

Editorial

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Christopher Graham, the UK Information Commissioner, has warned organisations to wake up to the fact that the rules on cookie use are changing and that they must start to think about how they will comply with the new requirements. Until now, it has been commonplace to bemoan the fact that the cookie amendment made its way into the final draft of the amended e-Privacy Directive. However, as Mr Graham has noted, the time for whinging has now passed, and organisations must face the reality of complying with its provisions. From the coalface, this wake up call is welcome, but the challenge lies in knowing what is required.

The new regulations, which will come into force on May 25th 2011, will require organisations operating websites in the UK to obtain consent from website visitors to store on, and retrieve usage information from, users' computers, commonly by way of cookies.

There are still no official details as to how the law will be implemented and enforced in the UK (or across the rest of the EU). As of March 10th 2011, the UK regulator had not seen a draft of the implementing regulations, raising a concern that it will not have sufficient time to publish guidance on how to achieve compliance before the regulations come into effect.

That said, in a recent letter to the regulator, the Minister for Culture, Communications and Creative Industries, Ed Vaizey MP, reassured business that "Government is committed to introducing the amended provision in a way that minimises impacts to business and consumers". Mr Vazey has stated that the regulations will "contain a clear statement on Article 5(3) of the e-Privacy Directive, and will set out how (the Government) sees implementation of the (sic) Article 5(3) going forward. It will make reference to what we see as the very necessary phased implementation of the Article, in order that meaningful solutions can be developed."

Importantly, the statement will set out the Government's expectations as to "what users of cookies should do whilst those solutions are developed." This statement will give comfort to organisations that are standing ready to implement changes, but are frustrated by a lack of clarity as to what is required.

Significantly, the Minister stated that the UK Government "does not see a one size fits all solution to this Article but rather

will look to the development of a UK ecology of solutions." It is not at all clear what this means, or what a "UK ecology of solutions" will look like, but a phased approach to implementation, together with an apparent rejection of a "one size fits all" solution, appears promising.

Turning to specific solutions, the UK intends to "continue to pursue enhanced browser settings, in which users are provided with more information as to the use of cookies and are presented with easily understandable choices regarding the import of cookies onto their machine." Business will be interested in the Government's support for "cross industry work on the use of third party cookies in behavioural advertising." In particular, the Government intends to refer to recital 66 in its transposition of the Directive, and to explain how it should be interpreted. The Government considers that this approach "will allow servers not to require consent for cookies strictly necessary for a requested service, and will cover the use of cookies that underpin shopping baskets in websites."

The Minister has acknowledged that there may be some uses of cookies that are not covered by this, and that it will encourage businesses to review their own use of cookies and to take steps to ensure that they comply with the Directive. The Government is setting up a separate working group to explore other options with industry, with the objective of publishing a list of 'approved' solutions as a guide to industry".

Christopher Graham has promised pragmatic guidance from his office to assist organisations with implementation, but has repeated his previous warning that organisations need to "wake up" to the fact that the law is changing. "The time for lobbying was five years ago; the time for compliance is now." At the very least, organisations should be creating an inventory of the cookies that they use, grouping them according to function, and in line with the government's approach to regulation. Other than that, the wake up call is somewhat hindered by a lack of information.

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