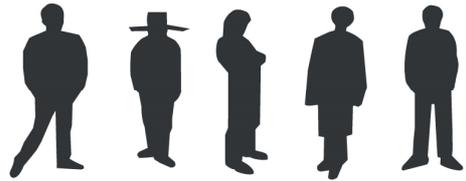


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Effektives Online-Marketing



The EU Cookie Law

Are things getting serious for the Advertising Industry in Germany?

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Directive 2009/136/EC of the European Parliament and of the Council

Since its adoption on November 25th, 2009, directive 2009/136/EC of the European Parliament and of the Council – often called the Cookie Law – has stirred intense discussions in the Member States of the European Union. Cookies are small text files that a website places on the user's device to store information. While websites have no memory and cannot communicate with each other, cookies allow visitors to login on one page, then move around to other pages and stay logged in, to name just one example. They allow users to set preferences for the display or language of a page, and for these to be remembered the next time he logs in. Additionally, cookies can monitor the pages users visit and allow advertisers to build an anonymised profile. When the user visits a site that shows an ad, advertisers can tailor it to the profile and show the right ad at the right time to the right person – this is known as behavioural advertising.

In the public view, cookies are often presented as a serious risk to an internet user's privacy. It is often overlooked that online marketing companies such as metapeople work transparent and according to data protection laws and do not create any person-related user profiles. Furthermore it is not mentioned that website contents are often financed by advertising activities.

From the European Parliament's point of view the directive serves to protect the privacy of internet users. Publishers are required to provide comprehensive information about the cookies to their sites visitors. The storage and processing of data is only allowed if visitors agree to it – this is called informed consent.

The directive obliges Member States to implement the obligations into national law until November 25th, 2011. While some states already transposed the directive into national law, other states have not. The German government for example has remained largely inactive and stated that the self-regulation approached by the advertising industry should be awaited before discussing

further measures. However, after the deadline for transposition of the directive has passed in May 2011, the Federal Commissioner for Data Protection and Freedom of Information (BfDI), Peter Schaar, announced that the directive is now directly applicable. Since Schaar's statement the discussion in Germany has rekindled.

In this paper metapeople discusses the core provisions of the directive. The terms of article 5 (3) of the directive are imposing new constraints for the storage of information in the World Wide Web. However it also provides considerable latitude for the implementation of the directive into national law. This has lead to a variety of different measures taken by the EU-member states, which metapeople will summarize in this overview. Particular attention is given to the developments in Great Britain and the Netherlands. The British government has implemented the directive in May 2011 and announced that the developed solution will provide a point of orientation for other EU-Member States. In the Netherlands the self-regulation measures of the advertising industry are discussed in view of the developments in Germany.

In the conclusion we provide an answer to the question if things are getting serious for the advertising Industry in Germany. Please note that the paper discusses current developments, but does not provide conclusive answers to juridical questions.

The Directive's core

On July 12th, 2002 the European Parliament adopted the directive 2002/58/EC on Privacy and Electronic Communications. After years of intense discussions an amendment of the directive was finally adopted on November 25th, 2009. The core of the directive 2009/136/EC is the article 5 (3). The article states:

„Member States shall ensure that the storing of information, or the gaining of access to information already stored, in the terminal equipment of a subscriber or user is only allowed on condition that the subscriber or user concerned has given his or her consent,

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The directive's core is the obligation to obtain an informed consent. Websites visitors must be provided with clear and comprehensive information about the used technology, the purpose of the data collection as well as the identity of the cookie setting party. Furthermore the consent must be obtained before the cookie is placed and/or information is stored.

having been provided with clear and comprehensive information, in accordance with Directive 95/46/EC, inter alia, about the purposes of the processing" (Article 5 (3)).

