



THE EU LAW ON THE USE OF COOKIES AND OTHER TRACKING TECHNOLOGIES BY WEBSITES EXPLAINED: REALITY AND MISUNDERSTANDINGS

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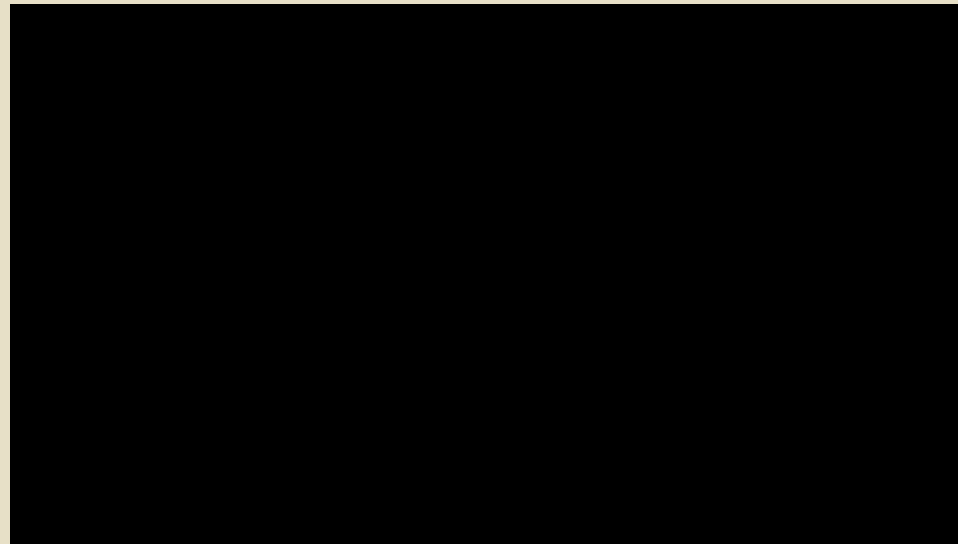
The 'behavioural advertising-cookies' relationship

- **Behavioural** advertising (also known as personalized advertising or targeted advertising) = advertising content targeted at a given consumer and corresponding and/or relating to the **behaviour** of the consumer-**target**.
- Consumer behaviour can be revealing of gender, personal characteristics, circumstances and preferences
- Online consumer behaviour is mirrored in consumer *clicks*, *page views*, *searches*, *purchases* (pages viewed, product pictures clicked, terms searched for, goods or services bought)
- This information is collected and **marked as belonging to the particular consumer-target** mainly through the use of **cookies**
- Algorithmic and other knowledge discovery techniques are applied analyzing the cookie-collected information, extracting knowledge and leading to the creation of detailed consumer profiles.

The ‘behavioural advertising-cookies’ relationship

What are cookies, how they have evolved and what is their role in behavioural advertising

“What is a cookie”, 2012, Advertsitement.com



The 'behavioural advertising-cookies' relationship

- Cookies are small text files sent and stored on personal computers or other devices by websites (during a visit) to 'store the behaviour' (in the form of clicks, views, searches e.t.c) of users or serve as a unique identifier linked to the behavioral data stored in website servers
- The cookie-sending website reads the cookie (or the information stored in it) every time the cookie-containing device access that website (in this way **the website 'knows'** that the person visiting is the person to whom the stored behavioral data belongs or relates to)
- The cookie-sending website adjusts its advertising and commercial content to the information about the particular consumer contained or linked to the cookie
- This process can for example lead to a situation whereby a consumer who has spent time reviewing a web page promoting books on 'how to save your marriage' is served with advertisements of sexy underwear 😊
- Based on an agreement between website owners and network advertising agencies (third parties), the latter are allowed to serve cookies and hence, behavioural ads on multiple individual websites

‘Behavioural advertising’ performers

- Individual websites (ex. eBay, Amazon) - **first party cookies** → tracking on that website only → profiles of richness comparable to that of the content of the website → behavioural advertisements and also commercial content
- Network advertising agencies (ex. DoubleClick) – **third party cookies** → tracking across a network of websites → naturally much richer consumer profiles → behavioural advertisements

