ICC United Kingdom
International Chamber of Commerce
The world business organization

ICC UK Cookie guide

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Introduction

In line with recent changes in European legislation, UK law now requires website operators to ask for a website user's permission when placing certain kinds of cookie on their devices for the first time.[1] Where consent is required, the law states that it should be "informed consent". This increases the onus on website operators to ensure that visitors understand what cookies are and why website operators and others want to use them.

This guide aims to help both website operators and website users come to terms with the new law by placing cookies into four categories, based on their function.

It is hoped that this will:

- Help website operators categorise the cookies they use and assist them in selecting an appropriate method of obtaining informed consent to the use of cookies from users of their websites.
- Assist communication with website users by giving them standard notices explaining what cookies are and how they are used on the websites they visit.

This guide is designed to help website operators to provide information to users in language they can understand and enable users to make an informed choice. Wide adoption of standard language will also, it is hoped, reduce the learning journey of users across websites.

ICC UK will update this guide on a regular basis to include further developments in the regulation of cookies and examples of best practice in complying with UK law.

Since the publication of the First Edition of this guide, the Information Commissioner's Office (ICO) has published updated detailed guidance on the law and a number of other organisations have published information about the use of cookies by businesses: see the Further Reading section at the end of this guide. The ICO's guidance contains useful information on the practical implications of the new law and how to comply with it, including recommendations for a cookie audit as the first step in a compliance strategy.

The ICC UK guide is not a statement of the law and does not constitute legal advice. Website operators are responsible for their own compliance strategies, depending on the cookies they use and the nature of the website. ICC UK does not endorse any particular method for gaining website users' consent.

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1 Regulation 6 of the UK Privacy and Electronic Communications Regulations 2003 (PECR) states that 'a person shall not store or gain access to information stored, in the terminal equipment of a subscriber or user unless the subscriber or user of that terminal equipment is provided with clear and comprehensive information about the purposes of the storage of, or access to that information and has given his or her consent'.

Part 1: Guidance for website operators

What is the ICC UK Cookie guide?

The ICC UK Cookie guide is a tool to help website operators obtain informed consent from their visitors and comply with the new rules governing the use of cookies.

By improving the quality and accessibility of information about cookies, the ICC UK Cookie guide will:

- help website operators identify the types of cookies they use and explain to the general public the types of cookies used on their website; and
- help website users become familiar with the uses of cookies so they can make informed decisions about which cookies they want on their devices.

What is in the guide?

The guide is based on the categorisation of cookies, their functions and what they are used for. This categorisation may be subject to change as ICC UK consults more widely with stakeholders, but to date four categories have been identified: (1) strictly necessary cookies, (2) performance cookies, (3) functionality cookies.

Part 2 of the guide sets out explanations intended for website users of each category of cookies. The guide aims to state as clearly as possible what each category of cookies is designed to do, so that website users can understand its purpose easily.

Part 3 of the guide sets out additional technical information and definitions for website operators, to help them compile an inventory of the cookies used on their site and to help categorise them.

Part 4 of the guide contains some examples of how consent might be obtained by website operators, where necessary, from website users for each category of cookie. Consent for use of cookies can be obtained in many ways, and although Part 4 of the guide is based on current guidance produced by the ICO, it is not prescriptive.

There is a list of references to useful sources of information in the Further reading section at the end of the guide.

The changes to the law also apply to other technologies that store or retrieve browsing information: see Part 2 of the guide for more details. However, the focus of the guide is solely on cookies and other technologies are not covered in this version of the guide. Future editions of the guide may include other technologies if there is sufficient demand.

What is the ambition of the guide?

If the guide is widely adopted by website operators, users will be exposed to consistent information about cookies. Widespread adoption of the guide should ensure that users will become familiar with the typical uses of the various types of cookies. Over time, users will have a better understanding of what cookies are present on any website they visit that uses the guide. By using the guide in conjunction with a website operator's chosen method of gaining consent, it is hoped that users will more often consent to the use of the cookies on the site because they will have a better understanding of how and why they are being used.

Layering of information

The guide is intended to help provide information to website users in layers. These layers are progressively more detailed, allowing those users who desire more information on the cookies used on a site to access that information, whilst not overwhelming less technically minded users with excessive or complex information.

The initial layer of information provided by the guide is designed to be simple and straightforward, and include information about

the definitions of the categories in the guide. This information could potentially be provided in conjunction with icons used on the site (see the section below on iconography for more details), although it is up to the individual website operator to decide if icons are appropriate, necessary and useful. ICC UK is not prescribing the use of icons but recognises that some organisations are using them, and others will no doubt consider their use. This information is set out in Part 2 of the guide.