Websites visitors must be provided with clear and comprehensive information about the used technology, the purpose of the data collection as well as the identity of the cookie setting party. Furthermore the consent must be obtained before the cookie is placed and/or information is stored. This is called "Informed Consent". Article 5 (3) allows exemptions to the obligation of informed consent:

„This shall not prevent any technical storage or access for the sole purpose of carrying out the transmission of a communication over an electronic communications network, or as strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service" (Article 5 (3)).

In June 2012 an independent advisory group of the European Commission presented a document which includes specific proposals for possible exceptions. The Article 29-Working Party differentiates between **First Party-Cookies** and **Third Party-Cookies**:

(1) **First party cookies** are those cookies that are set by or on behalf of the website visited. They are used to store information provided by the websites visitor and help to remember users at a later point in time. First party cookies gather information about the use of onsite content and enable publishers to customise user experiences.

(2) **Third Party-Cookies** are set by a website other than the one the user is visiting. They are for example used to track visited pages and enable advertisers to target advertisements toward user preferences.

Especially Third Party-Cookies are often not absolutely necessary to provide the service requested by the website's visitor. However the distinction

between First Party-Cookies and Third Party-Cookies is insufficient to decide if there is a need to obtain an informed consent. The purpose and the specific implementation of each cookie must be assessed on a case-by-case base.

In the opinion of the Article 29 Working Group some cookies can be exempted from informed consent – such as "user-input" cookies (used to keep track of the user's input when filling online forms or a shopping cart), also known as session-id cookies, multimedia player session cookies and user interface customization cookies (for example language preference cookies to remember the language selected by a user). However, the obligation to provide information about the cookies remains unaffected.

Having presented the directive's core as well as possible exceptions from the informed consent obligation, the next chapter concentrates on the different implementation of the cookie law in the EU-member states.

Evaluation of the implementation of the directive in EU member states

EU-directives include precise timetables regarding the implementation periods for Member States. But even if a deadline for transportation into national law is not met, directives can still have a direct effect. Therefore a provision has to be clear and precisely stated. Looking at the implementation of the cookie law in Europe so far, member states have evidently used the latitude of article 5 (3) in different ways. Generally two procedures can be distinguished:

■ Directive implemented

Opt-in: Denmark, France, Great Britain, Lithuania, Netherlands, Austria, Sweden, Spain

Opt-out: Bulgaria, Finland, Luxembourg, Poland, Slovakia, Czech Republic, Hungary

■ Directive not implemented

Belgium, Estonia, Germany, Greece, Italia, Latvia, Norway, Malta, Portugal, Cyprus



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Two procedures can be distinguished to obtain an informed consent:

1) **Opt-in:** Users are clearly presented with an option to agree or disagree with the collection, use, or disclosure of personal information. The setting of a cookie requires the explicit consent from the website's visitor.

(2) **Opt-out:** If the user does not clearly decline consent, an approval is granted. Internet users can for example adjust their browser settings to generally accept or reject cookies.

The directive was implemented into national law in Great Britain on 26 May 2011.

British legislators have determined that the user's consent can be expected if he continues to use a site after having been informed about the used cookies. Consent can therefore be assumed explicit as well as by an unambiguous act that leaves no doubt about the user's approval.

(1) **Opt-in:** Users are clearly presented with an option to agree or disagree with the collection, use, or disclosure of personal information. The setting of a cookie requires the explicit consent from the website's visitor.

(2) **Opt-out:** If the user does not clearly decline consent, an approval is granted. Internet users can for example adjust their browser settings to generally accept or reject cookies.

Instead of choosing one procedure, some member states adopted the language of the directive and thereby reproduced the inherent legal uncertainty of the article 5 (3) into their national law.

Another important matter concerns the best technical realization of the obligations resulting from article 5 (3). In the next chapter different approaches are presented in the context of the transposition of the directive in Great Britain.

The implementation of the Cookie Law in Great Britain and the Netherlands

The directive was implemented in national law in Great Britain on May 26th, 2011. As stated in the introduction, the British government further announced to present a sample solution for Europe. Therefore a closer look to the implementation in Great Britain seems to be worthwhile.