➡ Third-party cookies **more privacy-intrusive** than first-party cookies

Also **session cookies** expire as soon as the browsing session of the user ends = less or even non-privacy-intrusive

Persistent cookies remain valid and operative for years = more privacy-intrusive

Tracking cookies are persistent cookies – effective behavioral advertising requires persistent cookies

Cookies' usefulness

- Authentication
- Security
- Shopping cart
- Multimedia player
- User-customization
- Social plug in cookies for commenting or sharing content by logged-on social network members
- Advertising (keeping many online services free) but this also includes **behavioural advertising**

Behavioural advertising: issues and risks

- Data collection/processing relating to consumers without consumer knowledge: *'informational privacy' violations*
- Profiles with rich and detailed information including traditional personally-identifiable pieces existing somewhere, sold or exchanged: *security breaches, reputational harm, job loss, blackmail* (Edwards, 2003)
- Knowing of the tracking has a chilling effect on behaviour – avoiding looking at/searching for 'sensitive' products, services or material: *'decisional privacy' violations* (Froomkin, 2000)

Behavioural advertising: issues and risks

- When unbeknown to consumers, targeted advertising can give advertisers an unfair advantage even enabling them to prevent achievement of personal achievements: *autonomy attacks* (Zarsky, 2002-2003)
- *Secret price and quality discrimination* (Bygrave, 2001; European Commission, 2009)
- Personalized websites can be revealing of what a user clicked on or searched for to other computer users: *inadvertent disclosure of private facts to others* (Ohm, 2009)



Article 5(3) of the ePrivacy Directive: the ‘EU Cookie Law’

- **Pre-2009:** Article 5(3) required information about the use of cookies (and other comparable tracking technologies) and the *right to refuse* cookies (**opt-out scheme**)



—————> Cyprus implementation

- **Common way of compliance:** information about cookies was hidden in technical privacy policies themselves hidden behind tiny links at the very bottom of websites containing information on how to block cookies in browser settings
- Insufficient protection against the risks of behavioural advertising – few read them and few exercised choice – unfettered behavioural advertising

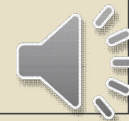


Article 5(3) of the ePrivacy Directive: the ‘EU Cookie Law’

- Cyprus implementation (word-for-word): Άρθρο 99(5), ο περί Ρυθμίσεως Ηλεκτρονικών Επικοινωνιών και Ταχυδρομικών Υπηρεσιών Νόμος του 2004 (Ν. 112(I)/2004) όπως τροποποιήθηκε από τον Νόμο 51(I)/2012

(5) Η αποθήκευση πληροφοριών ή η απόκτηση πρόσβασης σε ήδη αποθηκευμένες πληροφορίες στον τερματικό εξοπλισμό συνδρομητή ή χρήστη επιτρέπεται μόνον εάν ο συγκεκριμένος συνδρομητής ή χρήστης έχει δώσει τη συγκατάθεσή του, βάσει σαφών και εκτενών πληροφοριών, σύμφωνα με τις διατάξεις των περί Επεξεργασίας των Δεδομένων Προσωπικού Χαρακτήρα (Προστασία του Ατόμου) Νόμων του 2001 και 2003, μεταξύ άλλων για το σκοπό της επεξεργασίας:

Νοείται ότι δεν εμποδίζεται οποιαδήποτε τεχνικής φύσεως αποθήκευση ή πρόσβαση, αποκλειστικός σκοπός της οποίας είναι η διενέργεια της διαβίβασης μιας επικοινωνίας, μέσω δικτύου ηλεκτρονικών επικοινωνιών, ή που είναι απολύτως αναγκαία για να μπορεί ο παροχέας υπηρεσίας της κοινωνίας της πληροφορίας την οποία έχει ζητήσει ρητά ο συνδρομητής ή ο χρήστης να παρέχει τη συγκεκριμένη υπηρεσία.