A second layer giving more detail about the operation of cookies on the website should be easily accessible, either through a privacy policy or some other notice, such as a banner overlay on the website. External websites like **www.allaboutcookies.org** and **www.youronlinechoices.eu** can also help website operators provide further context to their users: see the Further Reading section at the end of this guide.

Some website owners are adopting further layers of information, for instance in the form of 'tool tips' that are displayed when a user's mouse rolls over the relevant icon or part of a privacy notice. This text has to be very brief because of the medium used. Example tool tips for each category of cookies are set out in Part 2 of this guide.

How the guide can be used:

The guide can help website operators to educate their users and make it easier to gain their informed consent for the use of cookies on their websites. If information given to users is consistent across different websites, users will quickly become familiar with what cookies are used and why.

The way in which website operators use the guide to assist in gathering consent from users will depend on the cookies concerned and the nature of the website. ICC UK is not prescribing nor endorsing any particular method for gaining website users' consent. Instead, the ICC UK Cookie guide is intended to make it easier for the user to access information about cookies and be in an informed position to give consent in whatever way the website operator feels will constitute a specific and informed indication of the user's wishes.

Some suggestions for methods of obtaining consent are outlined by the ICO in its updated guidance of May 2012 (listed in the Further Reading section of this guide). In summary these are:

- obtaining consent in the course of acceptance of website terms and conditions;
- settings-led consent — that is, obtaining consent as users select website settings;
- feature-led consent — that is, obtaining consent as users register for or "switch on" website features;
- function-led consent — that is, consent obtained as a result of users initiating or activating website functions; or
- notice and choice mechanisms, such as sensitively deployed pop ups or header bars.

The ICO has also confirmed that, in certain circumstances, website operators can rely on implied consent. Implied consent must still be specific and informed. It requires a shared understanding between a website operator and a website user as to its meaning. Further guidance on this issue is set out in Part 4.

Browser-based compliance

The use of a browser's settings is specifically identified in the e-Privacy Regulations as a means of giving consent. The Government and the ICO have said that browsers will be an important part of giving users the increased access, information and control required by the law. However, compliance with the law will only be achieved if enhanced browser settings that allow users to express consent to cookies being set are used in conjunction with the supply of adequate information to users, in a timely fashion, about the cookies for which consent is sought.

The ICO has said that it does not consider the browsers currently available on the market adequately allow users to express consent so the Government has been working with browser manufacturers to see if browsers can be enhanced to give users easier access to settings and to make those settings as informative and easy to use as possible. If and when browser manufacturers are able to release updated versions of their products which enhance a user's ability to control their privacy settings, ICC UK would be happy for browser manufacturers to include the guide in such products. Using browsers as a mechanism for obtaining consent could be very helpful for businesses because as the means by which most users access the internet, browsers are the most natural place for a user to signify consent. However, businesses should not rely on browsers alone and should follow the advice from the ICO in conjunction with the advice given in the rest of this guide to ensure their users are properly informed about the cookies used by a website or other information that may be placed or accessed on their machine.

It should also be noted that if and when browsers with enhanced privacy settings are released it will take time for users to adopt the latest versions. This guide is designed as a tool to aid compliance in the absence of enhanced browsers, but will continue to be a relevant tool once enhanced browsers are available.

Iconography and the advertising industry's EU framework

Use of the guide and its categories is not dependent on the use of icons, however, ICC UK considers that the use of icons will help to develop users' understanding of why different types of cookie are used by website operators, which is consistent with the view of the ICO in its guidance.

Iconography is a key part of the advertising industry's EU Framework / Best Practice Recommendation on Online Behavioural Advertising. At the heart of this Framework / Best Practice Recommendation are principles to offer internet users greater transparency and control over data collection and use for this purpose. To achieve this, the initiative uses a symbol or icon in or around an advert or on the website itself. The icon links to mechanisms of control, such as preferences managers and privacy dashboards as well as a pan-EU website — **www.youronlinechoices.eu** — where the user can find out more about this type of advertising, how to safeguard his or her privacy including where to turn off behavioural advertising. It is a means to inform internet users as well as provide easy-to-access controls in a consistent way across Europe. Further details on the initiative can be found at: **www.youronlinechoices.eu/goodpractice.html**.

