



department for
culture, media
and sport

24 May 2011

Open letter on the UK implementation of Article 5(3) of the e-Privacy Directive on cookies

This letter is issued by the Department for Culture, Media and Sport and the ICO has been fully consulted on its content. The aim of this letter is to address the concerns that have been raised by some industry stakeholders with regard to the UK implementation of amendments to the e-Privacy Directive made through a Statutory Instrument laid before Parliament on the 5th May 2011. It also sets out the view of the legislator which is shared by the regulator of how the UK implementation should be interpreted. As such, it should put beyond doubt the Government's intention in respect of this regulation.

It is the view of DCMS that the UK implementation of the revised e-privacy Directive, particularly with regard to Article 5(3) on cookies, is light touch, business friendly and sets a benchmark in Europe.

The UK approach was first set out in the BIS consultation on the preferred approach to implementation of the European Framework on Electronic Communications in September 2010 and was set down in final form in the Government response to that consultation published in April this year. That approach was the result of a substantive and open dialogue with our stakeholders and other interested parties.

The UK has led the debate on the implementation of Article 5(3) in Europe and throughout the implementation process has championed a proportionate and pragmatic approach to this challenging provision.

UK approach

The UK approach has been to copy out the wording of the provision into the Privacy in Electronic Communications Regulations 2003 and make reference to elements of the wording of Recital 66 which consider that browser settings may give consumers a way to indicate their consent to cookies.

We also make clear in our draft that we do not rule out other ways of getting the required consent from customers. This reflects the position set out in the Government response on Framework implementation that we do not think there is any rationale for Government to specify the technical measures needed to obtain consent. We have made clear that it is

industry that is best placed to develop technical solutions that meet the requirements of the Directive. The wording of the UK implementation reflects and enables this.

The Government response also set out proposals to continue to work with browser manufacturers to see if browsers can be enhanced to meet the requirements of the revised Directive. Account for this has also been made in the drafting. As was made clear in that document, default browser settings could not be considered to meet the requirements of the Directive. It is for this reason that the development of enhanced browsers that meet the information requirements of the revised Directive are being pursued in collaboration with industry.

The UK approach has also been built around support for the cross-industry work on third party cookies in behavioural advertising. This the UK has championed in Europe and also in the Government response. We believe that this work fully addresses one of the uses of cookies of most concern to users. It is, therefore, a major component in the Government's plans for meeting the requirement of the revised provisions and our SI reflects this.

The UK approach has been not to be prescriptive about measures to meet the requirements of the Directive and our drafting enables this.

Lastly, the Government response made clear that enforcement action will not be taken until appropriate technical solution are available.

Government and ICO position

It is the view of Government, shared also by the ICO, that the UK implementation is entirely consistent both with the ICO's work in this area and with the approach that the Government consulted on from September last year and that was set down in the Government response published in April this year.

Legal issues raised in response to the UK implementation

There are two main legal issues in the concerns raised with HMG by industry stakeholder with regard to the UK implementation which need clarification if the UK approach is to be understood properly:

- a concern that some of the other changes we are making makes it a requirement for there to be "prior consent" to the import of a cookie.
 - a suggestion that we have "gold-plated" the implementation by requiring more than minimum compliance and have placed technical constraints on industry.
- 1) Definition of Consent: Stakeholder concerns are based on a misinterpretation of the UK implementation caused by an incorrect reading of the definition of consent in the amended regulations. This is the definition set out in the Data Protection Directive, which was implemented in the UK through the Data Protection Act 1998. "Consent" is defined in the Data Protection Directive as "any freely given specific and informed indication of his wishes". It should be noted that this definition is not time bound – i.e. there is no constraint on when consent may be given.

Further, Article 5 of the revised e-Privacy Directive does not specify that the consent must be “prior consent”. The original text proposed by the European Parliament did do so but this was removed during negotiation. It should be noted that at other parts of the amended Directive, specific mention is made of “prior” consent. In those cases, notably at Article 6, the Directive now requires “prior” consent, and the Privacy in Electronic Communications Regulations have been amended to require that the subscriber/ user has “previously notified the provider that he consents” (at regulation 7).

However, the word “prior” does not occur in Article 5(3) of the Directive, and it therefore does not appear in the UK transposition. Crucially, there is no indication in the definition as to when that consent may be given, and so it is possible that consent may be given after or during processing.

It is important that stakeholders are aware that in its natural usage ‘consent’ rarely refers to a permission given after the action for which consent is being sought has been taken. This absolutely does not preclude a regulatory approach that recognises that in certain circumstances it is impracticable to obtain consent prior to processing. It also supports any approach underpinned by industry’s attempts to inform users about the specific choices available and as a result allow users to make choices (ie give consent) based on that information.

Crucially, the requirement of the revised Directive is for informed consent. It is this requirement that has shaped the UK approach set out above. It is therefore the firm view of Government that the definition of consent employed in the amending regulation enables rather than precludes the OBA Framework developed by industry. This view is reflected in the Information Commissioner’s approach and in his advice on this matter.