Article 5(3) of the ePrivacy Directive: the ‘EU Cookie Law’

- **Post 2009** (Citizens’ Rights Directive 2009/136/EC)
- Article 5(3) permits cookies “...on condition that the subscriber or user concerned has given his or her consent having been provided with clear and comprehensive information...”
exemptions →



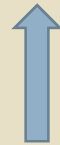
- Key change = **consent** = **opt-in scheme** = *major change...in theory*

- In practice?



Article 5(3) of the ePrivacy Directive: the ‘EU Cookie Law’

“Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned 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. This shall not prevent **any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network**, **or** as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service”



Two exemptions from the ‘consent’ requirement

New 'Cookies Law' in practice

- Online businesses' reaction has been...

- **Strong**

- **Negative**

[The stupid EU cookie law in 2½ minutes – YouTube](#)

[The stupid EU cookie law \(and why it should die\) – YouTube](#)

Do-not-track Californian law resulted in opposition letters to the Senate by Google and other businesses characterizing it unnecessary, unworkable and harmful to economy and innovation
(http://regmedia.co.uk/2011/05/05/dnt_opposition_letter.pdf)

- **Logical:**

Consumer personal data has come to be accepted as being the currency of the Internet

Data amassing has been the default for a long time

Businesses have built upon and 'dreamed of' collection of even more data and even deeper knowledge about users:

Google's CEO in 2007: "We are very early in the total information we have within Google. The algorithms will get better and we will get better at personalisation... The goal is to enable Google users to be able to ask the question such as 'What shall I do tomorrow?' and 'What job shall I take?'... We cannot even answer the most basic questions because we don't know enough about you. That is the most important aspect of Google's expansion." (Caroline Daniel and Maija Palmer, Google's Goal: to Organize your Daily Life, FT.com, 2007)

New 'Cookies Law' in practice

- Online businesses' reaction has been... (*cont.*)

- **Largely unfounded**

- No need for multiple and intrusive consent requests-consent can be obtained for multiple cookies or cookie purposes at a *single* 'consent request' point, consent given once can cover all subsequent connections (Recital 25) and even different websites used by the same OBA provider (DPWP, *Opinion 2/2010*, p.16; DPWP, *Opinion 16/2011*, pp.10-11; DPWP, *Opinion 4/2012*, p.6)

- Cookies vital to the operation of the Internet are temporary-session cookies (*not* persistent-tracking ones) and are, by virtue of Article 5(3), exempted from the consent requirement as necessary for the provision of an explicitly requested service or for carrying out the transmission over a network - authentication cookies, security cookies, shopping cart cookies, multimedia player cookies, user-customization cookies, social plug in cookies for commenting or sharing content by logged-on social network members are all exempted (DPWP, *Opinion 4/2012*, p.11)

- Advertising, the backbone of free services and content is not just the increasingly risky behavioural advertising but *untargeted advertising, contextual or editorial advertising* and '*short-term interest*' *targeted advertising* (Langheinrich *et al.*, 1999) are responsible for a significant part of the advertising revenue – Google is making billions from short-term-interest (keyword-based) targeted advertising, known as keyword advertising

New 'Cookies Law' in practice

- Online businesses' reaction has been... (*cont.*)

Effective

- *Common methods of compliance currently:*

-- **More-prominent-than-before** notice (top or bottom of websites) about the use of cookies and a statement that **by using the website, the user consents to their use**. A link in the notice leads to a page with information on the various cookies used and to instructions on how to opt-out or disable cookies through browsers – no opportunity to accept some and reject others, for example tracking cookies (*ex. Google UK, PriceGrabber UK*)

-- A microscopic notice that cookies are used with a link to learn more about them and about how to disable them through browser settings (*Amazon UK*)

-- A microscopic link at the very bottom of pages next to 'terms of use' and 'privacy policy' reading 'Cookies' or 'Ad targeting policy' like this 'PriceRunner UK - Compare UK Prices and Find Deals Online Copyright © 1999-2014 PriceRunner | [Terms & Conditions](#) | [Privacy Policy](#) | [Cookie Policy](#)' (*ex. eBay UK, PriceRunner UK*)

