
Legal and Regulatory Update

Marketers get a wake-up call from EU cookie legislation

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Abstract

New directives from the European Parliament threaten to radically restrict internet marketers' abilities to use the customer identification tool called 'cookies'. These simple code numbers issued to web users when they visit a website provide the site with a sense of memory and the site publisher with an ability to personalise editorial or advertising content. The vast majority of sites use cookies extensively and they have become the foundation for sophisticated marketing commerce. Following a confusing debate this directive will single out European companies and seriously disadvantage them as well as holding back the industry as a whole.

The European Parliament is well known for well-meaning but at times questionable decisions. When the EP voted to adopt Van Welzen's amendment to the draft directive on electronic data collection and privacy, few marketers in Europe's Internet industry understood the consequences; today they are united in disbelief and frustration. All have been shown quite clearly what a direct effect Europe can now have on our marketing practices.

His bizarre reasoning threatened 'cookies' — a key tool that allows websites to recognise their customers and indeed supports the transmission mechanics of the Web itself. Cookies give websites the memory to recognise their users, and they underpin the majority of e-shopping services and personalised Internet content you see. If a Web page has been customised to your tastes then the chances are that this is thanks to cookies. Behind the scenes they also drive the research webmasters use to improve their services and are used extensively by researchers and marketers. Indeed, the online advertising that funds the majority of the media sites we use for free is founded on them.

But the privacy directive tried to redefine them as highly sensitive personal data, 'spyware', subjecting them to heavyweight restrictions and legal regulations that will force many websites to abandon them.

The draft directive that MEPs considered at first reading was originally proposed to deal with data privacy in electronic communication services, and in particular to stamp out unsolicited messages being sent to us by e-mail or through mobile networks.

Ironically, cookies were never envisaged by the Commission to form part of the directive, and this amendment that appeared from left field was adopted without any discussion. It represented an alarming disconnect

The role of cookies

The Commission's view

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between MEPs and the industry they were regulating, as many thought they were increasing users' data privacy when in fact all they were doing was turning the clock back: reducing the Internet's speed and effectiveness, forcing websites to downgrade services and handicapping the very European Internet sector they are trying to foster.

The Interactive Advertising Bureau (IAB), the commercial voice and watchdog for the Internet and digital platforms, launched a heavyweight campaign to save cookies. It galvanised the support of all the UK's major trade bodies (including the Advertising Association, the Institute of Practitioners in Advertising and the Direct Marketing Association) and heavyweight media owners, advertisers and their agencies. Some intense lobbying and the support of the media meant the IAB initiative took a step closer to success in December following an announcement from Europe that rejected the proposed 'opt-in' legislation for cookies. For the UK's 22 million Web users this amendment to the original legislation from the Council of Ministers means that a website could transfer cookies so long as users are well informed about this process and are given clear opportunities to reject cookies if they wish.

While it is too early to pop champagne corks, the IAB has succeeded in convincing ministers to reject an explicit opt-in regime that could have cost UK businesses alone hundreds of millions of pounds (£187m within just the advertising industry alone).

However, this battle is far from over, and at the time of writing the campaigners must now clarify with the Commission and the DTI how the regime will work in practice, in line with accepted industry standards and self-regulation. Campaigners are keen to ensure that users' privacy rights are protected and want to promote best practice.

The latest amendment indicates as yet unspecified conditions for the use of cookies — namely an obligation to provide users with clear and comprehensive information in advance about the purposes of such cookies and to offer them the possibility to refuse. This new provision takes over the larger part of an amendment proposed by the EP but not the restrictive and impractical concept of an opt-in. The IAB is confident that the industry will easily satisfy these requirements and will work with fellow industry bodies to achieve these objectives set by the Council.

The IAB is working to develop practical self-regulation that will enable Web users to opt in or opt out of accepting cookies — but not so that site owners would be required to make prohibitive or costly alterations to sites. The organisation is also championing best practice by site owners to empower Web users and ensure that they have the control and the confidence to surf the Web knowing that privacy is a priority.

