



## What?

Late 2009 the European legislator introduced new, stricter legislation with regard to targeting and the use of cookies. This legislation is laid down in the amended ePrivacy Directive of November 25<sup>th</sup> 2009 and should have been implemented in the laws of the Member States by May 25<sup>th</sup> 2011.

On May 8<sup>th</sup> 2012 the Dutch passed a Bill to amend the Dutch Telecommunications Act (Telecommunicatiewet, hereinafter 'DTA'). This introduces a legal regime governing the use of cookies which is stricter than the ePrivacy Directive prescribes. The new regime for the use of cookies boils down to the requirement of informed consent based on an opt-in system:

- Prior to installing or reading cookies on the terminal equipment of the end user, the end user should be informed, and consent of the end user should be obtained;
- If the cookies are used to collect, combine or analyze information on the use of different services of the information society by the end user for commercial, charitable or non-profit purposes, this is presumed to be a procession of personal data. That means the Dutch Data Protection Act is applicable;
- Functional cookies are exempted.

## Principal rule: prior informed consent

### *Technology*

The new legislation doesn't specifically apply to cookies. It applies to any technology

- by which information is stored on the terminal equipment of a user, or
- by which information already stored is being accessed.

It concerns not only personal computers, but also mobile phones and other mobile devices.

Examples of cookies that fall within the *exemption* are cookies that are stored and read to remember the personal settings and preferences of a user, such as the preferred language, cookies used for the processing of online orders and the execution of transactions.

The new rules *do* apply to any other cookies, flash-cookies, Java-scripts, web taps and spyware or similar software such as dialler programmes. Device fingerprinting and digital television are also covered.

The Bill makes no distinctions between first party or third party cookies.



### *Prior information*

The information that has to be provided prior to placing or reading the cookie, needs to be 'clear and comprehensive'. It needs to inform the end user of the purpose of the cookie and the further processing of the data collected by the cookie.

This means that the end user should at least be provided with the following information:

- the identity of the party that installs the cookie (such as the ad network providers);
- the fact that the cookie is being stored on the terminal equipment;
- the purpose of the cookie;
- the period it remains active;
- if the cookie is being used to track online behaviour for targeted advertising this should be mentioned too, including with whom the information is being shared.

The information has to be easily accessible and understandable to the users.

### *Prior consent*

There has been a lot of debate about how consent should be obtained. The legal requirement is that consent has to be *free, specific and informed*. *Unambiguous* consent is *not* a requirement, although some parties argue that the law has to be interpreted as such. In the preamble of the ePrivacy Directive it is made clear that browser settings may possibly be an adequate means of giving consent. The Dutch government has confirmed that the present browsers are insufficient, mainly because they are set to accept cookies by default.

In line with the European Commission, the Dutch government is in favor of a Do-Not-Track standard as a means to obtain prior consent. However, the current standard, implemented in [www.youronlinechoices.eu](http://www.youronlinechoices.eu) is deemed to be insufficient.

### **Dutch data protection act (*Wet bescherming persoonsgegevens*)**

The requirement of obtaining informed consent before placing or further accessing cookies is in line with the ePrivacy Directive.

However, the adopted Dutch Bill goes considerably further and introduces an additional legal regime for the use of cookies. Any cookie used to collect, combine or analyze information of the user with regard to his online surfing behaviour, is presumed to involve personal data. As a consequence, the Dutch Data Protection Act is applicable to many different cookies, entailing an even stricter legal regime to the use of cookies.

This 'cookie plus' regime is applicable to all cookies, so cookies used for targeting (such as behavioural targeting, retargeting, adserving) as well as analytics cookies such as those used by Google Analytics.

### **Who**

Any party that places cookies on the terminal equipment of the user or accesses information already stored on this equipment should comply with the new rules. The regulatory authorities



have stressed that there can be a shared responsibility, imposing at least some responsibility for the publishers.

The new rules are applicable to anyone who wants to store information or access information already stored on the terminal equipment of internet users in the Netherlands. Thus, also companies established outside of the Netherlands are governed by the Dutch rules for the use of cookies.

### **When**

The new rules will most likely come into force as of June 1<sup>st</sup> 2012. The Dutch government has stated that it wants to await further developments of a Do-Not-Track standard within the European Union. For this reason it said that the new rules with respect to the consent requirement shall not be enforced before January 1<sup>st</sup> 2013. However, the responsible regulatory authority, *OPTA*, is an independent authority and therefore may enforce despite such promises of the government.

### **How**

The information that needs to be provided prior to placing the cookies has to be easily accessible and understandable to the users. This implies that a clearly visible link to the information most likely does suffice, however, a privacy policy as sole source of information is insufficient.

It is obvious that publishers and users of the cookie technology have to work together on this since the most logical place to provide information is on the website the consumer is visiting when the cookie is dropped.

The consent of the user must be a clear indication of his wishes. A pop-up screen with clear and comprehensive information and a tick-box stating "I accept" seems at present the only way to comply to the new cookie rules.

The regulatory authorities have expressed that consent is not required for each individual cookie. Once the user has agreed to cookies of a specific ad network provider, this ad network provider doesn't need to obtain additional consent for cookies serving the same purpose.

Users should always be given to possibility to opt-out.

Please note that at present it is still unclear how parties should comply with the consent requirement. The responsible regulatory authority *OPTA* has not given any guidelines, opinions or such on this subject yet. The responsible Minister has only expressed that browsers are *currently* not sufficient. Other than that he confirms there is no consensus in the EU and that therefore he cannot give any indication on how to practically obtain adequate consent. At present it is even unclear as of what date the new Dutch rules will come into force and when they will be enforced.