The Internet Advertising Bureau (IAB) takes the view that the icon associated with this initiative is a good example of how notice and control can be given to internet users in a contextual way. It is expected by the IAB that the icon will quickly become a widely-recognised symbol of transparency and control for consumers. The IAB believes that the high visibility of the icon in adverts and on websites (with billions of icons expected to be displayed per month) will help create consumer awareness, trust and confidence. The initiative is part of what the UK Government describes as an 'ecology of solutions', supporting greater transparency for internet users on data collection and use for this and other purposes. The IAB strongly encourages web publishers (as well as advertisers and agencies) to ensure that their data partners (e.g. advertising networks / technology businesses) are part of this programme.

The EU Framework / Best Practice Recommendation is supported by all aspects of the advertising and media industry, as well as by the UK Government itself. The IAB is still in discussions with the EU authorities about the Framework / Best Practice Recommendation, and website operators should keep this situation under review.

In addition to the advertising icon, some businesses may choose, if they wish, to deploy the use of icons to support different uses of data collection and use.

Case study

Below are four icons designed by one of ICC UK's members, a large and well-resourced organisation, for use in its sophisticated compliance solution. The icons have been developed with the ICC UK categories in mind. They are simple, intuitive, and are an example of what businesses considering using icons might choose to follow.

There may be some benefits in using icons in conjunction with the ICC UK guide, which are closely linked to the user learning experience and effective mechanisms in gathering consent. What should be avoided is a proliferation of different icons.

These icons are provided under licence from BT plc

Exemptions to consent

It should be noted that there are two exemptions to the consent requirement. The law states that informed consent is not required in relation to technologies that are:

- Solely used to transmit communications over an electronic communications network; or
- Strictly necessary to provide a service explicitly requested by the user.

The first of these exemptions is unlikely to be relevant to most website operators and it is not considered further in this guide. The meaning of the second exemption has been the subject of some commentary, including an Article 29 Working Party opinion (the "Article 29 Opinion"). The applicability of this "strictly necessary" exemption is considered further in Part 2.

On what basis will UK law apply?

Many websites do not confine their operations to one country. The law relating to cookies has been formulated at European level but has to be enacted on a country by country basis, by the national legislatures of each country of the European Union.

In the UK, the basis for the territorial application of the new cookie rules is similar to the one being used for the Data Protection Act 1998. So, the law will apply to website operators if:

- They are established in the UK; or
- They process personal data by means of equipment located in the UK. Storing or accessing cookies on a user's computer will trigger the application of this rule if the cookies involve the processing of personal data.

Note that the applicable law test might be different in other EU Member States (eg. the rules on cookies can apply by virtue of where the user is based). For companies with pan-European website operations, this element must therefore be taken into consideration before rolling out cookie compliance solutions.

By way of illustration, some examples of how the law currently operates, are included in the table below:

Scenarios	Does the UK law apply?
1. Company ABC is established in the U.S. They have a branch branchoffice in the UK. They operate a website which stores or accesses cookies on users' devices. The website is a global platform which does not target a specific market/audience. The branch is involved in dealing with queries received via the platform.	**YES:** UK law will apply as the company is established in the UK. Company ABC will have to comply with the cookie requirements.
2. Company ABC is only established in the U.S. They operate a website which stores or accesses cookies on users' devices. Cookies are being used for aggregated analytic purposes and any data collected is anonymous. The website is a global platform which does not target a specific market/audience.	**NO:** UK law will not apply as the company is not established in the UK and no personal data is being used in connection with cookies
3. Same as scenario 2, but with cookies being used to profile customers at an individual level.	**YES:** Theoretically, UK law will apply as the use of cookies involves processing of personal data. However, there would be questions about how the ICO can effectively exercise jurisdiction over company ABC, which is only based in the US. Company ABC shouldwill have to comply with the cookie requirements.
4. Company XYZ is established in the UK. They have a subsidiary in the Czech Republic (EU Member State). They operate a website which stores or accesses cookies on a users' devices. The website is a global platform which does not target a specific market. All the decisions with respect to the use of cookies are made from the UK where the marketing/CRM team is located.	**YES:** UK law will apply as the company is established in the UK. However, there is no need to comply with the Czech cookie rules as the Czech Data Protection Authority only has competence over a controller that processes data within the territory of the Czech Republic. Here, this is not the case as decisions with respect to cookies are taken in the UK.
5. Same as scenario 4 but instead of being located in the Czech Republic the company's subsidiary is located in the Netherlands (EU Member State). Moreover, the website is aimed wholly, or partially aimed, at a Dutch audience.	**YES:** UK law will apply, but Dutch law will also apply. Indeed, the applicability of the Dutch cookie regime is determined by the audience to at which the company website is aimed. Company XYZ will therefore have to comply with both cookie regimes.

