



# HOW THE EU HAS IMPLEMENTED THE NEW LAW ON COOKIES

Updated 8 October 2012



# SUMMARY OF EU IMPLEMENTATION OF ART 5(3) E PRIVACY DIRECTIVE (DIRECTIVE 2002/58/EC)

EU Member State	Implemented into local law?	Regulator guidance published?	Does local regulator interpret the law as requiring prior opt-in?	Can website operators rely upon implied <sup>1</sup> consent?
Austria	Yes	No	Yes	No
Belgium	Yes	No	Not clear	Not clear
Bulgaria	Yes	No	Yes	Unknown
Cyprus	Yes	No	Yes	No
Czech Republic	Yes	No	No	N/A. Opt-out principle applies
Denmark	Yes	Yes	No	Yes
Estonia	Yes	No	Unknown	Unknown
Finland	Yes	No	No	Yes
France	Yes	Yes	Yes	No
<i>Germany</i>	<i>No</i>	<i>No</i>	<i>Unknown</i>	<i>Unknown</i>
Greece	Yes	No	Yes	No
Hungary	Yes	No	No	Currently yes
Ireland	Yes	Yes	No	Yes
Italy	Yes	No	No	Unknown

EU Member State	Implemented into local law?	Regulator guidance published?	Does local regulator interpret the law as requiring prior opt-in?	Can website operators rely upon implied <sup>1</sup> consent?
Latvia	Yes	No	Yes	No
Lithuania	Yes	Yes	Yes	Unknown
Luxembourg	Yes	No	Yes	No
Malta	Yes, but not yet in force	No	Unknown	Unknown
Netherlands	Yes	Yes	Yes	No
<i>Norway<sup>2</sup></i>	<i>No</i>	<i>No</i>	<i>No</i>	<i>N/A</i>
<i>Poland</i>	<i>No</i>	<i>No</i>	<i>Yes</i>	<i>Yes</i>
Portugal	Yes	No	Yes	No
Romania	Yes	No	Yes	Yes
Slovak Republic	Yes	No	Yes	No
<i>Slovenia</i>	<i>No</i>	<i>No</i>	<i>Unknown</i>	<i>Unknown</i>
Spain	Yes	No	Yes	No
Sweden	Yes	No	Yes	Not clear
United Kingdom	Yes	Yes	Yes	Yes

<sup>1</sup> In the UK, the ICO has deemed implied consent as a method to obtain consent. This will only work where the user is given specific and comprehensive information about the use of cookies, and the user gives an indication of his wishes to consent (e.g. continues to browse and doesn't disable cookies).

<sup>2</sup> Norway is not an EU Member but as a consequence of its membership in the EEA (European Economic Area (Nw: EØS)), Norway is under an obligation to adopt EU Directives.

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EU Member State	E-Privacy Directive Implemented into local law?	Regulatory Guidance Issued?	Current Position (Legal, enforcement and regulatory position)	Meaning of Consent	Does local regulator interpret the law as requiring prior opt-in?	a) Applicable Legislation b) Regulatory Guidance c) Authority Responsible for implementation
<p><b>AUSTRIA</b></p> <p>DLA Piper Contact:  <b>Wolfgang Freund</b>  <b>T</b> +43 1 531 78 1401  <b>wolfgang.freund@dlapiper.com</b></p>	Yes	No	<ul style="list-style-type: none"> <li>■ The E Privacy Directive was implemented in Austria by amendment of the relevant provisions of the Austrian Telecommunications Act (Telekommunikationsgesetz 2003, “TKG”). The changes to the TKG have come into effect on 22 November 2011.</li> <li>■ The relevant section of the TKG now states that a user must give informed consent for the storage of personal data.</li> </ul>	<ul style="list-style-type: none"> <li>■ Under Austrian law “informed consent” is required prior to the processing of personal data. The user has to be aware of the fact that consent for the storage or processing of personal data is given, as well as the details of the data to be stored or processed, and has to agree actively. Therefore obtaining consent via some form of pop up or click through agreement seems advisable.</li> <li>■ Consent by way of browser settings, or a pre-selected check-box etc. is not sufficient in this respect.</li> <li>■ Furthermore in case of consent by way of browser settings the required information regarding the storage of personal data must be made available to the user as is required by the TKG.</li> </ul>	Yes	<ul style="list-style-type: none"> <li>a) Telekommunikationsgesetz 2003 as amended by BGBl I Nr. 102/2011;</li> <li>b) N/A; and</li> <li>c) Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR)/Austrian Data Protection Authority (DSK).</li> </ul>

EU Member State	E-Privacy Directive Implemented into local law?	Regulatory Guidance Issued?	Current Position (Legal, enforcement and regulatory position)	Meaning of Consent	Express Opt-In Consent Required (if so, required by law or regulatory guidance)?	a) Applicable Legislation b) Regulatory Guidance c) Authority Responsible for implementation
<p><b>BELGIUM</b></p> <p>DLA Piper Contact:  <b>Patrick Van Eecke</b>  <b>T +32 (0)2 500 1630</b>  patrick.van.eecke@dlapiper.com</p>	Yes	No	<ul style="list-style-type: none"> <li>■ Article 5(3) of the E-Privacy Directive was implemented into Belgian Law by means of amendment of article 129 of the Belgian Electronic Communication Act. The amendment follows the wording of the E-Privacy Directive closely. As a result, the amended article 129 of the Belgian Electronic Communication Act requires prior informed consent.</li> <li>■ The amended article 129 of the Belgian Electronic Communication Act does not allow for the user's consent to be expressed by usage of the appropriate settings of a browser or other application as suggested by the European legislator in consideration 66 of the Cookie Directive.</li> </ul>	<ul style="list-style-type: none"> <li>■ There is no specific regulation on consent in the context of cookies. The general rules on data protection must be complied with, meaning that consent must be prior, free, specific and informed.</li> </ul>	<p>The law does not foresee in stricter wording than that determined in article 5(3) of the E-Privacy Directive.</p> <p>The Belgian authorities (Privacy Commission/ Telecommunications Regulator) may however chose to issue regulatory guidance on applying the rules and distinguishing between types of cookies.</p>	<p>a) Article 129 of the Electronic Commerce Act</p> <p>b) Not issued yet</p> <p>c) The Belgian Institute for Postal Services and Telecommunications and the Belgian Privacy Commission</p>

