Christopher Graham became UK Information Commissioner in June 2009, with responsibility for overseeing the Freedom of Information Act and Data Protection Act regimes — upholding information rights in the public interest, promoting openness by public bodies and data privacy for individuals. Christopher was Director General of the Advertising Standards Authority (ASA) from April 2000 to June 2009. From 2003 to 2005, he was Chairman of the European Advertising Standards Alliance (EASA), the federation of advertising self-regulatory bodies across the EU Single Market. Before joining the ASA, Christopher was for 3 years Secretary of the BBC. Christopher first joined the broadcaster as a News Trainee in 1973. He was a Current Affairs Producer for BBC radio and TV before becoming Managing Editor of News Programmes for TV and Radio.

European Commission

New rules now in force

Regulation

Legal and Regulatory Update

Cookies recipe a challenge, but doable

Christopher Graham

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Topic: Data privacy

Who: European Commission

Where: United Kingdom

When: Article submitted on 1 August 2011

Law stated as at: 26 May 2011

(The first item in this quarter's survey of current legal issues is a short article by the Information Commissioner, Christopher Graham, and represents the latest (in August 2011) position of the ICO on the difficult question of cookies in relation to recent developments in Brussels).

Not since King Alfred burnt those cakes has there been such a fuss about the authorities' supposed failure to understand the ingredients, the mix and the recipe. A thousand years on and it's 'cookies', not cakes, that are causing the outrage. But the reactions are similar. What do our lords and masters think they are doing? Don't they know they'll ruin everything?

The European Commission's new rules on the use of web cookies have been in the baking for the last 2 years. They were implemented into UK law by the government on 26 May.

The new rules, which have been brought in as an amendment to the Privacy and Electronic Communications Regulations, make clear that website owners now need to get consent to store cookies on users' computers. Cue outrage from website operators. It'll never work. They don't understand.

As the UK regulator of data protection issues, I've been charged with overseeing the new requirements. Inevitably, I've been getting the flak for the decisions of our legislators, in Brussels and at Westminster. But if you can't stand the heat, as they say, you've no future in the cakes and cookies business. So what is the Information Commissioner doing to lower the temperature?

I have said all along that putting the new cookies rule into practice will be challenging. It would obviously ruin some users' browsing experience if they needed to negotiate endless pop-ups to do anything useful online — and I am not saying that businesses have to go down

Common sense approach

that road. Equally, I have to remember that this law has been brought in to give consumers more choice about what companies know about them. That's why I'm taking a common sense approach that takes both views into account.

Rules governing the use of cookies have been around a lot longer than most people think. Since 2003, UK website owners have been required to provide users with 'clear and comprehensive' information about the cookies being used on their websites. Of course, the new rules go much further — but this doesn't mean online marketers have to admit defeat.

In fact, the new rules could be the prompt that the online business needs to develop a more grown-up relationship with their customers, a relationship based on respect in place of cynicism, engagement in place of ignorance.

The ICO has been criticized for our pragmatic approach. Usually, it's the government that provides for an implementation phase before new rules come in. This time, it's fallen to the regulator. Either way, online businesses need to use well the time that's been afforded them.

Browser solutions

The government is working with browser manufacturers to investigate the future options for browser settings being sophisticated enough to allow websites to assume user consent. But 'future' is the operative word here as any technical 'fix' is not yet in place — and in any case it would not cover users who access websites through mobile devices.

The best starting point on the road to compliance is for UK website owners to undertake an audit of the cookies that are in use. This is useful housekeeping anyway, and an opportunity to remove redundant cookies will make sure what information that is still being collected is genuinely of use. We've given UK website owners a 12-month 'lead in' period to give organizations and businesses time to properly consider what they are doing and what solutions will best meet their needs.

Lead-in period

By next May, we expect businesses and organizations to have clear information about the way in which cookies are operating on their websites and to be obtaining consent to set those cookies. Exactly how far each organization will need to go in getting consent will depend on exactly what the purpose of the cookie is. Certainly, having widely available and easily understood information that is relevant to users is fundamental.

And let's not forget that there is an exception to the new rules. If a cookie is strictly necessary for a service requested by the user, then consent is not needed. This covers the use of most online shopping baskets.

Our work on helping people to comply with the new rules is ongoing. We have published initial advice, but we never intended that would be the end of it. We are very interested in how businesses and organizations are working towards solutions.

So the cookies rules have sparked a lively debate on just what the law will mean in practice for UK websites. Some developers and website owners are worried that the new rule will have a detrimental impact on websites, making internet browsing a less enjoyable experience.

Meanwhile, we have privacy campaigners and consumers who want to

Striking the right balance

exercise their right to disallow websites from tracking their choices. As both referee and mediator, I have to strike the right balance between the two. A mutually agreeable outcome, while challenging, must still be possible. And nobody needs to get their fingers burnt.

Top tips on the road to compliance

- Identify which cookies are operating on your website.
- Confirm the purpose of each of the cookies — in particular whether you link it to other information about users such as usernames.
- Identify what data each cookie holds.
- Confirm the type of cookie it is (ie session or persistent).
- If it is a persistent cookie, determine its lifespan.
- Identify third-party cookies.
- Confirm whether your privacy policy currently provides accurate and clear information about each cookie.

*Christopher Graham,
Information Commissioner*

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 email to Stephen Groom (stephen.groom@osborneclarke.com)

Debit/credit travel payment surcharge crackdown looms

Nick Johnson

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(The following items of current interest come from the Marketing Law website of Osborne Clarke (<http://www.marketinglaw.co.uk>), where they first appeared in July 2011).

Topic: Financial services
Who: Office of Fair Trading
Where: United Kingdom
When: 28 June 2011
Law stated as at: 11 July 2011

What happened

The Office of Fair Trading (OFT) has told passenger travel companies to get much clearer on debit and credit card surcharges, or face enforcement action under the Consumer Protection from Unfair Trading Regulations 2008 (CPRs).

In its response to a super complaint from Which? under the Enterprise Act 2002, the OFT concludes that many airlines and other operators in

Complaint by Which?