Responsible use of the guide

Use of this guide is entirely voluntary and its effectiveness will depend on widespread adoption by website operators. Adoption of this guide will create expectations in the minds of users and it is important that website operators use this guide consistently and properly, in particular by not miscategorising or mis-describing cookies. This guide is therefore a useful tool to aid compliance.

Part 2: Categories of cookies

This part of the guide contains a simple definition of cookies and their importance for users. It also contains the descriptions of each category of cookie that could be given to users, together with guidance for website operators on each category. The ICO guidance contains further examples of how to draw users' attention to information about cookies.

It is critical that, where consent is required for the use of cookies, any consent obtained is informed consent. The provision of information that is understandable, easily accessible and consistent will help this process. The notices set out below help to inform consent in this way.

Cookies that do not fit into the guide categories:

As mentioned in part one there are four initial categories, which form the basis of the guide but are not definitive. We are keen to ensure that these categories do not become entrenched but rather evolve as industry discovers cookies that need more accurate categorisation. As such ICC UK recognises that there will be cookies that do not fit into the categories that have been set out, either in part or at all. Where a cookie does not fit into an appropriate category based on the guidance given in this Part 2 and the technical notes in Part 3 of this guide, website operators will have to devise their own descriptive wording and consent approach. ICC UK will conduct a monthly review of the categorisation and in partnership with interested parties to ensure that the categories in the guide are both relevant and useful. Website operators may notify ICC UK with details of the relevant cookies and if there is sufficient demand ICC UK may amend the categories to enable such cookies to be placed within the existing categories, or create a new category.

Cookies that fit into multiple categories

It is up to website operators to appropriately place cookies in the correct category based on what function those cookies have and their use. However, there may be cookies that fit into all/several of the categories in the guide as a result. For instance where a cookie can be used to change website functionality, and is also used for delivering online behavioural advertising, the cookie must be placed into both category 3 and category 4 and consent must be sought in relation to both categories/uses.

Case study:

One household name, a website operator which provides online recipes, uses a third-party cookie which fits into several of the categories described in the guide.

The third party, on behalf of the website operator, wraps adverts around recipes on the site, and then uses the cookie to track the adverts and keep count of the number of times that each advert is viewed by users. The cookie also prevents a user from being served the same advert more than once. The cookie does not collect information that would identify a user.

Based on the purposes for which this cookie is used, it should be categorised as a performance cookie (category 2), a functionality cookie (category 3) and a targeting or advertising cookie (category 4) (for more details about each category, see detailed guidance below).

Consent will need to be obtained from users of the website in respect of all three categories. However, given that the cookie is only a category 4 cookie to the extent that it is used to track the number of times an advert has been viewed (see parts 2 and 3 for details of category 4), the website operator will only need to obtain consent from users in respect of this activity and not other uses that are covered under category 4.

What is a cookie?

Cookies are text files containing small amounts of information which are downloaded to your device when you visit a website. Cookies are then sent back to the originating website on each subsequent visit, or to another website that recognises that cookie. Cookies are useful because they allow a website to recognise a user's device. You can find more information about cookies at: **www.allaboutcookies.org** and **www.youronlinechoices.eu** for a video about cookies visit **www.google.co.uk/goodtoknow/data-on-the-web/cookies**

Cookies do lots of different jobs, like letting you navigate between pages efficiently, remembering your preferences, and generally improve the user experience. They can also help to ensure that adverts you see online are more relevant to you and your interests.

The cookies used on this website have been categorised based on the categories found in the ICC UK Cookie guide. A list of all the cookies used on this website by category is set out below.

Guidance for website operators

The law applies to cookies and also to similar technologies for storing or retrieving information such as local shared objects (often referred to as "flash cookies"), web beacons or web bugs (including transparent or clear gifs). These other technologies are not specifically covered by this guide.

It is up to website operators that use these technologies to develop their own statements and consent methodologies. The principles and the wording in the guide may be adapted for this purpose. Website operators will need to discuss with relevant parties e.g. their advertising networks what technologies they are using and how consent from website users may be captured so that the website operators can produce appropriate consent wording in respect of these technologies.

Although the decision has been made not to cover other technologies in detail in this version of the guide, detailed guidance may be provided for other technologies in subsequent versions of the guide depending on changes in approach and the use of these other technologies.