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<b>BULGARIA</b> Firm: <b>Wolf Theiss</b> Website: <a href="http://www.wolftheiss.com">www.wolftheiss.com</a> Contact: <b>Anna Rizova</b> <b>T +359 2 861 3703</b> <a href="mailto:anna.rizova@wolftheiss.com">anna.rizova@wolftheiss.com</a>	Yes	No	<ul style="list-style-type: none"> <li>Art. 5(3) of E Privacy Directive was implemented into Bulgarian legislation on 29 December 2011. It now states that users should be provided with clear and comprehensive information about the purposes of data processing and they must be given the opportunity to refuse storing or accessing such information.</li> </ul>	<ul style="list-style-type: none"> <li>Consent means any freely given, explicit and informed statement of the data subject by which the data subject unambiguously gives their consent to their personal data being processed.</li> </ul>	Yes	a) Electronic Commerce Act; b) N/A; and c) Consumers Protection Commission.
<b>CYPRUS</b> Firm: <b>Pamboridis &amp; Associates</b> Website: <a href="http://www.pamboridis.com">www.pamboridis.com</a> Contact: <b>Yiota Kythreotou Theodorou</b> <b>T +357 22 753 100</b> <a href="mailto:kythreotou@pamboridis.com">kythreotou@pamboridis.com</a>	Yes	No	<ul style="list-style-type: none"> <li>Directive 2009/136/EC has been implemented in Cyprus on the 18 May 2012, through Law No. 51(I)/2012 amending the Regulation of Electronic Communications and Postal Services Law.</li> <li>The amendments follow the wording of the E-Privacy Directive closely, and leave the detailed compliance requirements to be clarified by the Cyprus Office of the Commissioner for Personal Data Protection.</li> <li>Prior informed consent is required in accordance with the provisions of the Processing of Data (Protection of the Individual) Law of 2001 and its amendment Law No. 37(I)/2003.</li> </ul>	<ul style="list-style-type: none"> <li>Consent means consent of the data subject, any freely given, express and specific indication of his wishes, clearly expressed and informed, by which the data subject, having been previously informed, consents to the processing of personal data concerning him.</li> </ul>	Yes, required by law	a) The Electronic Communications and Postal Services Law of 2004 and its amendment Law No. 51(I)/2012; b) N/A; and c) Office of the Commissioner of Electronic Communications and Postal Regulation and the Office of the Commissioner for Personal Data Protection.

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<b>CZECH REPUBLIC</b>  DLA Piper Contacts: <b>Peter Valert</b> <b>T</b> +420 222 817 250 peter.valert@dlapiper.com  <b>Eva Spurkova</b> <b>T</b> +420 222 817 802 eva.spurkova@dlapiper.com	Yes	No	<ul style="list-style-type: none"> <li>On 1 January 2011, the Czech Republic implemented the E Privacy Directive. The E Privacy Directive was implemented into Czech law by Act No. 468/2011 Coll., which amended Act No. 127/2005 Coll., on Electronic Communications, as amended. The amendment went into effect on January 1, 2011 and introduces the <b>opt out</b> principle.</li> <li>The E Privacy Directive was reflected into Section 89 par. 3 of the Act on Electronic Communications which states: <i>“Anyone who intends to use or uses electronic communications networks to store data or to gain access to data already stored in the terminal equipment of the participants or users, is required to inform such participants or users in advance and provably about the scope and purpose of the processing of data and is obliged to offer them <b>to refuse</b> the possibility of the processing.”</i></li> </ul>	<ul style="list-style-type: none"> <li>The Czech legislator derived the meaning of consent from the purpose of the directive, which is not to overload a user with a confirmation of his consent at every website visit, but to provide him with an easy opportunity to refuse storing of personal data.</li> </ul>	No	a) The Act No. 127/2005 Coll., on Electronic Communications as applicable law;  b) Office for Personal Data Protection (“ <b>OPDP</b> ”); and  c) Ministry of Industry and Trade of the Czech Republic.

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<p><b>DENMARK</b></p> <p>Firm: <b>Horten</b></p> <p>Website: <a href="http://www.horten.dk">www.horten.dk</a></p> <p>Contact: <b>Egil Husum</b> T +45 3334 4224 EHU@horten.dk</p>	Yes	Yes	<ul style="list-style-type: none"> <li>■ Directive 2009/136/EC was implemented in the new Danish Act on Electronic Communications Services and Networks which came into force on 25 May 2011 in accordance with the implementation deadline in the Directive. However, the Act did not implement the specific provisions concerning the use of cookies, but instead provided an authorisation to the Danish Minister of Business and Growth to execute an executive order on this matter.</li> <li>■ The “Executive Order on Information and Consent Required in Case of Storing and Accessing Information in End-user Terminal Equipment” came into force on 14 December 2011.</li> <li>■ Pursuant to the Order the use of cookies requires consent. The consent must be freely given and specific.</li> </ul>	<ul style="list-style-type: none"> <li>■ The consent must be freely given and specific and the user must be given an option.</li> <li>■ However, this does not imply that consent must be obtained each time a cookie is used but a user must be given an option. Furthermore, the consent must be informed which implies that a user must receive information about the consequences of consenting. Finally, the consent must be an informed indication of the user’s wishes. Normally, consent is obtained through tick-the-box but also the use of a homepage after having received the relevant information concerning cookies can constitute consent. Yet, consent by use of a homepage must be used with caution.</li> </ul>	No, but consent by use of a homepage must be used with caution.	<p>a) (i) Act No 169 of 3 March 2011 on Electronic Communications Services and Networks and (ii) Executive Order No 1148 of 9 December 2011 on Information and Consent Required in Case of Storing and Accessing Information in End-user Terminal Equipment;</p> <p>b) Guidance notes No 9018 to the new rules on storing of cookies and similar technologies; and</p> <p>c) The Danish Business Authority.</p>



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			<ul style="list-style-type: none"> <li>In addition to this the information to the user must fulfil the following requirements: (i) The information must be clear and easy to understand; (ii) the purpose of the use of cookies must appear; (iii) the identity of the person or entity which is responsible for the use of cookies must appear; (iv) the possibility of withdrawal of consent must be easily accessible and be described in the information; and (v) this information must be easily accessible for the user at all times.”</li> </ul>			
<b>ESTONIA</b> Firm: <b>LAWIN</b> Website: <a href="http://www.lawin.com">www.lawin.com</a> Contact: <b>Pirkko Liis Harkmaa</b> <b>T +372 6306460</b> <a href="mailto:pirkko.liis.harkmaa@lawin.ee">pirkko.liis.harkmaa@lawin.ee</a>	Yes	No	<ul style="list-style-type: none"> <li>The Ministry has concluded that the new law is already satisfied by Art 102 of the Estonian Electronics Communications Act and as a result no further implementation measures are necessary.</li> </ul>	<ul style="list-style-type: none"> <li>There is no specific regulation on consent in the context of “cookies”. It is however recommended to apply general rules on personal data protection also in case of cookies, but the law is a bit vague in this respect.</li> </ul>	Whether or not explicit opt-in consent is required is still unclear as no respective practice has developed yet.	a) Estonian Electronic Communications Act (RT I 2004, 87, 593, as amended from time to time) and Estonian Personal Data Protection Act (RT I 2007, 24, 127, as amended from time to time); b) N/A; and c) Ministry of Economic Affairs and Communications and Data Protection Inspectorate.

