, and also covers applications other than browsers used to access websites, such as site specific apps.

Under the Directive, cookies may only be deposited on a device if the user is provided with:

1.

clear and comprehensive information about the purpose of the processing of the data; and

2.

the right to refuse consent to such processing.

The new rules do not prevent the use of cookies for the sole purpose of "carrying out or facilitating the transmission of a communication over an electronic communications network" (e.g. making a contact form work), or where the cookie is "strictly necessary in order to provide an information service explicitly requested by the user" (e.g. an online shopping basket for an online retailer).

### Uncertainty

While the requirements may seem straightforward, the varied and changing world of the internet leaves some doubt about what businesses must do to comply. In particular, if the information and refusal requirements are interpreted very strictly, this could have a cooling effect on the expansion of behavioural advertising witnessed over the last few years.

In particular, different web-browsers have different options which permit or block cookies. They also differ in their ability to screen certain types of cookies at all. It is currently a matter of debate as to whether a website relying on browser settings alone will be providing sufficient means to give or withhold consent in accordance with the Directive.

The preamble to the Directive says that information and the right to refuse may be offered once for the use of various cookies during the same and subsequent sessions. However, the fact that a user's preferences will often be recorded as a cookie adds a problem. How is a website to record a refusal to allow cookies if it cannot use a cookie to do so? Will such a user need to express his or her refusal every time he or she accesses the website because of this?

Guidance recently published by the Information Commissioner's Office (the "ICO") has confirmed that businesses will have a grace period of 12 months until May 2012 to implement the appropriate measures but have made it clear that businesses must take an active approach within this period to consider how they use cookies and what steps they should take to obtain the required consent.

### **How to respond**

While uncertainty remains, businesses may be best to think about the underlying purpose of the Directive. The Directive sees the computer, phone or other web-access device as part of the user's private sphere. Anything placed there should therefore be done with permission. Any information taken from there should be with the knowledge of the user as to what is being taken and what it is being used for. Using cookies and similar devices in as open and consensual a way as possible is likely to prove the best way to avoid falling foul of the law.

For further information on any of the matters raised in this article, please contact Thomas Dickson – Telephone 028 9089 4843 or email [Thomas.Dickson@mcgrigors.com](mailto:Thomas.Dickson@mcgrigors.com)

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