Category 1: strictly necessary cookies

Notice for users

These cookies are essential in order to enable you to move around the website and use its features, such as accessing secure areas of the website. Without these cookies services you have asked for, like shopping baskets or e-billing, cannot be provided.

TOOL TIP▸ These cookies enable services you have specifically asked for.

Guidance for website operators

User consent is not required for the delivery of those cookies which are strictly necessary to provide services requested by the user. However, it is important to give users the opportunity to understand these cookies and the reasons they are used.

The 'strictly necessary' category is narrowly defined in the UK due to the wording of the law. The view of the ICO is that only a small range of activities can be categorised as 'strictly necessary' and the use of the cookie must be related to a service provided on the website that has been explicitly requested by the user. For a list of examples, see Part 3.

Category 2: performance cookies

Notice for users

These cookies collect information about how visitors use a website, for instance which pages visitors go to most often, and if they get error messages from web pages. These cookies don't collect information that identifies a visitor. All information these cookies collect is aggregated and therefore anonymous. It is only used to improve how a website works.

TOOL TIP▸ These cookies collect anonymous information on the pages visited.

Guidance for website operators

Web analytics that use cookies to gather data to enhance the performance of a website fall into this category. For example, they may be used for testing designs and ensuring a consistent look and feel is maintained for the user. They may also be used to track the effectiveness of 'pay-per-click' and affiliate advertising, but where the same cookies are used for re-targeting they must be included in category 4 as well. This category does not include cookies used for behavioural/ targeted advertising networks.

The Article 29 Opinion (footnote 2) supports the view that first party analytics cookies are not exempt from the consent requirement, although the Article 29 Opinion acknowledges that such analytics cookies are less intrusive. The approach to consent in Part 4 reflects that.

Category 3: functionality cookies

Notice for users

These cookies allow the website to remember choices you make (such as your user name, language or the region you are in) and provide enhanced, more personal features. For instance, a website may be able to provide you with local weather reports or traffic news by storing in a cookie the region in which you are currently located. These cookies can also be used to remember changes you have made to text size, fonts and other parts of web pages that you can customise. They may also be used to provide services you have asked for such as watching a video or commenting on a blog. The information these cookies collect may be anonymised and they cannot track your browsing activity on other websites.

TOOL TIP▸ These cookies remember choices you make to improve your experience.

Guidance for website operators

These cookies are used to remember customer selections that change the way the site behaves or looks. It might also include cookies that are used to deliver a specific function, but where that function includes cookies used for behavioural/targeted advertising networks they must be included in category 4 as well as this category.

Category 4: targeting cookies or advertising cookies

Notice for users

These cookies are used to deliver adverts more relevant to you and your interests They are also used to limit the number of times you see an advertisement as well as help measure the effectiveness of the advertising campaigns. They are usually placed by advertising networks with the website operator's permission. They remember that you have visited a website and this information is shared with other organisations such as advertisers. Quite often targeting or advertising cookies will be linked to site functionality provided by the other organisation.

TOOL TIP▸ These cookies collect information about your browsing habits in order to make advertising relevant to you and your interests.

Guidance for website operators

The view of the ICO is that the person setting the cookie is primarily responsible for compliance with the requirements of the law, which in this case may be a third party. However in practice, operators of consumer-facing websites may be best positioned to obtain consent. Where third-party cookies are set through a website, both the third party and the website operator will have a responsibility for ensuring users are clearly informed about cookies and for obtaining consent. In practice it is obviously considerably more difficult for a third party who has no direct interface with the user to achieve this.

Where third-party cookies are involved, chains of responsibility can become complicated, but it is important to ensure that website operators and third parties work together to provide the user with as much information as possible in order to allow the user to make an informed choice as to whether to accept cookies from the third party. Website operators will not necessarily be aware of the exact type of cookies placed on their websites by third parties. This means that website operators and third parties must work together to ensure that the first party has complete information about the cookies used on that site and expressly agree the way in which consent to third-party cookies will be obtained from users and communicated to all parties.

Targeting or advertising cookies are placed for the benefit of website operators, either by third parties at the direction of website operators or alternatively by website operators using third-party functionality on their website. Careful analysis of your cookie audit will be required to establish the correct position.

Website operators should be aware that targeting or advertising cookies may be used for a range of purposes such as market research and analytics generally as well as online behavioural advertising. It is up to website operators that use category 4 cookies for such other purposes to develop their own statements and consent methodologies, adapting the principles and the wording in the guide accordingly.