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<p><b>FINLAND</b></p> <p>Firm: <b>Hannes Snellman Attorneys</b></p> <p>Website: <a href="http://www.hannessnellman.com">www.hannessnellman.com</a></p> <p>Contacts: <b>Erkko Korhonen</b> T +358 9 22884308 erkko.korhonen@hannessnellman.com</p> <p><b>Kaisa Fahllund</b> T +358 9 2288 4209 kaisa.fahllund@hannessnellman.com</p>	Yes	No	<ul style="list-style-type: none"> <li>■ Legislation has been adopted by the Finnish Parliament adopting the new law, which entered into force on 25 May 2011. The new Finnish law recognises the possibility of obtaining consent via browser/other application settings. However, the user needs to be given comprehensible and complete information on the purposes of saving or using such data. The legal requirement written in law is “consent” that is however interpreted in the preliminary works of the new law so that the user may give the consent via browser or other application settings. The saving and use of data is allowed only to the extent required for the service, and it may not limit the protection or privacy any more than is necessary.</li> <li>■ Further, under the new law the provisions regarding consent do not apply to any saving or use of data which is intended solely for the purpose of enabling the transmission of messages in communications networks or which is necessary for the service provider for the purpose of providing a service that the subscriber or user has specifically requested.</li> </ul>	<ul style="list-style-type: none"> <li>■ At present, “opt out” consent would be sufficient in Finland. The Finnish Act governing the cookies sets two conditions on placing cookies on users’ computers: i) the user has given consent and ii) comprehensible and complete information on the purposes of saving or using such data are given to the user. These two conditions are separate in a way that they both need to be fulfilled. Giving the required information to the user will not release from the requirement to obtain a consent.</li> <li>■ As Finland was one of the first countries that implemented the Article 5(3) of the E Privacy Directive it is to be seen whether the interpretation will remain the same if “opt in” becomes prevailing practice elsewhere in the EEA.</li> </ul>	No	<p>a) The Act on the Protection of Privacy in Electronic Communications (516/2004, in Finnish: <i>Sähköisen viestinnän tietosuojalaki</i>);</p> <p>b) No guidance published; and</p> <p>c) The Finnish Communications Regulatory Authority (FICORA), the Data Protection Ombudsman.</p>

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<p><b>FRANCE</b></p> <p>DLA Piper Contact:  <b>Carol Umhoefer</b>  <b>T +33 1 40 15 24 34</b>  <b>carol.umhoefer@dlapiper.com</b></p>	Yes	Yes	<ul style="list-style-type: none"> <li>■ France has implemented the EU Cookies Directive in the Law n° 78-17 of January 6, 1978. The law states that any subscriber or user of electronic communication services must be fully and clearly informed by the data controller or its representative of (i) the purpose of any cookie (i.e, any means of accessing or storing information on the subscriber’s/ user’s computer), and (ii) the means of refusing cookies, unless the subscriber/user has already been so informed. Cookies are lawfully deployed only if the subscriber/user has expressed consent after having received such information.</li> <li>■ However, the foregoing provisions do not apply (i) to cookies the sole purpose of which is to allow or facilitate electronic communication by a user, or (ii) if the cookie is strictly necessary to provide on line communication services specifically requested by the user.</li> <li>■ In November 2011, and again in April 2012, the French Data Protection Authority (“CNIL”) issued guidance for cookies.</li> </ul>	<ul style="list-style-type: none"> <li>■ Consent must be (i) freely given (i.e, in circumstances where the user has a choice to refuse consent), (ii) specific (i.e, relate to a specific cookie associated with a clearly defined purpose), and (iii) informed (i.e, the user must be given information beforehand, specifying the cookie’s purpose as well as the possibility to revoke consent).</li> <li>■ The law also provides that consent can result from the subscriber’s/user’s connection settings (e.g., browser settings) or any other means under the subscriber’s/user’s control.</li> </ul>	Yes. The law copies the text of the Directive almost word for word; guidance is very clear that opt-in consent is required.	<ul style="list-style-type: none"> <li>a) The Law n° 78-17 of January 6, 1978 – as modified – on information technology, data files and civil liberties;</li> <li>b) <a href="http://www.cnil.fr/en-savoir-plus/fiches-pratiques/fiche/article/ce-que-le-paquet-telecom-change-pour-les-cookies/">http://www.cnil.fr/en-savoir-plus/fiches-pratiques/fiche/article/ce-que-le-paquet-telecom-change-pour-les-cookies/</a>; and</li> <li>c) Commission nationale de L’informatique of des libertés (“CNIL”).</li> </ul>

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			<ul style="list-style-type: none"> <li>■ The CNIL considers that certain cookies are not covered by the law (e.g., cookie, used to constitute a “basket” on an e-commerce platform, session ID cookie.)</li> </ul>			
			<ul style="list-style-type: none"> <li>■ The CNIL considers that the website owner is liable for allowing a third party to install a cookie on the user’s computer.</li> <li>■ The April 2012 guidance also reaffirms that these rules apply to all cookies whether containing personal data or not.</li> <li>■ The April 2012 guidance also reminds operators that non compliance with French law can trigger financial penalties in amount of up to €150,000 for a first violation or up to €300,000 (for subsequent violations within 5 years). However the CNIL has recognized that compliance may not be immediate, and the CNIL will take into consideration all efforts implemented to reach compliance. Pre enforcement measures have begun.</li> </ul>	<ul style="list-style-type: none"> <li>■ However, according to the CNIL, commonly used browsers do not offer compliant settings.</li> <li>■ The CNIL regards the following consent collection mechanisms as compliant: <ul style="list-style-type: none"> <li>– a banner at the top of a webpage;</li> <li>– a consent request zone overprinting on the site’s homepage; and</li> <li>– boxes to tick when registering for an online service.</li> </ul> </li> </ul>		

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<b>GERMANY</b>  DLA Piper Contact: <b>Dr Thomas Jansen</b> <b>T +49 89 232 372 110</b> thomas.jansen@dlapiper.com	No	No	<ul style="list-style-type: none"> <li>The process of implementing the Act is delayed as several draft bills did not pass the German Parliament. The first bill to amend the Telemedia Act of March 2011 provided that storage of data on the equipment of the user will only be permissible where the user has been informed and consent is given by them.</li> </ul>	<ul style="list-style-type: none"> <li>Unknown/TBC</li> <li>The original exception to the consent requirement remains where the cookies is used for enabling an information or communication the user has explicitly requested.</li> <li>It remains to be seen whether it would also be sufficient to link the information about processing of personal data and technical measures to the browser settings or whether an active opt-in, e.g. by clicking on a pop-up screen will be required.</li> </ul>	TBC	Awaiting implementation
<b>GREECE</b>  Firm: <b>Kyriakides Georgopoulos &amp; Daniolos Issaias</b>  Website: www.kgdi.gr  Contact: <b>Konstantinos Issaias</b> <b>T +30 210 817 1500</b> k.issaias@kgdi.gr	Yes	No	<ul style="list-style-type: none"> <li>EU Directive 2009/136 has been implemented into the Greek legal system with Law 4070/2012, which has been voted by the Greek Parliament on 6 April 2012.</li> <li>In fact this law amends Law 3471/2006 on Protection of personal data and privacy in the electronic telecommunications sector.</li> <li>According to article 4 par. 5 of Law 3471/2006 as amended by Law 4070/2012, the storage of information or the access to information already stored to the terminal equipment of a subscriber or user is permitted only if this specific subscriber or user has provided his consent following an updating.</li> </ul>	<ul style="list-style-type: none"> <li>The ways of expression of consent will be regulated following an Act of the Hellenic Data Protection Authority.</li> </ul>	Yes	a) Law 3471/2006, as amended and in force today; b) No; and c) Hellenic Data Protection Authority.

