

Cookie FAQs

What are the new rules? The new regime requires:

- clear and comprehensive information about cookies; and
- consent to the use of most cookies.

The new rules don't just apply to cookies. Any technology that is used to store or access information stored on a user's device (desktop, mobile or other) will be caught.

What about cookies essential for my website? There is an exemption for technology used to transmit a communication and cookies which are 'strictly necessary' to meet a user's request. This is interpreted narrowly: it will cover cookies used in shopping carts, but not used for ad-serving or tracking.

What do you need to do to comply? The Information Commissioner recommends the following:

1. Carry out a 'cookie audit'
For each of the cookies that your website uses, you should know:
 - What does the cookie do?
 - What information does it collect?
 - When does it expire?
 - Does our website need that cookie?
 - If third party, who places it?
2. Determine how intrusive your cookies are
Cookies that facilitate tracking across sites are more intrusive; analytics cookies less so. While the rules apply to all cookies, particular care should be taken in informing users and obtaining consent in respect of intrusive cookies.
3. Produce an appropriate information notice
The Information Commissioner advocates a "layered" approach so that those who wish to find out more can do so. This could be in a separate 'cookie policy' or your privacy policy.
4. Put in place a mechanism for obtaining consent
No single way has been promoted by the Information Commissioner. There is flexibility as to how you put the rules into practice. This could involve express consent (e.g. interstitial), consent via terms and conditions, or notice and implied consent.

Can I rely on browser settings to obtain consent? Browser settings don't yet satisfy the requirements. The Information Commissioner has advised that, longer term, this may be an option but only when browser settings block cookies by default.

What is the deadline for compliance and why is 26 May 2012 important? The cookie rules came into force on 25 May 2011. Helpfully, the Information Commissioner declared a twelve month 'lead in period' to allow industry to get to grips with the new cookie consent regime, during which no enforcement action would be taken. This comes to an end on 26 May 2012. However, even after this date the Commissioner's Office advised that "*all of our enforcement actions are likely to be in the form of negotiations. If people listen to our advice and are prepared to take steps towards compliance, there shouldn't be a problem. However, if businesses deliberately stop short compliance of total compliance, then this is a risk*".

How will the new cookie rules be enforced? Initially, as above, by negotiation. Ultimately, the Information Commissioner's usual powers of enforcement could apply:

- a monetary penalty of up to £500,000 – although only in cases of "serious or substantial breach";
- requiring an undertaking from your business' senior management guaranteeing future compliance; or
- an enforcement notice – breach of which is a criminal offence.

Individuals who suffer damage, or damage and distress, can also claim damages.

What's happening in other countries? The revised Privacy and Electronic Communications Directive, which brought about these new rules, applies across the European Union. However, there is local variation. Implied consent is feasible in the UK, but may not equate to compliance in all other Member States, some of which are more prescriptive about compliance.

When deciding how to tackle the new regime, there is a balance to be struck between complying with the new rules and maintaining a commercially effective website. However, the Information Commissioner has made quite clear that "doing nothing, is not an option".

More information about rules elsewhere in the EU can be found at:

http://www.twobirds.com/English/News/Articles/Documents/Implementation_ePrivacy_Directive-Apr2012.pdf.

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