The Article 29 Opinion (footnote 2) supports the view that third party cookies that are used to track user behaviour to enable the delivery of targeted or online behavioural advertising are not exempt from the consent requirement.

Part 3: Technical notes and definitions

This part contains technical notes and definitions to assist in the categorisation of each cookie on their site by website operators.

Category 1: strictly necessary cookies

Generally these cookies will be essential first-party session cookies, and if persistent or third party, there should be a good justification for this.

Not all first-party session cookies will fall into the 'strictly necessary' category for the purposes of the legislation. Strictly necessary cookies will generally be used to store a unique identifier to manage and identify the user as unique to other users currently viewing the website, in order to provide a consistent and accurate service to the user.

Examples include:

- Remembering previous actions (e.g. user entered text, or purchases added to "carts") when navigating back to a page in the same session.
- Managing and passing security tokens to different services within a website to identify the visitor's status (e.g. logged in or not).
- To maintain tokens for the implementation of secure areas of the website.
- To route customers to specific versions/applications of a service, such as might be used during a technical migration.
- Multimedia content player session cookies (such as flash player cookies) for the duration of a session.
- Load balancing session cookies for the duration of a session.
- Third-party social plug-in content sharing cookies (for members of a social network who have already logged in) which do not track users.

These cookies will not be used

- To gather information that could be used for marketing to the user.
- To remember customer preferences or user ID's outside a single session (unless the user has requested this function).

Category 2: performance cookies

These cookies can be first or third party, session or persistent cookies. To fall within this category their usage should be limited to performance and website improvement.

Examples include:

- Web analytics — where the data collected is limited to the website operator's use only, for managing the performance and design of the site. These cookies can be third-party cookies but the information must be for the exclusive use of the publisher of the website visited.
- Ad response rates — where the data is used exclusively for calculating response rates (click-through rates) to improve the effectiveness of advertising purchased on a site external to the destination website. If the same cookie is used to retarget adverts on a third-party site this would fall outside the performance category (see Category 4)
- Affiliate tracking — where the cookie is used to let affiliates know that a visitor to a site visited a partner site some time later and if that visit resulted in the use or purchase of a product or service, including details of the product and service purchased. Affiliate tracking cookies allow the affiliate to improve the effectiveness of their site. If the same cookie is used to retarget adverts this would fall outside the performance category (see Category 4)
- Error management — Measuring errors presented on a website, typically this will be to support service improvement or complaint management and will generally be closely linked with web analytics.

- Testing designs — Testing variations of design, typically using A/B or multivariate testing, to ensure a consistent look and feel is maintained for the user of the site in the current and subsequent sessions.

These cookies should not be used to re-target adverts, if they are, they should be placed in category 4 as well.

Category 3: functionality cookies

These cookies can be first party, third party, session or persistent cookies. These cookies will typically be the result of a user action, but might also be implemented in the delivery of a service not explicitly requested but offered to the user. They can also be used to prevent the user being offered a service again that had previously been offered to that user and rejected.

Examples include:

- Remembering settings a user has applied to a website such as layout, font size, preferences, colours etc.
- Remembering a choice such as not to be asked again to fill in a questionnaire.
- Detecting if a service has already been offered, such as offering a tutorial on future visits to the website.
- Providing information to allow an optional service to function such as offering a live chat session.
- Fulfilling a request by the user such as submitting a comment.

These cookies should not be used to re-target adverts, if they are, they should be placed in category 4 as well.

Category 4: targeting cookies or advertising cookies

These cookies will usually be third-party cookies, although if a user is visiting the advertising network's own website it is technically possible these could be first party. They will always be persistent but time-limited cookies. These cookies can be associated with services provided by the third party but this is not always the case. These cookies contain a unique key that is able to distinguish individual users' browsing habits or store code that can be translated into a set of browsing habits or preferences using information stored elsewhere. Generally speaking, the privacy statement should indicate if the cookie is being used as part of an advertising network. Cookies may also be used to limit the number times a user sees a particular ad on a website and to measure the effectiveness of a particular campaign.

Examples include:

- Cookies placed by advertising networks to collect browsing habits in order to target relevant adverts to the user. The site the user is visiting need not actually be serving adverts, but often this will also be the case.
- Cookies placed by advertising networks in conjunction with a service implemented by the website to increase functionality, such as commenting on a blog, adding a site to the user's social network, providing maps or counters of visitors to a site.

