Osborne Clarke is one of Europe's most respected law firms, and advises market-leading and high-performing organizations on their UK and international legal needs. Any enquiries regarding this column should be sent by e-mail to Stephen Groom (stephen.groom@osborneclarke.com).

Legal and Regulatory Update

Cookies saved (may-be) by UK response to revised E-Privacy Directive

Stephen Groom

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Topic: Online advertising

Who: UK Government (Department for Business Innovation and Skills)

When: September 2010

Where: Whitehall

Law stated as at: 6 October 2010

What happened

The UK Government launched a consultation on the implementation of the 'Citizens Rights Directive' 2009/136 ('CRD'), which among other things amends the E-Commerce Directive (2002/58/EC).

The key point that UK marketers were waiting to hear about was cookie consent. Would the UK be following the apparently clear thrust of the CRD and introducing 'cookie opt-in' into UK law with effect from 25 May 2011 (the deadline imposed by Brussels for transposition of the CRD into the local laws of all EU states)?

On the face of it, the UK had little option but to do just that given the wording of the new, revised Article 5(3) of the Privacy and Electronic Communications Directive. Here is a mark-up of the operative part of the new 5(3) with the new wording in italics:

'Member States shall ensure that the *storing of* information or *the gaining of* access to information stored in the terminal equipment of a subscriber or user should only be 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*'.

New article 5(3) wording

Although the wording of the old and new Article clearly extended well beyond cookies to creatures such as web bugs and clear gifs, the main focus of all stakeholder reaction was cookies and would this mean having to display pop-up consent windows every time a consumer came to their site? And would more pop-ups be needed for consent to third-party advertising cookies?

Wiggle room around explicit prior consent?

The Article 29 Working Party (the group of all EU state data privacy regulators) certainly seemed to be of this view, but others such as marketing law suspected that there was wiggle room in the wording of this and other parts of the Directive that would allow an 'opt-out' interpretation.

For instance, there is para 66 of the preamble to the CRD.

Having foreshadowed Article 5(3) by referring to the 'paramount importance that users be provided with clear and comprehensive information when engaging in any activity which could result in [access to or storage of information on a user's computer]', the recital goes on to say *Where it is technically possible and effective ... the user's consent to processing may be expressed by using the appropriate settings of a browser or other application.*

This has been seized on by the UK Government in its consultation document as the basis for its preferred approach to implementing Article 5(3). Similarly, the closing limb of 5(3) and its indication that prior consent will not be required if the cookie is strictly necessary to deliver a service which has been requested by the user.

The preferred implementation strategy

So what is the Coalition Government's preferred implementation strategy?

The main Department for Business Innovation and Skills (BIS) consultation document makes its position clear by expressing the view that 'The internet as we know it today would be impossible without the use of ... cookies ... so it is important that this provision is not implemented in a way which would damage the experience of UK web users or place a burden on UK or EU companies that use the web'.

So much is acknowledged, the consultation paper goes on, by 5(3)'s acceptance that consent is not required when the cookie is needed to provide a requested service. An example of this would be where a cookie is needed in order to provide the audio elements of audio visual content being accessed online.

The accompanying Impact Assessment document goes even further by stating:

'Option 2: Allow consent to the use of cookies to be given via browser settings. This is the preferred option because it allows the UK to be compliant with the E-Privacy Directive without the permanent disruption caused by an opt-in regime'.

On the basis of this thinking, the currently favoured mode of implementation is to simply copy out the new 5(3), perhaps with some

additional wording reflecting the browser setting reference in Recital 66, thus ‘leaving ICO (or any future regulators) the flexibility to adjust to changes in usage and technology’.

Why this matters

So UK Plc has nailed its colours firmly to the mast of a new cookie regime which on the face of it will not be significantly different in practice to the current position.

Some have said this is not a done deal by any means. First, BIS may change its tune once it sees the consultation responses. Secondly, by simply leaving it to ICO to interpret the directive’s wording, they say, the Government has done a Pontius Pilate and dumped the problem in the lap of ICO, who might well toe the Article 29 express prior opt-in line.

However, all ICO’s public pronouncements on the issue to date have indicated a preference for the BIS line, provided the industry takes a responsible approach, while bodies such as the Internet Advertising Bureau are working at pushing at this open door by building a head of steam behind industry self-regulation and an agreed set of online behavioural advertising standards.

So all looks fair for a pragmatic and workable solution in the UK. The big question, however, is whether the rest of the EU will go the same way. The word is that Denmark is minded to take a leaf out of the UK’s book, but if others do not, who knows where this will leave the Single Online Market.

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New official guidance on ‘skill with prizes’ games

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Where: Great Britain

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What happened

The Gambling Commission and HMRC have issued guidance on ‘skill with prizes’ games (‘Guidance’).