Concerning the technical realisation the British regulatory body, the Information Commissioner's Office (ICO), provides some useful indications for a legally compliant implementation of the EU-directive:

(1) **Pop-Ups:** Consent can be achieved by a pop-up box that contains information about the used cookies and asks for consent to cookies when the user accesses a website.

(2) **Terms of use:** Consent can also be obtained by using terms of use - or terms and conditions that ask for consent from users when they first register or sign-up to websites.

(3) **Individual settings:** If cookies are set in context of personalized settings the users

consent can be obtained during the individualization.

(4) **Header/Footer Bars:** Information about the cookies, as well as consent, can also be achieved in a header or footer on the visited website.

In general the informed consent only needs to be obtained once. Relating to the opt-out procedure the ICO states that the browser settings can only be considered as an informed consent in certain exceptional circumstances.

Furthermore, British legislators have determined that the user's consent can be expected if he continues to use a site after having been informed about the used cookies. Consent can therefore be assumed explicit as well as by an unambiguous act that leaves no doubt about the user's approval.

While this approach seems to be an elegant approach, it still has to be considered that first- and third-parties are not allowed to place a cookie on the site when the user visits it for the first time. The implementation of this measure is associated with high costs and technical challenges. Therefore even the ICO broke its own regulation: When a user opens the page, a layer with information about the used cookies appears in the lower part of the screen. The following message appears:

„We have placed cookies on your computer to help make this website better. You can change your cookie settings at any time. Otherwise, we'll assume you're OK to continue.“

If a user clicks on the layer he gets detailed information about the used cookies and he can exercise his right to opt-out. If he ignores the layer and keeps on using the page this is assumed to be an explicit consent to the storing and processing of data.

British publishers had to acquit to the new law by May 26th, 2012. In the event of serious violations, the ICO can impose a fine up to 500.000 GBP. However many British publishers have not adapted to the new

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The directive has not been implemented in Germany until today. While article 15 (3) of the German Telemedia Act stipulates that users have to be informed about cookies and must further have the right to opt-out, an explicit approval of the user is not needed.

The German Federal Commissioner for data protection and freedom of information stated that the directive provisions are substantive enough to be directly applicable in Germany.

Due to the different implementations of the directive (opt-in/opt-out) in Europe this statement seems highly questionable. Additionally, it has to be highlighted even direct applicable directives do not have a horizontal direct effect.

The self-regulation measures of the German online marketing industry help to create more transparency. However they are not to be put on a par with provisions of the law.

regulation until today. Yet the ICO has not imposed any sanctions.

The Netherlands are an example for a Member state that has implemented a strict opt-in-procedure in June 2012. Article 11.7a of the Dutch Telecommunications Act defines that information can only be stored with the users explicit content. Additionally, the Dutch law does not distinguish between First Party-Cookies and Third Party-Cookies. The legislator implemented a so called presumption of law. It is assumed that every cookie processes person-related data, requiring the explicit content (opt-in) of the visitor. The presumption of law has come into force on January 1st, 2013. Violations of the law can be penalised by fines up to 450.000 Euro.

The website rtl.nl is an example for the strict implementation of the directive in the Netherlands. If a user does not explicitly express his consent, he cannot visit rtl's website.

Due to the dynamic development and the uncertain legal situation, conclusive insights cannot be drawn. However, online marketers as well as publishers should closely follow the developments in Great Britain and the Netherlands. While the law in Great Britain might set an example for the rest of Europe, the Dutch implementation of the directive seems more like a worst case scenario.

The implementation of the Directive in Germany

The directive has not been implemented in Germany until today. While article 15 (3) of the German Telemedia Act stipulates that users have to be informed about cookies and must have the right to opt-out, an explicit approval of the user is not needed. The German government explained that the requirements have to be discussed at an European level first as there were a number of unresolved questions about their implementation in practice. Other proposals by German political parties for the implementation of the directive were also rejected by the German government.

