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**INFORMATION**

# EU Cookie Law

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# Introduction

Last year, the EU introduced a piece of legislation that limited how websites could collect data about their visitors. Primarily aimed at improving privacy it requires website owners to gain consent before they can store or retrieve information from their visitor's devices. The practical implication of this has focussed on cookies: small files used by websites to gather data on visitors.

Cookies can be used for anything from remembering a customer is signed in to helping track movements across a range of websites in order to deliver "targeted" advertising.

In the UK, these changes are reflected within the Privacy and Electronic Communications Regulations and will be policed by the Information Commissioner's Office (ICO).

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Without clear lines of what is (and isn't) required of website owners, the ICO deferred enforcing the regulations by a year, which now start on 26th May 2012.

#### Confusion reigns

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Unfortunately, confusion has come about as there is a large number of ways that the law can be interpreted, with variations and possible exemption for cookies that are essential for a site to function and those that are a possible privacy concern.

In order to comply, a website owner must obtain explicit clarification that they can store information about visitors on their devices. In December the **ICO gave additional background on their interpretations of consent:**

#### Key points set out include:

- More detail on what is meant by consent. The advice says 'consent must involve some form of communication where an individual knowingly indicates their acceptance.'
- The guidance explains that cookies used for online shopping baskets and ones that help keep user data safe are likely to be exempt from complying with the rules.

- However, cookies used for most other purposes including analytical, first and third party advertising, and ones that recognise when a user has returned to a website, will need to comply with the new rules.
- Achieving compliance in relation to third party cookies is one of the most challenging areas. The ICO is working with other European data protection authorities and the industry to assist in addressing the complexities and finding the right answers.
- The ICO will focus its regulatory efforts on the most intrusive cookies or where there is a clear privacy impact on individuals.

# Are you confused?

Initially, the expectation was that every single cookie would have to be explained and accepted by a user. In practice this is widely considered unworkable and the general public is unlikely to understand the intricacies of how cookies affect a website and their experience using it, so might well instinctively opt out resulting in an impaired experience on the site and complete lack of data for the website owner.

Also, websites with large overlays explaining tracking cookies and asking visitors to accept them are likely to perform very badly for user engagement against other sites which aren't as strict.

Therefore, while website owners are worried about not complying, there is also concern that some of the methods suggested would negatively impact their site's performance.

It is expected that first party cookies will be exempt from legislation. The key area of impact is likely to be ‘minimally intrusive’ analytics cookies for website usage and performance data.

## The way forward

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In this period of confusion there have been several approaches suggested. For instance **BT** have introduced an overlay at the bottom of the page with information should a visitor want it but by default tracking everything.

The **ICO** themselves have an opt-in box at the top of the page, which is quite intrusive. However, it could be considered that it doesn't even meet their own criteria of ‘informed consent’ as it doesn't give the full information of what cookies will be stored and the scope of the data used. In practice most sites are taking a ‘wait and see’ approach.

In general it's expected that first party cookies, those set by the website itself, will be exempt. While third party ones would be broadly separated into those that have minimal privacy intrusion such as Google Analytics and those that are more specific such as advertising tracking. Some are even being overt that they aren't making a decision yet, such as **Delia Online's** overlay.

## Is Analytics exempt?

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For most websites the key impact will be to Analytics, which uses cookies to track how visitors find and navigate around your website. It's expected, but not guaranteed, that a site is unlikely to be prosecuted for not obtaining specific consent for Analytics cookies, as long as they have a robust and clear privacy policy explaining that this data is collected and how it will (and won't) be used. An example of this is **econsultancy** who have a clear ‘cookie’ link in the top navigation. ...[More details](#)

The **government's Cabinet Office's own guidelines** focus heavily on the intent of the cookies rather than specifically whether they are used or agreed. In relation to Analytics “*The consensus was, especially in the case of first-party analytics cookies, these types of cookies are ‘minimally intrusive’ (in line with the ICO guidance) and that the bulk of our efforts to rationalise our use of cookies should be focused on cookies classified as ‘moderately intrusive’*” ...[More details](#)

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“There will not be a wave of knee-jerk formal enforcement action taken against people who are not yet compliant but are trying to get there.”

### What should we do?

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Unfortunately, even at this late stage there is no single approach and, as above, the ICO have stated that they would much rather work with sites to comply, than start prosecutions.

However, there are some core steps that should be undertaken in preparation for the new legislation:

- Do a full audit of cookies used by the site and consider their classification against the ICO guidelines for their level of intrusiveness.
- For the most intrusive cookies, consider their necessity and whether the benefits are outweighed by having to ask for consent from every visitor and the possible impact of user engagement with your site.

- Ensure that there is a robust and clear privacy policy that covers your cookies, the data stored and how it'll be used.
- Consider increasing the prominence of cookie information on the site and if you feel all cookies will be exempt, giving an option to specifically opt out, perhaps with an overlay or top/bottom bar.

**It is likely that until the ICO starts enforcing the legislation and the exact parameters are defined through test cases and examples, that website owners might well be left pondering what is really required of them to comply.**

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