Definitions

A number of terms used in this guide are defined below. These definitions are based on those used in the ICO guidance.

Affiliate — an affiliate is a website operator who can send traffic to a website using links from another website. The affiliate is paid an agreed commission from the referral.

First and third-party cookies — whether a cookie is 'first' or 'third' party refers to the domain placing the cookie. First-party cookies are those set by a website that is being visited by the user at the time — the website displayed in the URL window. Third-party cookies are cookies that are set by a domain other than that of the website being visited by the user. If a user visits a website and another entity sets a cookie through that website this would be a third-party cookie.

Persistent cookies — these cookies remain on a user's device for the period of time specified in the cookie.

Session cookies — these cookies allow website operators to link the actions of a user during a browser session. A browser session starts when a user opens the browser window and finishes when they close the browser window. Session cookies are created temporarily. Once you close the browser, all session cookies are deleted.

Part 4: Consent wording

This part contains examples of wording for obtaining users' consent to the use of cookies falling within the categories set out in Part 2. The ICO guidance contains further examples of how to obtain users' consent to the use of cookies in practice.

Website operators should also provide for withdrawal of consent previously given by users to the use of each category of cookies. There is no prescribed form or process for this.

Implied consent

The ICO has said that in certain circumstances implied consent is an appropriate method for website operators to gather consent for the use of cookies. In the ICO's latest guidance there are detailed notes on what is required for implied consent to be successfully relied on, and these should be a website operator's primary resource when developing a solution. However, below are some key extracts from the ICO's guidance on providing notices when relying on implied consent.

"In compliance terms... this difficulty arises because although the person setting the cookie may think that there is an inference of consent, ***without information being given to the user, it is unlikely that they will understand that they are giving any sort of agreement****."* — (share understanding with the user).

"users are unaware of how much depends on their device and their activity being used to facilitate the provision of online services. ***The key to the validity of implied consent in this context is the narrowing of this gap****."* — (improve the user's knowledgeknowledge of the user).

"User actions can only give a strong enough indication if there is a shared understanding of what is happening. An example might be that the user is given a clear and unavoidable notice that cookies will be used and on that basis decides to click through and continue to use the site" — (obvious and prominent unavoidable engagement).

There are three things that a notice shouldmust do if implied consent is going to work effectively. 1. Share understanding with the user about what cookies are 2. Improve the user's knowledge 3. Be obvious and prominent.

In addition it would be a good idea to consider whom your audience is. If you run a website that is aimed at technology experts, and you can demonstrate that fact to the ICO, then it is more likely that a solution could relying on implied consent and theits notice accompanying the consent method mightwould require less detailed information, shorter notices and less obviousness. The notice should still satisfy the requirements set out in the ICO's guidance but it can more specifically meet the information needs of your audience. Where you can demonstrate that your audience is likely to have a very high knowledge of what is being asked of them, implied consent should in theory be less burdensome.

Where a website is targeting non-technically sophisticated users notices for implied consent might need to be more detailed. It is clear from the ICO that generic notices are not sufficient for implied consent to be valid. In other words the less sophisticated the user the more transparency and clarity is required.

The use of implied consent will most likely be acceptable to the ICO when used to gather consent for category 2 (Performance cookies) and category 3 (Functionality cookies). The use of implied consent for category 4 cookies (Targeting and Advertising cookies) is unlikely to be acceptable.

The ICO's latest guidance states that website operators can rely on implied consent in some circumstances. Broadly speaking, there are two requirements.

First, the consent to be implied must still be specific and informed. In other words, the website operator must tell users that a specific action on their part will be interpreted as their giving consent to the use of cookies. As for all cookie notices, the information must be clear, relevant and prominent.

Second, the user must take some action from which consent can be inferred. Website operators must be satisfied that the

user's action (for example navigating between pages page or clicking on a particular button) constitute at least an indirect expression of the user's consent to the setting of cookies and not just an indication of their explicit request for content or services.

The suggested notices in this Part 4 are intended to ensure that any implied consent is obtained in accordance with these principles.

Category 1: strictly necessary cookies

For those types of cookies that are strictly necessary, no consent is required.

Category 2: performance cookies

These cookies only collect information about website usage for the benefit of the website operator, consent for use of these types of cookies may be obtained in any of the ways outlined earlier in this guide, for instance in the terms and conditions of the site or when the user changes the settings for the site. The method used will depend on the nature of the website, and the precise function/use of the cookies involved.

Obtaining consent by functional use: Immediately after the notice in Part 2 above, place the words: "By using our [website][online service], you agree that we can place these types of cookies on your device."