➡ Only a notice (**not consent**) rule

New 'Cookies Law' in practice: ineffective

- **WHY?**

Strong business resistance + negative publicity = a hostile environment

but also lack of support by officials and official bodies:

- European institutions (legislator) (approved Directive 2009 – retention of Recital referring to previous opt-out approach)
- Vice-President of the European Commission responsible for the Digital Agenda (Roundtable speech 2010 – behavioural advertising friendly, quick acceptance of industry arguments against opt-in, reduction of rule to a sufficient notice one)
- Communications Committee of the European Commission (Working Document 2010 – implementation of rule through technical means to be developed by self-regulation)
- Relaxed national implementations of the rule - vast majority of Member States does not require opt-in consent and/or considers implied consent as acceptable (table compiled by Fisher Field Waterhouse)
- Un-readiness to apply and enforce the rule at national level and sort of postponement of enforcement for one year in the UK (2011 entry into force)
- UK Information Commissioner (ICO Guidance 2012 – moving away from opt-in consent and towards implied or perhaps 'imposed' consent)
- Art29 Data Protection Working Party (DPWP Working Document 2013 – departing from previous Opinions clearly interpreting new rule as strict opt-in and aligning guidance with the 2012 ICO guidance)


New 'Cookies Law' in practice: Vice-President of the EU Commission (Digital Agenda)

- Drawing a positive/innocent picture of behavioural advertising...
 - A lot on the benefits of online including behavioural advertising on consumers (free services, free content)
- Presenting behavioural ads as being generally or widely desirable or wanted...
 - *"Like anyone I can feel bored or annoyed when faced with...ads I am not interested in. So the idea of only seeing ads that are likely to interest me is an appealing one"*
- Masterfully siding in favour of a 'prior information' (as opposed to prior consent) rule
 - *"Obviously we want to avoid solutions which would have a negative impact on the user experience. On that basis it would be prudent to avoid options such as recurring pop-up windows. On the other hand, it will not be sufficient to bury the necessary information deep in a website's privacy policies. We need to find a middle way."*

(European Roundtable on the Benefits of Online Advertising for Consumers, http://europa.eu/rapid/press-release_SPEECH-10-452_en.htm?locale=FR (17/9/2010))

New 'Cookies Law' in practice: DPWP

At first (2010-2012) the DPWP interprets and insists that **new rule = strict opt-in**

- Explicitly rejects opt-out schemes, consent expressed through browser settings when default is set to accept cookies, *practice of making access conditional upon acceptance to behavioural (tracking) cookies*, consent to an *open-ended processing activities or purposes*.
- Speaks about active participation in accepting cookies through splash screens and dialog boxes requiring a click signifying consent after detailed information directly on screen through layered notices is provided to users.
- Makes clear that tracking (advertising) cookies do **not** fall within any of the exemptions
- Detailed illustration in the next four slides 

New 'Cookies Law' in practice: DPWP

- 22/6/2010 (Opinion 2/2010)
 - Practice of privacy policies, opt-out schemes and settings of browsers that by default accept cookies specifically stated as *not* complying with the new Article 5(3) rule (pp.13-16)
 - Called for prior opt-in mechanisms, which require *an affirmative data subject's action* to indicate consent *before* the cookie is sent to the data subject without specifying any (p.16)
 - Stated that “...*consent means active participation of the data subject prior to the collection and processing of data. The opt-out mechanism often refers to a 'non' reaction of the data subject after such processing has already started. Furthermore, under opt-out mechanism there is no active participation; simply the will of the data subject is assumed or implied. This does not meet the requirements for legally effective consent*” (pp.15-16)
 - Emphasized the need for detailed prior information/notice (pp.17-19)

New 'Cookies Law' in practice: DPWP

- **13/7/2011 (Opinion 15/2011)**

- Discussed the ingredients of consent as defined in Article 2(h) of the Data Protection Directive, namely an indication of one's wishes, freely given, informed and specific by which the data subject signifies his agreement to personal data relating to him being processed
- Emphasized that consent is a *positive act* and *excludes* any system giving a right to object/refuse after the processing has taken place (p.10)
- Discussing the '*specific*' ingredient, it stated or repeated that:

--- "*...blanket consent without specifying the exact purpose of the processing is not acceptable... it should refer clearly and precisely to the scope and the consequences of the data processing. It cannot apply to an open-ended set of processing activities*" (p.17)

--- "*(the) definition explicitly rules out consent being given as part of accepting the general terms and conditions for the electronic communications service offered*" (p.18)

--- **making access or membership to social networks conditional upon acceptance of cookies for behavioural advertising without offering the possibility of separate acceptance is not 'free and specific consent'** (pp.18-19)

New 'Cookies Law' in practice: DPWP

- 8/12/2011 (Opinion 16/2011)

- Confirmed/insisted that privacy policies, opt-outs and cookie-accepting default browser settings do not comply with the legal rule (pp.5-7)
- Specified ways in which opt-in consent can be obtained, all consistent with the requirement of *active participation* by the user: “a static information banner on top of a website requesting the user’s consent to set some cookies”, “splash screen on entering the website explaining what cookies will be set by what parties if the user consents”, “a default setting prohibiting the transfer of data to external parties, requiring a user click to indicate consent for tracking purposes” and “a default setting in browsers that would prevent the collection of behavioural data” (pp.9-10)
- Repeated the need for the provision of information ‘directly on screen interactively through layered notices’ about who sets cookies, about the monitoring across websites and about the fact that profiles will be constructed for behavioural advertising purposes (p.5)

New 'Cookies Law' in practice: DPWP

- 7/6/2012 (Opinion 4/2012)
 - Repeated that tracking and behavioural advertising do *not* fall within any of the Article 5(3) exemptions from the consent requirement (pp.6, 9-10)
 - Again speaking of 'banners and consent *requests*' mirroring insistence in some active and also specific participation towards cookie acceptance (p.6)

New 'Cookies Law' in practice: DPWP

- ... and then it comes the Working Document 2/2013 (October 2013) -- implied consent
 - Guidance on obtaining consent following implementation of the Directive by all Member States and the experience of the various business implementations
 - Expressly rejects the practice of website access being made conditional upon the use of all cookies – users should be able to reject non-functional cookies and still being able to use the website such as to buy products (p.5)
 - **BUT** earlier in the same Document, the DPWP is vague and liable to be taken as suggesting the opposite:

“Tools to obtain consent may include splash screens, banners, modal dialog boxes, browser settings...the users may signify their consent, either by clicking on a button or link or by ticking a box in or close to the space where information is presented...or *by any other active behaviour* from which a website operator can unambiguously conclude it means specific and informed consent...active behaviour means an action the user may take, typically one that is based on a traceable user-client request towards the website, *such as clicking on a link, image or other content on the entry webpage*...*If the user enters the website where he/she has been shown information on the use of cookies, and does not initiate an active behaviour, such as described above, but rather just stays on the entry page without any further active behaviour, it is difficult to argue that consent has been given unambiguously”* (pp.4-5)

New 'Cookies Law' in practice: DPWP

- **DPWP sensitivity to commercial reality and business interests continues...**
 - **Opinion 03/2016 on the evaluation and review of the e-Privacy Directive (19/7/2016):**
 - ❖ It calls for an amendment making it clear that Article 5(3) covers all tracking technologies regardless of the type of technology used (not just cookies or other technologies that work in the same way, i.e., by storing or accessing information on the user's terminal equipment) – very positive
 - ❖ Also calling (again) for further exemptions to the 'consent' requirement: first-party analytic cookies (enabling aggregate website statistics) provided they data are anonymized, cookies that are strictly necessary for securing network security and more generally, when any data collected is anonymized – this means that IP addresses should be erased/not kept)
 - ❖ Correctly reinstates that advertising/marketing does not fall within any of the exemptions from the consent requirement, **yet the difficult question is (again) left untouched (is implied consent sufficient if the cookie purpose is behavioral advertising?)**