As mentioned in the introduction, the German Federal Commissioner for data protection and freedom of information stated that the directive provisions are substantive enough to be directly applicable in Germany. Due to the different implementations of the directive (opt-in/opt-out) in Europe this statement seems highly questionable. Furthermore it has to be highlighted that even direct applicable directives do not have a horizontal direct effect (i.e. an individual may not rely on the text against another individual in court). However, there is no conclusive legal certainty yet.

While the German government explained that it will wait for proposals for self-regulation, the European Advertising Standards Alliance (EASA) and the Interactive Advertising Bureau (IAB) Europe are trying to prevent a stricter regulation by drafting a code of conduct for their members. This code contains the obligation to integrate an Icon. The icon appears in and around behavioural adverts and will provide a one click option for consumers to access further information. Additionally, and more important, it enables users to opt-out of receiving online behavioural advertising via the website youronlinechoices.eu/. The Deutscher Datenschutzrat Online-Werbung (DDOW, voluntary self-regulatory body for online behavioural advertising) designed two codices:

(1) Code for First-Parties: If cookies are used to store information about the user's behaviour, publishers have to put the aforementioned icon on their website. By clicking on this icon the user will be provided information about the purpose of data collection and processing.

(2) Code for Third Parties: Advertisers that store data and provide online behavioural advertising have to inform users about their activities. The icon therefore has to be placed within the advertising media.

These self-regulations measures help to create more transparency. However they are not to be put on a par with provisions of the law. The implementation of the codices does not implicate that the directive will not be

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Even while Peter Schaar expressed that the European cookie standards could now be applied and enforced in Germany it has to be stated that until now there is no established legal precedent.

It has to be highlighted that the obligation to obtain an informed content does not imply the prohibition of cookies at all. Furthermore information and transparency can contribute to a better understanding of cookies and the benefits resulting from the usage of cookies for internet users.

German companies should continue to watch the developments in Great Britain. A lot of observers state that it will become apparent in the near future if the turn from the opt-in to the opt-out-procedure is a first step toward the end of the directive - or if it is a practicable and discreet way of implementing the directive

transposed into national law in Germany. Furthermore the Article 29 Working Group has stated that the codices are not meeting the requirements of the directive (opinion 16/2011). Therefore it seems questionable if the self-regulation initiative prevails.

Conclusion

We asked if things will get serious for the German advertising industry. As we have seen, there is no simple answer to this question. Even though Peter Schaar expressed the opinion that the European cookie standards could now be applied and enforced in Germany it has to be stated that there is no established legal precedent yet. Many observers expect that due to the unclear standards of the proposed cookie rules, the data protection authorities will refrain from enforcing such rules. For publishers the implementation of the directive's obligations seems to be more like a moral than a legal decision for now. However, if the German legislator does not take further steps in the near future, infringement proceedings before the European Court of Justice are possible.



Still it has to be highlighted that the obligation to obtain an informed content does not imply the prohibition of cookies at all. Furthermore information and transparency can contribute to a better understanding of cookies and the benefits resulting from the usage of cookies for internet users. Website's contents are often financed by online behavioural advertising. Cookies enable advertisers and publishers to more effectively measure digital advertising and

help them to create more specific and targeted advertising.

German companies should continue to watch the developments in Great Britain. A lot of observers state that it will become apparent in the near future if the turn from the opt-in to the opt-out-procedure is a first step toward the end of the directive - or if it is a practicable and discreet way of implementing the directive.

In case of a strict Dutch-like adaption of the directive into German national law companies should think about ways to make the consent to cookies attractive for the user – for example through coupon promotions.

metapeople uses data for marketing-optimization purposes. We do not personally identify or pool data for the creation of personalised profiles. We provide tracking solutions that enable an optimised online marketing to our customers.

Metapeople will keep on working in a proper manner und will stay a reliable partner.

Contact



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