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<p><b>HUNGARY</b></p> <p>DLA Piper Contacts:  <b>Monika Horvath</b>  <b>T +36 1 510 1110</b>  monika.horvath@dlapiper.com</p> <p><b>Zoltán Kozma</b>  <b>T +36 1 510 1100</b>  zoltan.kozma@dlapiper.com</p>	Yes	No	<ul style="list-style-type: none"> <li>■ Before implementing Article 5 (3) of the E Privacy Directive into Hungarian law, section 155 (4) of the Hungarian Act C of 2003 on Electronic Communications (“Act C of 2003”) already provided that “<i>the storing of information, or the gaining of access to information on the electronic terminal equipment of a subscriber or user obtained via electronic communications networks is only allowed on the condition that the subscriber or the user concerned has given his or her consent, after having been provided with clear and comprehensive information</i>”. Accordingly, Article 5 (3) of the E Privacy Directive did not result in a significant change in Hungarian law.</li> <li>■ Irrespective of the foregoing, the Hungarian Parliament issued a draft bill to the Parliament which implements the E Privacy Directive into Hungarian law. This entered into force in August 2011. This Act modifies Act C of 2003, and almost provides the same wording as referred to above.</li> </ul>	<ul style="list-style-type: none"> <li>■ There is no specific guidance or regulation in relation to the meaning of consent. On the basis of the wording of the relevant Act, however, it is clear that it must be prior consent, after the subscriber has been provided with clear and comprehensive information, which information inter alia includes the purpose of processing.</li> <li>■ Service providers shall be authorized to obtain and store communications transmitted on their network only to the extent strictly necessary for the provisions of services for technical reasons.</li> <li>■ General practice is that consent can be obtained via browser settings, however, as mentioned so far this has not been confirmed by the opinion or the guidance of the Authorities yet.</li> </ul>	No	<p>a) Section 155(4) of the Hungarian Act (2003 on electronic Communications);</p> <p>b) No; and</p> <p>c) National Media and Infocommunications Authority.</p>

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<p><b>IRELAND</b></p> <p>Firm: <b>Mason, Hayes and Curran</b></p> <p>Website: <a href="http://www.mhc.ie">www.mhc.ie</a></p> <p>Contact: <b>Philip Nolan</b> T +353 1 614 5000 pnolan@mhc.ie</p>	Yes	Yes	<ul style="list-style-type: none"> <li>■ Implemented into Irish law by Statutory Instrument No. 336/2011, the European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011, with effect from 1 July 2011.</li> <li>■ Users must be provided with “clear and comprehensive” information, including as to the purpose of the cookie. Such information must be “prominently displayed and easily accessible” and be as “user friendly as possible”.</li> <li>■ The Regulations do not apply to cookies which are “strictly necessary in order to provide an information society service explicitly requested” by the user.</li> <li>■ There is no formal “lead in period” of the sort adopted in the UK. Businesses must be immediately compliant with the new rules.</li> </ul>	<ul style="list-style-type: none"> <li>■ The Regulations do not specify how consent should be given beyond stating that the methods of giving consent should be as “user friendly as possible”. Where it is technically possible and effective consent may be given by browser settings.</li> <li>■ The user’s consent may be given by the use of appropriate browser settings where it is technically possible and effective. Such settings would require, as a minimum, clear communication to the user as to what he or she was being asked to consent to and a means of giving or refusing consent to any information being stored or retrieved.</li> <li>■ Consent can be obtained by other technological applications by means of which the user can be considered to have given his or her consent.</li> </ul>	No. Implied consent could be relied upon in certain circumstances.	<p>a) European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (SI 336 of 2011);</p> <p>b) Guidance Note on Data Protection in the Electronic Communications Sector; and</p> <p>c) Data Protection Commissioner.</p>

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<p><b>ITALY</b></p> <p>DLA Piper Contacts:  <b>Giangiaco Olivi</b>  <b>T +39 02 80 618 515</b>  giangiaco.olivi@dlapiper.com</p> <p><b>Stefania Baldazzi</b>  <b>T +39 02 80 618 616</b>  stefania.baldazzi@dlapiper.com</p>	Yes	No	<ul style="list-style-type: none"> <li>■ Implemented into Italian law with effect from June 2012.</li> <li>■ The new provisions are a very close reflection of the wording of Recital 66 of Directive 2009/136/EC and Section 5(3) of Directive 2002/58/EC (as amended by Directive 2009/136/EC). As such, they pose exactly the same interpretation problems as these provisions of EU law, especially with regard to the nature of consent required for compliance. The only significant notice, taking into account the proposals difference is that the decree requires the Italian data protection Authority to determine certain simplified methods of providing subscribers or users with an information made by business and consumer associations.</li> </ul>	<ul style="list-style-type: none"> <li>■ Business may have to wait for a general decision by the Italian data protection Authority before they can assess the true impact of the change. However, in an opinion submitted to the government in relation to the draft decree, the Authority has already stated that the new provisions on cookies should be interpreted as establishing an opt-in regime in Italy.</li> </ul>	No	<p>a) Legislative Decree n. 69 of 28 May 2012, amending the Italian Privacy Code (Legislative Decree n. 196 of 30 June 2003);</p> <p>b) TBC; and</p> <p>c) Garante per la protezione dei dati personali (<a href="http://www.garanteprivacy.it">www.garanteprivacy.it</a>).</p>



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<b>LATVIA</b> Firm: <b>LAWIN</b> Website: <a href="http://www.lawin.com">www.lawin.com</a> Contact: <b>Sarmis Spilbergs</b> <b>T +371 67814848</b> <a href="mailto:sarmis.spilbergs@lawin.lv">sarmis.spilbergs@lawin.lv</a>	Yes	No	<ul style="list-style-type: none"> <li>Latvia has implemented the new law through amends to the Law on Information Society Services. The implementation of the Directive does not expressly address the use of browser settings to obtain consent. It provides that cookies may be stored only after the user has consented, which shall occur only after information regarding intended purpose of data processing is provided in accordance with Personal Data Protection Law.</li> <li>No official guidance has been issued by Data State Inspectorate to current date regarding collection of consent for use of cookies. There are no signs of relaxation of general rules with respect to consents for cookies.</li> </ul>	<ul style="list-style-type: none"> <li>Since Personal Data Protection Law implements Directive 95/46/EC, the consent for cookies must be “unambiguously given”.</li> </ul>	Yes	a) Law on Information Society Services, art. 7 <sup>1</sup> ; b) No; and c) Data State Inspectorate ( <a href="http://www.dvi.gov.lv/eng/">http://www.dvi.gov.lv/eng/</a> ).
<b>LITHUANIA</b> Firm: <b>LAWIN</b> Website: <a href="http://www.lawin.com">www.lawin.com</a> Contacts: <b>Jaunius Gumbis</b> <b>T +370 52681830</b> <a href="mailto:jaunius.gumbis@lawin.lt">jaunius.gumbis@lawin.lt</a> <b>Julius Zaleskis</b> <b>T +370 52191934</b> <a href="mailto:julius.zaleskis@lawin.lt">julius.zaleskis@lawin.lt</a>	Yes	Yes (in December 2011)	<ul style="list-style-type: none"> <li>Lithuania has implemented the new EU law through amendments to the Law on Electronic Communications which came into effect on 1 August 2011.</li> <li>The amendments mirror the text of the new EU law and require that consent to the use of cookies must be “opt in”.</li> <li>Lithuanian State Data Protection Inspectorate has published recommendations about the method of consent to the use for cookies. The guidance confirmed that consent can be obtained through pop ups, banners or website registration while relevant settings contained within current browsers are not likely to form a valid consent.</li> </ul>	<ul style="list-style-type: none"> <li>‘Prior’ explicit consent is required.</li> <li>Users must be given a genuine opportunity not to consent.</li> <li>There is no clear guidance on possibility to obtain an implied consent.</li> </ul>	Yes, required by law and regulatory guidance.	a) The Law on Electronic Communications of the Republic of Lithuania No IX 2135 (in Lithuanian – <i>Lietuvos Respublikos elektroninių ryšių įstatymas</i> ); b) <a href="http://www.ada.lt/images/cms/File/naujienu/slapuk_DV.pdf">http://www.ada.lt/images/cms/File/naujienu/slapuk_DV.pdf</a> ; and c) State Data Protection Inspectorate (in Lithuanian – <i>Valstybinė duomenų apsaugos inspekcija</i> ).