New 'Cookies Law' in practice: DPWP

- **Business tendency to use privacy-intrusive cookies and not seek consent also continues...**

- **DPWP Cookie Sweep Combined Analysis Report (3/2/2015):**

- ❖ 478 websites investigated in eight member states (not including Cyprus)
- ❖ 86.09% of cookies were found to be third-party cookies
- ❖ Only 74 sites were using only first-party cookies
- ❖ Only 15 sites set only session cookies
- ❖ Only 16% of the websites enable users to accept some cookies and decline other type (eg. behavioral) cookies – this means that the law is not complied with but the DPWP refrains from stating this expressly!

New 'Cookies Law' in practice: ICO

- **ICO Guidance December 2011** = along the lines of the 2010-2012 DPWP Opinions = explicit consent through for example splash screens and dialog boxes
- **ICO Guidance May 2012** = moving away from explicit opt-in consent as the only method of compliance opening the door to implied consent expressed through mere website use: “While explicit consent...might be the most appropriate way to comply in some circumstances this does not mean that implied consent cannot be compliant...For implied consent to work there has to be some action taken by the consenting individual from which their consent can be inferred. This might for example be visiting a website, moving from one page to another or clicking on a particular button” (pp.6-7) and...
- ...effectively reducing the legal rule to one of prior clear notice: “To rely on implied consent for cookies, then, it is important that the person seeking consent can satisfy themselves that the user’s actions are not only an explicit request for content or services but also an indirect expression of the user’s agreement that in addition to providing such content or services the provider may store or access information on the user’s device. *To be confident in this regard the provider must ensure that clear and relevant information is readily available to users explaining what is likely to happen while the user is accessing the site and what choices the user has in terms of controlling what happens.*” (p.8)

New 'Cookies Law' in practice: ICO

- An ICO 12-minute video of May 2012 summarizing the required approach of compliance contains *absolutely no reference* to 'consent', the very innovation brought with the new rule – not even when behavioural advertising is discussed – the word 'choice' is heard once (<https://www.youtube.com/watch?v=V0M8MYiGkQw>)
- Similar approach to that adopted by the industry (the EASA/IAB Code) and expressly rejected in the DPWP Opinion 16/2011: "...instead of seeking users consent, claims to provide for a way of exercising "choice". In fact it is a choice to opt out, as it offers the user the possibility to object to having his/her data collected and further processed for OBA"
- ICO May 2012 Guidance celebrated as 'the death of the stupid cookie law' (<http://libertarianhome.co.uk/2013/01/the-stupid-cookie-law-is-dead-at-last/>)
- ***BUT is it really dead?: UK ICO Cookie Guide, November 2012:***
"The use of implied consent for ...targeting and advertising cookies is unlikely to be acceptable"

New 'Cookies Law' in practice: conclusions

- Many websites do not comply with the opt-in rule of the new Article 5(3)
- EU officials and national data protection authorities did not mean to accept implied consent for the case of behavioural advertising but did not manage to pass this message (omitted to say this expressly as they should have done so)
- Implied consent finds some support in the law: the definition of consent in the DPD Commission Proposal involved reference to freely, given, specific and informed express indication of his wishes but the word express was removed by the Council Common Position (DPWP Opinion 15/2011, p.5) – the General Data Protection Regulation does not contain the 'express' requirement.
- Still, the adequacy of consent must be judged in accordance with the magnitude of the risks entailed in each particular cookie purpose – behavioural advertising is very risky/privacy-intrusive strict requirement of consent (express consent the safest option for online businesses)
- Ideally, official bodies should come forward clarifying that opt-in really means opt-in at least in relation to behavioural advertising
- One way is enforcement but so far enforcement is scarce (Internet giants and other businesses admit to using cookies for behavioural advertising – are they going to face enforcement action for not seeking consent in the context of an opt-in approach?)
- Otherwise, the future is likely not to be (very different) from the present (a watered-down and/or largely ignored rule that has failed to achieve its aims)

Thank you very much for listening

