The Cookie Laws and Their Application

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Francoise Gilbert is the founder and a principal of the IT Law Group, a niche law firm that focuses on information privacy and security, cloud computing, and data governance. Her clients include primarily global companies and publicly held entities, which she advises on all aspects of the collection, use, and protection of personal data at the national and global level.

She has been recognized as one of the top privacy lawyers in the United States in a survey by Computerworld magazine. For several years, she has been listed in Chambers USA, Chambers’s Global, Best Lawyers in America, and Who’s Who in E-Commerce as one of the leading lawyers in the field of Information Privacy and Security.

Francoise is the author and editor of the two-volume treatise Global Privacy & Security Law, which analyzes the laws of 65 countries on all continents.

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BACKGROUND

• Dir. 2009/136/EC amended provisions of Dir. 2002/58/EC (e-Privacy Directive), including Art. 5(3)
  • Member States shall ensure that the storing of electronic information, or gaining access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user has given his or her consent, having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing...

• Amendments were to be implemented by May 25, 2011
• The “Cookie Amendment” is only one of the amendments in the 2009 Directive
• Most but not all EU Member States have implemented the “cookie amendment”
• Those who failed to do so being sued by EU Commission
MEMBER STATE LAWS

- Austria
- Belgium
- Bulgaria
- Czech Republic
- Denmark
- Estonia
- Finland
- France
- Greece
- Hungary
- Ireland
- Italy

- Latvia
- Lithuania
- Luxembourg
- Netherlands
- Slovakia
- Spain
- Sweden
- United Kingdom
WHAT DOES THIS MEAN?

• Consent:
  • Consent must be freely given
  • Must be specific, must refer to a specific cookie, associated to a specific purpose
  • Must be “informed”, i.e. given before the processing (sending the cookie or accessing information) occurs
WHAT DOES THIS MEAN?

• **Notice:**

• User must be informed by the data controller

• In a clear and comprehensive manner of:

  • The purpose of any action to place information in the user’s equipment, or to gain access to information already stored; and

  • The means at the user’s disposal to oppose such action
STATUS OF IMPLEMENTATION

- Wide variety of implementations - or lack thereof.
- **Notice:**
  - Splash screen when accessing the site, inviting the user to read a cookie notice.
  - Layered notice, with summary notice (one sentence, to half page) and detailed notice
  - For 3rd party cookies, link to third party notices
- **Consent:**
  - “Do you want to continue”?  
  - “To opt-out”  
  - “To set your browser...”
HOW TO IMPLEMENT LAWS?

• Conduct a **cookie audit**
• Identify the first and third party cookies on your site(s)
• Understand what these cookies do - it may be many different things
• Decide of a **strategy** for
  • interaction with users
  • consent requirements for cookies where implied consent might be acceptable; where express form of consent is necessary
• **Implement**
  • consider staged implementation
CONTENT OF DISCLOSURES

• Technical description of the cookies
• What the cookies do
• Organize them by type, e.g.:
  • Advertising; target
  • Performance; analytics
  • Functionality
  • Strictly necessary
  • Third party
• Mechanism for users to exercise his choice
REQUEST CONSENT

• Banner at the top of the landing page

• Consent request zone constructed as an html overlay on the page

• Set of tick boxes presented during subscription to an online service

• Avoid traditional pop-ups because they are often blocked by browsers
RESOURCES

- **UK ICO** - Guidance on the rules on use of cookies and similar technologies (version 3, May 2012) [http://www.ico.gov.uk/]
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