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<b>LUXEMBOURG</b> Firm: <b>Bonn &amp; Schmitt</b> Website: <a href="http://www.bonnschmitt.net">www.bonnschmitt.net</a> Contacts: <b>Guy Arendt</b> T +352 27 855 <a href="mailto:garendt@bonnschmitt.net">garendt@bonnschmitt.net</a> <b>Alain Grosjean</b> T +352 27 855 <a href="mailto:agrosjean@bonnschmitt.net">agrosjean@bonnschmitt.net</a> <b>Julia Senior</b> T +352 27 855 <a href="mailto:jsenior@bonnschmitt.net">jsenior@bonnschmitt.net</a>	Yes	No	<ul style="list-style-type: none"> <li>■ Luxembourg implemented Directive 2009/136/EC by a law of 28 July 2011 which modified the law of 30 May 2005 and came into effect on 1 September 2011.</li> <li>■ Prior informed consent of a subscriber/user is required. Other requirements include: the method of providing information and right to refuse should be as user friendly as possible and where it is technically possible and effective, the users consent may be expressed by appropriate browser/application settings.</li> </ul>	<ul style="list-style-type: none"> <li>■ “Consent” means any freely given specific and informed indication of his wishes by which the person concerned or his legal, judicial or statutory representative signifies his agreement to personal data relating to him being processed (Art 2(b) law of 30 May 2005 as modified).</li> </ul>	Yes, required by law.	a) Law of 30 May 2005 as modified laying down specific provisions for the protection of persons with regard to the processing of personal data in the electronic communications sector; b) No; and c) <i>Commission Nationale pour la protection des données.</i>

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<b>MALTA</b> Firm: <b>Mamo TCV Advocates</b> Website: <a href="http://www.mamotcv.com">www.mamotcv.com</a> Contacts: <b>Antoine Camilleri</b> T (+356) 21231345 antoine.camilleri@mamotcv.com <b>Claude Micallef-Grimaud</b> T (+356) 21231345 claudio.micallefgrimaud@mamotcv.com	Amendments found in Article 2(5) of Directive 2009/136/EC have not yet come into force in Malta.	No	<ul style="list-style-type: none"> <li>Legal Notice 239 of 2011 or ‘The Processing of Personal Data (Electronic Communications Sector) (Amendment) Regulations, 2011’, (which has not yet been brought into force) will amend Regulation 5 of the Principal Regulations to implement the amendments found in Article 2(5) of Directive 2009/136/EC. The amending regulations shall come into force on such date as the Minister responsible for data protection may establish by notice in the Malta Government Gazette. The DPC’s own website states that a “commencement date for the bringing into force of such legal notice needs to be established”.</li> <li>We have no indication of when such date may be although we expect that this will occur in the near future.</li> </ul>	<ul style="list-style-type: none"> <li>The situation is unclear in Malta. Further comments may only be made when (and if) the amending legislation is brought into force.</li> </ul>	The situation is unclear in Malta. Further comments may only be made when (and if) the amending legislation is brought into force.	a) Processing of Personal Data (Electronic Communications Sector) Amendment) Regulations, published in the Government Gazette on 24 June 2011; b) None; and c) Office of the Data Protection Commissioner (“DPC”): – <a href="mailto:idpc.info@gov.mt">idpc.info@gov.mt</a> – <a href="http://www.dataprotection.gov.mt">www.dataprotection.gov.mt</a>
<b>NETHERLANDS</b> DLA Piper Contacts: <b>Richard Van Schaik</b> T +31 20 541 9828 richard.vanschaik@dlapiper.com <b>Marloes Dankert</b> T +31 20 541 9271 marloes.dankert@dlapiper.com	Yes	Yes, the regulator has provided a Q&A	<ul style="list-style-type: none"> <li>The Dutch Telecommunications Act (“Act”) was amended with effect from 5 June 2012. Among other things, that amendment introduced stricter rules for placing and accessing cookies.</li> <li>With effect from 5 June 2012 cookies may only be placed and accessed after website visitors have been clearly informed about these cookies (purpose, type of cookies, etc.) and have granted their permission to that effect.</li> </ul>	<ul style="list-style-type: none"> <li>Consent must be freely given, specific and informed: it should refer clearly and precisely to the scope and the consequences of the cookie processing.</li> <li>In case personal data will be processed, the consent must be unambiguously given: this means that there may be no doubt that the data subject has given consent to the processing of its personal data.</li> </ul>	Prior explicit consent is required.  Please note that granting consent can be a condition for using a website.	a) Article 11.7a Dutch Telecommunications Act; b) A Q&A provided by the the regulatory body can be found at <a href="http://www.opta.nl">www.opta.nl</a> ; and c) The Independent Post and Telecommunications Authority (OPTA) is responsible for monitoring and enforcement of the Telecommunications Act ( <a href="http://www.opta.nl">www.opta.nl</a> ).