The political agreement by the Council of Ministers paves the way for an early adoption of a common position by the ministers, scheduled to be early in 2002. The common position will then pass back to the European Parliament for a second reading lasting between three and four months.

The next phase will be crucial to the ultimate success of the 'Save our Cookies' campaign. Campaigners must work hard to convince MEPs that the compromise solution adopted by the member states will meet their original public policy objectives, namely that Internet users' personal data

The issue is unresolved

Self-regulation is critical

More European legislation threatens online marketing

must not be processed unfairly and without their consent. The IAB is confident that tried-and-tested UK self-regulatory practice in the direct marketing field — which allows consumers to opt out of data processing — will deliver the MEPs' objectives in the newer online environment.

Of greater concern to those in the media is that sadly this is the thin end of a thick wedge. The natural inclination of the European regulators is to restrict and protect. The U-turn on e-mail marketing announced in December represents an alarming shift towards opt-in which would have an equally damaging effect as the initial cookies amendment. The latest Green Paper on Consumer Protection in the Internal Market shows how the Commission feels there are two worlds: one for marketers and one for consumers. It is as if marketers produced goods and services in isolation from knowing what their customers want, and that consumers somehow need more legislation to protect their interests. Where is the e-commerce strategy? Have these regulators ever canvassed the views of real consumers? Do they even know the EU's own websites use cookies without consent in the very way they seek to outlaw?

Ironically the real reason the legislation is unnecessary is that Internet companies are championing user privacy. It is in their best interests because protecting user privacy fosters the greater confidence in the sector they are all striving for. And existing privacy regulations already provide strong protection; indeed, data-processing laws have never been stronger. In the UK, if you as a user are not given an opportunity to opt out by the website from your data being used for marketing purposes, they are breaking the law. It is that clear.

The 'dangerous' cookie is no more than a small, harmless strand of data your computer is given when you visit some websites. Only the issuer can read the cookie and it allows them to tailor the content to your needs. If you call a second page or return to the site later it will remember you. Forcing sites constantly to demand their Web users to reaffirm 'explicit prior consent' for each and every type of cookie delivered would create waves of interrupting messages and error screens. Confused users will switch off and new users would be frustrated as to why so many sites no longer work.

Commercial impacts

The likely costs of such legislation and the commercial impacts are startling. Advertising revenues underpin the economics of most websites — the sector has just proven itself and convinced brand owners of the Web's value. The most recent figures show that in the UK alone Internet ad spend grew by a staggering 42 per cent year on year for the first half of 2001 to £90.2m, maintaining it as the fastest-growing marketing medium, but the threat of EU meddling could set Europe back years.

Advertisers use cookies to schedule their campaigns, calculating the reach and frequency of online ads. These measurements are becoming increasingly important in making the Internet a more widely accepted part of conventional media planning and buying. They also show the number of people making a purchase as a result of seeing an Internet advert, and business analysts use them to tune their websites into more effective operations.

The battle for cookies has been a wake-up call for the entire marketing

sector, but as marketers we need to understand the processes that brought the industry here. Centralised European legislation is having ever greater effects on our markets, and yet most companies in the interactive marketing arena neither have public affairs on their radar nor believe they can influence the course of those debates.

Contact the IAB team

As the commercial marketing trade association focused entirely on the new digital channels, the IAB works with other trade bodies. The regulatory issue facing this sector will be extremely challenging during the next year and trade bodies and their members will need to remain both vigilant and proactive in tackling these issues. The recent debate on e-mail marketing, and the unfortunate direction towards opt-in at regulatory level, show clearly how great an effect these decisions can have.

The IAB is very pro-Europe, indeed, with sister organisations in most European countries and currently holding the presidency of IAB Europe, the UK is championing European integration. Working in the most cross-border of all media that is hardly surprising, but the breadth and depth of the legislative impact that directives like this can have on the operating practices and indeed market capitalisation of interactive companies is alarming. It is time for us all to pull together and tackle such issues head on before it is too late.