

UK Cookie Laws: Practical Guidance

Most websites use a type of technology, known as cookies, to identify visitors to that website. The law on the use of such cookies has changed so that it is necessary to obtain consent before using a cookie, unless that cookie is strictly necessary for a service explicitly requested by a user. This note summarises this law and the Information Commissioner's guidance on this topic.

Audit cookie usage

The guidance suggest you should first conduct an audit to identify what cookies are currently used and why. For example, some cookies may benefit from the "strictly necessary" exemption (see *Categorise and assess cookies* below). It may be possible simply to remove others altogether. This audit should include any third party cookies (see *Third party cookies* below) and other locally stored objects such as flash cookies.

Categorise and assess cookies

The next step is to categorise and assess each of these cookies. Cookies do not require consent if they are strictly necessary for the provision of website services explicitly requested by the user.

Examples of how this exemption is likely to be interpreted are set out below. Care should be taken over cookies that are used for more than one purpose as consent may still be needed unless all those purposes fall within the "strictly necessary" exemption.

Strictly necessary (consent <u>not</u> needed)	Not strictly necessary (consent required)
<ul style="list-style-type: none">Shopping cart cookies.Cookies used for security purposes.	<ul style="list-style-type: none">Analytical cookies (e.g. Google Analytics).Ad serving cookies (e.g. DoubleClick).Cookies used to personalise websites.

Get consent

Where consent is required, you should consider if the cookie might intrude on the user's privacy. This is because the UK takes a flexible approach to consent. The more intrusive the cookie, the further you will need to go to obtain that consent.

The majority of websites have adopted an implied consent model whereby a pop-up window or banner is displayed indicating that the website uses cookies and that by continuing to use the website the user consents to the use of those cookies. The window or banner should provide a link to a full cookie policy. The Information Commissioner has adopted this approach and his guidance suggests it is sufficient to provide implied consent. A number of variants to this approach exist:

- the window or banner may expressly state that continued use constitutes consent or may just link to a cookie policy containing this statement;
- the window or banner may appear on every page of the website until acknowledged by the user or may disappear once the user starts to navigate around the website; and
- there may be a mechanism on the website itself to disable cookies, rather than requiring the user to amend their browser settings.

It seems likely most UK websites will continue to rely on implied consent, despite suggestions from European regulatory body, the Article 29 Working Party, that a stricter approach should be adopted (see [here](#) for more details). However, other options are available including:

- *“Must click” consent windows or splash screens.* When the user first visits a website they are presented with a window or splash screen that they must click through to access the rest of the website and, in doing so, consent to the use of cookies. The window or splash screen should provide information on how to turn those cookies off in case the user objects to their use. This approach is likely to lead to a high degree of compliance and high uptake of cookies. However, some users may be deterred from visiting the website.
- *Acceptance of website terms and conditions.* If the user agrees to a set of terms and conditions (e.g. by signing up to an online banking service) it should be possible to get consent to the use of cookies at the same time. However, for existing users it is not sufficient simply to notify the user that the terms have been changed to include consent to the use of cookies. Some form of positive agreement is required.
- *Website settings and features.* Equally, if the user makes a choice about how a website works for them (e.g. personalising a weather website by providing their location), it should be possible to get consent to the use of a cookie as part of that choice.

It is important to note this is not a comprehensive list nor are these options mutually exclusive. In some cases, it may be appropriate to utilise more than one of the approaches set out above.

In the medium term, it may be possible to infer consent based on a user’s internet browser settings. However, the privacy setting on current internet browsers are not sufficiently clear.

Regardless of the option selected, transparency is important. You should provide a clear and simple cookie policy explaining what cookies are and how they are used. The ICC has issued a cookie guide for this purpose.

Third party cookies

It is technically possible to set up a website to allow third parties to place a cookie on a user’s computer. This technique is used in the context of behavioural advertising. The Information Commissioner is still considering the issues around behavioural advertising but in the meantime websites should provide as much information as possible to users about these cookies and provide the users with meaningful and informed choices over their use.

Other issues

The cookie law involves a degree of risk assessment and a balance between compliance and other factors such as the usability of the website in question. A mass market, consumer-facing UK website using a wide range of intrusive cookies will need a more compliant solution compared to, for example, a business-facing website only using a limited number of analytics cookies.

It is also important to note that this law originates from a European Directive. As a result, other European member states also have their own cookie laws. These laws may not be interpreted or applied in the same way as the UK.

The Information Commissioner’s guidance on cookies is available [here](#).

This note is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on this note or on other areas of law, please contact one of your regular contacts at Linklaters.