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			<ul style="list-style-type: none"> <li>■ Information and consent may not or no longer be provided or obtained granted, respectively, by means of default standard browser settings.</li> <li>■ The new rules in the Telecommunications Act also prescribe that as per 1 January 2013 cookies or similar data files placed or accessed, are considered to be personal data, unless the party placing such cookies or information can prove otherwise.</li> <li>■ Rules regarding the required prior consent do not apply to ‘necessary cookies’.</li> <li>■ No sanctions have been imposed yet by the Independent Post and Telecommunications Authority (OPTA), though general warning letters have been circulated.</li> </ul>	<ul style="list-style-type: none"> <li>■ Providing information and obtaining consent can be done in various ways. Examples include using a header bar, a pop-up or an alternative start page which provides information about the cookies to be placed and accessed where website visitors can tick a box granting permission for the relevant acts. The Act requires that users are given clear and complete information. This information must in any case explain who will place the cookies and for what purpose they will be used. Permission to use cookies must be granted before they are used.</li> </ul>	<p>Please note that if a customer does not give consent, either access to the website must be denied, or cookies cannot be placed.</p>	

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<b>NORWAY</b> DLA Piper Contact: <b>Nils Arne Gronlie</b> <b>T +47 2413 1542</b> nils.arne.gronlie@dlapiper.com	No	No	<ul style="list-style-type: none"> <li>The amended E Privacy Directive requiring opt in for cookies has not been implemented into Norwegian law yet. The Ministry of Transport and Communications (the Ministry) has commenced a public consulting procedure on the changes. The public consulting procedure commenced 23 June 2010 and the hearing deadline was 23 September 2010. The Ministry reports that there has been a delay in the matter and that they are currently working on a proposition to be put before the Norwegian Parliament. The proposed amendment to Norwegian law seems to be in line with the amended E Privacy Directive regarding the use of cookies, ie requiring opt in.</li> </ul>	None.	No – the current requirement status is opt out.	a) Ecom Regulations section 7-3; b) N/A; and c) The Ministry of Transport and Communications (Nw: Samferdselsdepartementet).
<b>POLAND</b> DLA Piper Contacts: <b>Krystyna Szczepanowska-Kozłowska</b> <b>T +48 22 540 74 02</b> krystyna.szczepanowska@dlapiper.com  <b>Dagmara Jaskulak</b> <b>T +48 22 540 74 57</b> dagmara.jaskulak@dlapiper.com	No	No	<ul style="list-style-type: none"> <li>E-Privacy Directive has not yet been implemented in Poland. The amendment to the Telecommunication Act which reflects the amended Directives and in particular article 5(3) of the E-Privacy Directive is currently being discussed by the Polish Parliament.</li> </ul>	<ul style="list-style-type: none"> <li>Prior explicit consent is required.</li> <li>However, based on the explanations of the Ministry of Administration and Digitization implied consent will also be a valid form of consent under certain circumstances. This means that consent can be inferred by a user's actions (e.g. the user is given clear and relevant information about the cookies that are used, and on that basis decides to click through and continue to use the website).</li> </ul>	Yes. Explicit opt – in consent is required by law, but can also rely upon implied consent.	a) Telecommunication Act; b) No; and c) The Ministry of Administration and Digitization.

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<b>PORTUGAL</b>  Firm: <b>ABBC &amp; Associados</b>  Website: <a href="http://www.abbc.pt">www.abbc.pt</a>  Contact: <b>João Costa Quinta</b> <b>T +351 213 583 620</b> <a href="mailto:j.quinta@abbc.pt">j.quinta@abbc.pt</a>	Yes	No	<ul style="list-style-type: none"> <li>The Directive 2009/136/EC, in what regards article art.º 5 (3) of the Directive addressing “cookies” was recently transposed by Law no. 46/2012, of 29 August, amending Law no. 41/2004, of 18 of August on the protection and processing of personal data in e communications.</li> <li>The new art.º 5º of the Law (“storage and access to information”) now determines that the storing of information and the possibility to access information stored in a subscriber/ user’s terminal is only allowed on the condition the subscriber/user has provided his or her previous consent, which must be based in clear and comprehensive information, namely about the purposes of the processing, in accordance with the provisions laid down in the Law on the Protection of Personal Data. This does not prevent technical storage or access for the sole purpose of carrying out the transmission of a communication over an e-communication network or if strictly necessary in order for the provider of an information society service to provide a service expressly requested by the subscriber/user. Non compliance with the “Opt in” rule consists of an administrative offense, punishable with fines ranging from EUR 5,000 to 5,000,000 for companies. At this point, the local regulatory Authority (CNPD) has not yet issued any guidelines.</li> </ul>	N/A	<ul style="list-style-type: none"> <li>Yes</li> <li>The new law does not require “express” consent. However once consent must be prior and based in full information, basing on existing rules and guidelines, we do not think that implied consent shall suffice.</li> </ul>	a) L 41/2004, of 18 of August;  b) Not yet issued  c) CPND (local DPA)/ ANACOM.

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			<ul style="list-style-type: none"> <li>The E Privacy Directive has not been implemented yet in Romania. There was a legislative procedure which was however inexplicably abandoned. The legislative procedure had been initiated in March 2011 aiming to implement the E Privacy Directive in order to observe the transposition deadline. The procedure was stopped in October 2011 before being passed by the Deputy's Chamber further to its withdrawal by the initiator.</li> </ul>			

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<b>ROMANIA</b> DLA Piper Contacts: <b>Marian Dinu</b> T +40 372 155 881 marian.dinu@dlapiper.com  <b>Cosmina Simion</b> T +40 372 155 816 cosmina.simion@dlapiper.com	Yes, through Law No. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, as subsequently amended.	No	<p>The national implementation of the E-Privacy Directive follows closely the wording of the directive. The storing of cookies on users terminals is allowed provided that several conditions are being met:</p> <ul style="list-style-type: none"> <li>■ Users have provided their consent;</li> <li>■ Users have been informed in an easily accessible manner and user-friendly language about the data processing operation in accordance with Data Protection Law no. 677/2002</li> </ul> <p>User consent is not required in case the storing of cookies is necessary solely for the purpose of ensuring transmission through an electronic communications network and/or such operations are strictly necessary in order to provide an information society service, expressly requested by the user.</p> <p>Failure to comply with the legal requirements is qualified as a minor offence sanction with fines ranging from approximately EUR 1,120 to 22,230. For companies whose turnover exceeds approximately EUR 1,120,000 the administrative fines raise up to 2% of the turnover.</p>	Users express consent is required. However, an implicit consent may be envisaged in case the user has adjusted the settings of its internet browser to accept cookies.	Yes – although not expressly stated in an official document.	a) Law No. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector, published in the Official Gazette no. 1101/25 November 2004, as subsequently amended (latest amendments as of 26 April 2012) b) – c) The National Supervisory Authority for Personal Data Processing (ANSPDCP)



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<b>SLOVAK REPUBLIC</b>  DLA Piper Contact: <b>Michaela Stessl</b> <b>T +421 2 59202 142</b> michaela.stessl@dlapiper.com	Yes	No	<ul style="list-style-type: none"> <li>In Slovakia, former “informed consent” is required prior to the storage of data or the acquisition of the access to data already stored in the terminal equipment of the participants or users. It has to be proven that the user was provided with exact and precise information regarding the purpose of such processing of data. The consent of the user shall be given actively, therefore obtaining the consent through the means of pop-up agreements and/or similar means shall be sufficient.</li> </ul>	<ul style="list-style-type: none"> <li>In Slovakia, “informed consent” is required prior to the storage of data or the acquisition of the access to data already stored in the terminal equipment of the participants or users. It has to be proven that the user was provided with exact and precise information regarding the purpose of such processing of data. The consent of the user shall be given actively, therefore obtaining the consent through the means of pop-up agreements and/or similar means shall be sufficient.</li> </ul>	Yes, required by law.	a) Act. No. 351/2011 Coll. on electronic communications;  b) N/A; and  c) Ministry of Transport, Construction and Regional Development of the Slovak Republic.
<b>SLOVENIA</b>  Firm: DLA Piper (Vienna office)  DLA Piper Contacts: <b>Wolfgang Freund</b> <b>T +43 1 531 78 1401</b> wolfgang.freund@dlapiper.com  <b>Dr. Jasna Zwitter-Tehovnik</b> <b>T +43 1 531 78 1042</b> jasna.zwitter-tehovnik@dlapiper.com	No	No	<ul style="list-style-type: none"> <li>Presently, Slovenia has not implemented the E-Privacy Directive and no draft implementing legislation is being considered for adoption. Also, no official position has been taken by the competent regulatory body.</li> <li>On account of the above, infringement proceedings have allegedly been initiated against Slovenia by the European Commission.</li> </ul>	N/A	N/A	a) N/A;  b) N/A; and  c) Information Commissioner ( <i>Informacijski pooblaščenec</i> ).