Category 3: functionality cookies

As these cookies are site specific and are linked to user choices for using a site, consent for use of these types of cookies may be obtained in a number of ways, for instance when the user changes the settings for the site or selects an option, e.g. language or country. The method used will depend on the nature of the website, and the precise function of the cookies involved.

One option would be to use the same method as category 2:

Obtaining consent by implied consent or functional use: Immediately after the notice in Part 2 above, place the words: *"By using our [website][online service], you agree that we can place these types of cookies on your device."*

Or you may wish to opt for a different method (see below).

Obtaining "function" or "setting" led consent: At the point where the user selects the function or setting, add the following words: *"When you choose this [option][setting], you agree that we can place [customisation cookies][icon] on your device."*

Category 4: targeting or advertising cookies

These cookies collect the most information about users, so where the website operator is responsible for setting a targeting or advertising cookie it is important to obtain a clear informed consent from the user to their use. It is the party setting the cookie that is required by law to obtain the consent of the user but this is not always practical. Where a third party sets targeting or advertising cookies with the permission of the website operator, the website operator may be best placed to get consent for its use, even though it is the third party who is setting the cookie.

The ICO's Guidance says that each party must play their part and it is up to the website operator to ensure that the relationship with the third party is clear. It is up to individual companies to decide the most appropriate method of obtaining consent, dependent on the purpose for which the category 4 cookies are to be used and the specific circumstances they find themselves in. What is absolutely clear is that whatever mechanism is used, the user should be given a clear, informed choice.

Further reading

ICO guidance

For more background on the new law, the ICO published updated guidance in May 2012 on the new rules for using cookies which can be found at: **www.ico.gov.uk/for_organisations/privacy_and_electronic_communications/cookie_rules_prepare.aspx**

Information about cookies

Useful information about the technical aspects of cookies can be found at: **www.allaboutcookies.org**

Behavioural advertising and online privacy

A guide to behavioural advertising and online privacy has been produced by the internet advertising industry which can be found at: **www.youronlinechoices.eu**

The guide contains an explanation of the IAB's self-regulatory scheme to allow users greater control of the advertising they see.

From 4 February 2013, the Advertising Standards Authority (ASA) will require advertising networks and other 'third parties' to notify web users of ads delivered using Online Behavioural Advertising (OBA) and to give web users the choice to opt out of receiving such ads. This follows new rules introduced by the Committee of Advertising Practice (CAP) after thorough consideration by bodies representing the online advertising industry.

The Regulatory Statement can be found at:

www.cap.org.uk/News-reports/Media-Centre/2012/~/media/Files/CAP/Misc/Regulatory%20statement%20OBA.ashx

The rules can be found at:

www.cap.org.uk/News-reports/Media-Centre/2012/~/media/Files/CAP/Misc/New%20Online%20Behavioural%20Advertising%20rules.ashx

The help note can be found at:

www.cap.org.uk/~/media/Files/CAP/Help%20notes%20new/OBA%20Help%20Note%20for%20CAP.ashx

Implementation of the e-Privacy Directive across the EU

The E-Privacy Directive is in the process of being implemented across Europe on a country by country basis. Inevitably, there have been differences in the both the timing with which this has taken place and the way in which the Directive has been trans¬posed into national law between countries.

We have set out in a table our understanding of the situation in 12 countries in which the E-Privacy Directive will take or has already taken effect, which is available on the ICC UK website: www.international-chamber.co.uk

Please note that the situation in each country covered is quite fluid. The information in the table should be treated as general guidance and legal advice should always be sought on specific countries to ascertain the precise position at the time before acting in reliance upon any of the information in the table.

About ICC UK

ICC UK is the voice of international business in the UK.

We aim to further our members' interests by making it easier for them to trade internationally. We do this by working with governments and businesses worldwide to open up markets, establish a level playing field for enterprise, and promote sensible regulation.

ICC UK's Digital Economy Programme is a leading forum for shaping public policy and industry self-regulation on a range of digital issues—including data protection, Internet governance, cyber security and cloud computing.

ICC UK has worked with a range of data privacy experts and technical experts in developing this guide. In particular, we would like to thank the following for their extensive contributions: Robert Bond, Speechly Bircham; Mark Turner, Herbert Smith; Richard Cumbley, Linklaters; Edward Du Boulay, Herbert Smith; Simon Dawes, BT; Jane Hill, BT; Gabriel Voisin, Bird & Bird.

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