- 2) Goldplating: The Government does not accept any suggestion that the implementation represents gold-plating. Gold-plating is when implementation goes beyond the minimum necessary to comply with a directive, by:
- extending the scope, adding in some way to the substantive requirement, or
 - substituting wider UK legal terms for those used in the directive; or
 - not taking full advantage of any derogations which keep requirements to a minimum (e.g. for certain scales of operation, or specific activities); or
 - retaining pre-existing UK standards where they are higher than those required by the directive; or
 - providing sanctions, enforcement mechanisms and matters such as burden of proof which are not aligned with the Macrory principles 29 (e.g. as a result of picking up the existing criminal sanctions in that area); or
 - implementing early, before the date given in the directive.

There is nothing in the implementing regulations, and, in particular, not in new regulation 6(3A) which adds to the scope or the substantive requirement contained in the amended Directive. Regulation 6(3A) is an illustrative example of how

consent may be signified. It is not the only way in which consent can be given by a subscriber or user. If Government had decided on a single means of obtaining consent, regulation 6(3A) would read, for example, “consent must be given in the following way...”.

- 3) Amends and sets: Regulation 6(3A) is an example, it does not preclude an individual giving consent by either leaving his browser settings as they are (if they are provided with adequate information about cookies and what those settings mean for him), or by some other method. The use of the word “may” makes clear that this is an example only and that other means of obtaining consent are available and can also meet the requirements of the Directive.

It is the view of Government, reflected in the Information Commissioner’s advice, that the regulation should therefore be understood to read that if a subscriber or user is able to signify consent through the amending or setting of a browser (assuming they are provided with appropriate information), they “may” also signify consent through choosing not to amend settings or controls of a browser. This example therefore allows for the industry led work on the use of third party cookies used in online behavioural advertising as well as the work to be undertaken with browser manufacturers.

In this context, the concern expressed by some industry stakeholders that the UK interpretation forecloses discussions with browser manufacturers and places technical constraints on business is unwarranted. Rather, UK drafting at regulation 6 (3A) is enabling on three different counts as it:

- i. Makes clear that amendment of browser settings or controls can constitute consent, providing legal certainty on this issue.
- ii. Makes clear that browser settings are not the only means of obtaining consent;
- iii. Allows for the subscriber not to amend settings and still signify consent.

UK Government discussions with browser manufacturers will make no starting presumptions about what these settings will look or how they will function in practice.

- 4) Technically constraining: The inclusion of the words “or by using another application or programme to signify consent” also make clear in law that there are also means other than browser settings (assuming appropriate information has been provided) of obtaining consent that meet the requirements of the Directive. Therefore, through this drafting, the UK implementation allows for the OBA Framework approach that industry has led and the UK Government has championed in discussions in Europe.
- 5) Language differences: With regard differences in language in the implementing regulations of the Directive, it was not felt that the wording in Recital 66 was appropriate for UK legislation. Indeed, it could be argued that Recital 66 could be interpreted as meaning no changes need be made to the browsers as they currently stand and that leaving the current settings as they are (without the provision of further information) is enough. It is clear from the Commission’s

communications on this matter that they do not consider that the current situation is good enough, and that they require some change in order for the Directive to be properly implemented.

It should be noted that the wording in the statutory implement was shared by DCMS with the ICO during drafting. The ICO considered a straight copy-out would not work, as specifically, it could preclude other solutions to the giving of consent by appearing to focus solely on browser settings. In addition, copy out of recital 66 could reinforce an idea that the requirements of the regulations had not changed and that, therefore, current default browser settings would be enough to constitute consent. The ICO and (as noted above) the European Commission are clear that this would not be consistent with the Directive.

The UK implementing regulations text therefore does not allow for default browser settings as they currently stand to constitute consent. This approach would not meet the requirements of the Directive and would be highly likely to lead to the Commission initiating infraction proceedings against the UK Government.

- 6) Subscriber/ User: Stakeholders have also questioned why regulation 6(3A) applies to subscribers and not to users. We intend that “subscriber” should be read so as to include “users”, and we believe that a Court would read subscriber as including user as so as to ensure consistency of application with the rest of the regulation. However, we accept that this could be clearer and DCMS is currently looking to see whether this particular drafting issue has any material impacts. Although we suspect that this is not the case, we can look to amend the legislation, if needed, later this year.

ICO Advice

The ICO have issued initial non-binding advice on how companies and organisations may meet the requirements of the Directive. This provides advice for companies and organisations on how consent may be achieved. The drafting at page 9, makes clear that the ICO supports the work that is being done on third party cookies. The ICO are clear that this advice will be updated to reflect the phased implementation and future iterations will refer to and endorse the OBA Framework, provided of course that that Framework is acting as a mechanism for compliance with the regulations.

The Information Commissioner has informed us that further guidance will also reflect technological developments once appropriate technical solutions have been developed. That guidance will continue to reflect the approach set out in the Government response and account for those technical solutions. It will also need to reflect any views or issues published by the European Commission.

DCMS believes that this letter answers in full the concerns raised by stakeholders on the UK implementation. It makes clear beyond any reasonable doubt how in the view of the UK Government the regulation should be interpreted. The approach taken is one consistent with that of the Information Commissioner. DCMS looks forward to continuing its close collaboration with the ICO and other stakeholders on the development of

appropriate technical solutions to this challenging and difficult provision. We remain firmly convinced that the UK implementation is correct that it is good for business, good for consumers and addresses in a proportionate and pragmatic way the concerns of citizens with regard their personal data online.

A handwritten signature in black ink, appearing to read 'Ed Vaizey', enclosed within a thin black rectangular border.

Ed Vaizey

Minister for Culture, Communications and Creative Industries