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<p><b>SPAIN</b></p> <p>DLA Piper Contact: <b>Diego Ramos</b> T +34 91 790 1658 diego.ramos@dlapiper.com</p>	Yes	No	<ul style="list-style-type: none"> <li>The Spanish Information Society Services and Electronic Commerce Law was recently amended in order to implement the changes required by Directive 2009/136/EC.</li> </ul>	<ul style="list-style-type: none"> <li>Although no guidance has been issued on this point, strictly speaking, prior explicit consent is required.</li> </ul>	Yes, by law, but this may be general by way of browser settings.	<p>a) The Spanish Information Society Services and Electronic Commerce Law 34/2002;</p> <p>b) None as at the time of writing; and</p> <p>c) The Spanish Telecommunications and Online Services Authority and, for privacy features, the Data Protection Agency.</p>
			<ul style="list-style-type: none"> <li>Web site service providers are now required to obtain the informed consent of users to the deployment of cookies and similar devices on web sites. The information about the use of cookies must be “<i>clear and complete</i>”, specifying the reasons why data is being collected via such devices, and must comply with existing information requirements under Spanish data protection law. The new provisions allow such consent to be obtained via adequate browser or application settings, provided that the user is required to configure these settings, either during the installation or software update process, by way of an “<i>express action</i>”.</li> <li>In the rush to introduce the changes, no specific sanctions for non-compliance were stipulated in the legislation, leaving some uncertainty as to the consequences of breach.</li> </ul>			

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<b>SWEDEN</b>  DLA Piper Contact: <b>Johan Sundberg</b> <b>T +46 (0)8701 7824</b> johan.sundberg@dlanordic.se	Yes	No	<ul style="list-style-type: none"> <li>Sweden has implemented the new EU law through amendments to the Electronic Communications Act (2003:389) which came into effect on 1 July 2011.</li> <li>In relation to legitimate techniques, the Swedish Government has concluded that for practical reasons, the amendments shall not be regarded as a change in substance.</li> </ul>	<ul style="list-style-type: none"> <li>Consent is defined as any <i>voluntary, specific and unambiguous expression of will</i>. There may not be any doubts that the user provides his/her consent to the processing. Hypothetical or silent consent is thus <i>not</i> sufficient as it may not be required by the user to actively undertake measures to avoid the processing of the personal data.</li> </ul>	Yes	a) Electronic Communications Act (Sw. lag 2003:389 om elektronisk kommunikation);  b) N/A; and  c) Swedish Post and Telecom Agency.

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			<ul style="list-style-type: none"> <li>■ In addition, the Swedish Data Inspection Board is of the opinion that it should be distinguished between different types of cookies. When using cookies for purposes other than to adjust settings on a site for the user's previous requests and similar, informed consent would be required. According to the Data Inspection Board's view, it is what a cookie will be used for that determines whether consent is required or not.</li> <li>■ On the other hand, the Swedish Post and Telecom Agency ("<b>the Agency</b>") (<i>the regulatory body in relation to cookies</i>) does not seem to agree. The Agency cannot see that the required consent can be waived without the possibility of exemption <i>expressly</i> stated in the provision.</li> <li>■ The Swedish part of the European Trade Association of the Digital and Interactive Marketing Industry ("<b>IAB Sweden</b>") has created a self regulating committee in response to the introduction of the new consent for cookies. The self regulating committee has assembled a group with representatives from the industry and other organizations. The committee was set up with a view to producing best practice guidance for the use of cookies and a first recommendation has been published.</li> </ul>	<ul style="list-style-type: none"> <li>■ However, <i>implicit behavior</i> may form a valid consent (as long as there is no sensitive personal data involved). Implicit behavior means in this context that the user provides data after having received clear information about both the intended processing of the data, the fact that it is optional to provide the data, and also that submitting the data would be considered as providing a consent to the processing.</li> <li>■ The Swedish government has also indicated that the rules on consent should not be seen as a change from the old regime and therefore web browser settings would probably be regarded to indicate consent.</li> </ul>		

EU Member State	E-Privacy Directive Implemented into local law?	Regulatory Guidance Issued?	Current Position (Legal, enforcement and regulatory position)	Meaning of Consent	Does local regulator interpret the law as requiring prior opt-in?	a) Applicable Legislation b) Regulatory Guidance c) Authority Responsible for implementation
<p><b>UNITED KINGDOM</b></p> <p>DLA Piper Contacts:  <b>Cameron Craig</b>  T +44 20 7796 6574  cameron.craig@dlapiper.com</p> <p><b>Paul McCormack</b>  T +44 20 7796 6140  paul.mccormack@dlapiper.com</p>	Yes	Yes (in May 2011, December 2011 and May 2012)	<p>Implemented into UK law with effect from 26 May 2011.</p> <ul style="list-style-type: none"> <li>Amendments follows the wording of the E Privacy Directive closely and leaves the detailed compliance requirements to be clarified by the Information Commissioner’s Office (“ICO”).</li> <li>It had been widely anticipated that the ICO would indicate in its guidance that browser settings could be used to obtain the necessary consent. The ICO has made it clear that businesses should not rely on users’ browsers settings as a way of obtaining consent to comply with the new law – or at least not yet.</li> <li>Website operators were given a 12 month “lead in period” to develop the ways in which they use cookies to comply with the new rules (therefore commencing on 26 May 2011 and expired on 25 May 2012).</li> <li>On 25 May 2012, the ICO issued revised guidance to clarify and reaffirm that implied consent can be relied upon as a valid form of consent (rather than explicit opt-in consent).</li> </ul>	<ul style="list-style-type: none"> <li>Strictly speaking, ‘prior’ explicit consent is required.</li> <li>However, implied consent will also be a valid form of consent under certain circumstances.</li> <li>Implied consent means consent which “specific and informed” and an “indication of wishes”. This means that consent can be inferred by a user’s actions (e.g. the user is given clear and relevant information about the cookies that are used, and on that basis decides to click through and continue to use the site).</li> </ul>	<p>Yes, but can also rely upon implied consent (which means not necessary to obtain an explicit acknowledgment) (e.g. tick box or click accept).</p> <p>It is possible to rely on continued use of the website as an indication of implicit consent, subject always to the requirement to provide relevant, clear and comprehensive information.</p>	<p>a) The Privacy and Electronic Communications (EC Directive) Regulations 2003, as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011;</p> <p>b) <a href="http://www.ico.gov.uk/news/blog/2012/~-/media/documents/library/Privacy_and_electronic/Practical_application/cookies_guidance_v3.ashx">http://www.ico.gov.uk/news/blog/2012/~-/media/documents/library/Privacy_and_electronic/Practical_application/cookies_guidance_v3.ashx</a>; and</p> <p>c) Information Commissioner’s Office.</p>

# OPINION ON EXEMPTIONS TO CONSENT

The Article 29 Working Party (“**WP29**”) was established under the EU Data Protection Directive (Directive 95/46/EC) and is an independent advisory body which advises on issues of data protection and privacy. The WP29 publishes various opinions on data protection and privacy law. Their opinions supplement the law and relate to its interpretation and although not legally binding, are generally likely to be persuasive.

On 7 June 2012, WP29 adopted opinion 4 of 2012 addressing the meaning of the “**cookie consent exemption**” (WP194) (“**Opinion**”). The crux of the cookie law is the provision of clear information and obtaining consent from users or subscribers. The Opinion aims to clarify the types of cookies (or similar technologies) which would fall within the exemptions set out under the E-Privacy Directive and provides examples of how various circumstances would be treated under the new law.

## EXEMPTIONS A AND B

The Opinion confirms that there are two key exemptions (referred to as “**criterion**”) under which the requirement of informed consent to the use or storage of cookies (or similar technologies) may be waived. These Criterion are:

- **Criterion A:** the cookie is used “for the sole purpose of carrying out the transmission of a communication over an electronic communications network”; and
- **Criterion B:** the cookie is “strictly necessary in order for the provider of an information society service [“**ISS**”] explicitly requested by the subscriber or user to provide the service”.

The WP29 has made it clear that in relation to transmitting a communication, the types of processing which may be done under Criterion A does not leave much room for interpretation as the transmission of the communication must be impossible without the use of the cookie, i.e. absolutely necessary. The Opinion makes it clear that under Criterion B, the ISS must have been specifically requested **by the user** which means that the user provided a positive or explicit action to request the service.

## COOKIES WHICH DO FALL WITHIN AN EXEMPTION

The Opinion says that the following cookies may be exempted from informed consent under certain conditions:

1. **User-input cookies:** used to remember user’s input (e.g. a shopping cart), for the duration of a session or persistent cookies limited to a few hours in some cases (*Criterion B*);
2. **Authentication cookies:** used to identify the user once logged in/authentication purposes, where essential for this purpose will be exempt (*Criterion B*);
3. **User centric security cookies:** used to detect authentication abuses, for a limited persistent duration (*Criterion B*);
4. **Multimedia content player session cookies:** such as flash player cookies, for the duration of a session, provided these “flash” or other cookies do include additional information (*Criterion B*);
5. **User Interface customization cookies:** (e.g. language preferences or result display), where used for the duration of a session (*Criterion B*);
6. **Third party social plug-in content sharing cookies:** (e.g. social plug-in modules to integrate social networking into the website) for “logged-in” members of a social network (but the exemption will not extend to “logged-out” members) (*Criterion B*); and
7. **Load balancing session cookies:** used to distribute the process of web server requests of a pool of machines (instead of just one), for the duration of session where necessary to carry out the communication over the network (*Criterion A*).

## COOKIES WHICH DO NOT FALL WITHIN AN EXEMPTION

The Opinion says that the following cookies *will not* fall within an exemption from informed consent under certain conditions:

1. **Social plug-in “tracking” cookies:** used to track individuals for additional purposes (other than being “logged-in”) such as behavioural advertising, analytics or market research, will not fall within an exemption;
2. **Third party advertising:** such as behavioural advertising, requires consent (and will not fall within an exemption); and
3. **First party analytics:** used for measuring websites, although “strictly necessary” for the website operator, will not be strictly necessary to provide the functionality requested by the user (or subscriber) and will therefore *not* fall within an exemption;

## KEY CONSIDERATIONS WHEN APPLYING AN EXEMPTION

- A) **The View of the User:** When applying criterion B (*the strictly necessary exemption*), the important point is to examine what is strictly necessary “*from the point of view of the user and not the service provider*”.
- B) **Multiple Purpose Cookies:** Cookies used for several purposes can only benefit from an exemption to informed consent if “*each distinct purpose individually benefits from such an exemption.*”
- C) **First Party Cookie:** First party session cookies are far more likely to be exempted from consent than third party persistent cookies.
- D) **Purpose of the Cookie:** the **purpose** of the cookie should always be the basis for evaluating if the exemption can be successfully applied rather than a technical feature of the cookie.



# COOKIE AUDITS

## STEP 1 – COOKIES AUDIT

Businesses should begin identifying the cookies (and similar technology) which are used by their website. A “cookie audit” should be undertaken with the assistance of your IT department/specialist legal advisors. Cookie audits should include a review of the types of cookies used by the website; the life span of such cookies; and how intrusive the cookies are.

## STEP 2 – MAP OUT COMPLIANCE OPTIONS

Once the company understands the cookies which its website(s) use, they must then consider the options available to them in order to comply. These might include the options set out in the UK regulator’s guidance, for example: pop-ups; terms and conditions; settings led consent; feature led consent; and browser settings. The “strictly necessary” exemption available under the rules should also be considered, and companies should look to local regulator guidance and also the WP29 Opinion (as referred to above) when applying this exemption.

## STEP 3 – IMPLEMENTATION

In order to ensure that enforcement action is not taken against you by the applicable EU privacy regulator, you need to check when your compliance method must be in place. The deadline for compliance has expired in many European jurisdictions, therefore companies must act now to avoid any possible enforcement action.

## STEP 4 – ADDITIONAL CONSIDERATIONS AND STEPS

When conducting a cookie audit, you should also consider and undertake the following:

- **Due Diligence:** conduct due diligence of ad network/metrics partners and vendors before contracting;
- **Click wrap agreements:** make sure your business never signs click wrap agreements without legal review;
- **Effective contracts:** bind your partner to: a) comply with applicable laws; b) clear and conspicuous disclosure; c) opt in/opt out; d) flow through terms to vendors; and e) audit rights;
- **Post contract monitoring:** is your partner fulfilling its contractual promises?
- **Test/Evaluation Agreements:** always check/test agreements against legal requirements and your Privacy Policy. Reviews become long term arrangements.





# COOKIES IN THE UNITED STATES

Please note that organisations that do business in the United States should augment their cookie audit to examine specifically the use through their websites by their own organisation or third party advertisers or ad networks of Flash cookies (LSOs) or other tracking mechanisms that continue to function after a user has set his or her browser to reject tracking cookies. More than 50 class action lawsuits have been filed in the U.S. targeting those cookie practices.

DLA Piper will provide a further alert discussing these U.S. specific risks.



This publication is intended as a general overview and discussion of the subjects dealt with. It is not intended to be, and should not be used as, a substitute for taking legal advice in any specific situation. DLA Piper accepts no responsibility for any actions taken or not taken on the basis of this publication. If you would like further advice, please speak to your DLA Piper contact.

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