

# News Update

## PRIVACY

### Consent necessary for cookie use

On Wednesday 3 November 2010 Minister Verhagen sent the new legislative proposal for the amendment of the Telecommunication Act to the Lower Chamber of the Dutch Parliament. The legislative proposal is an implementation of the ePrivacy Directive of 2009, which amends, among other matters, the rules for the use of cookies. Websites using cookies have to inform the user more comprehensively than in the past and also have to obtain the user's 'consent'.

The amended legislation is applicable to third party cookies that are used to keep track of the surfing behaviour of internet users. On the basis thereof advertisements are put on the website targeted at the user. This form of behavioural targeting is a major source of income for websites and a major means of communication for advertisers. The requirements do not apply to cookies that are necessary to offer services to the user, e.g. to enter into a transaction in a web shop.

Initially the government wanted to include in the legislative proposal that *unambiguous* consent was required. This was in line with an opinion of the Article 29 Working Party (the independent advisory body of European privacy supervisors). The legislative proposal and the opinion caused quite some unrest in the *online advertising* branch because 'unambiguous consent' may mean that the internet user must expressly give

his consent for each cookie by ticking a box. It was feared that many users would not make the effort and that the behavioural targeting practice would lose its right to exist. Advertisers felt that an important method to sell their products and services was being threatened.

By deleting the word 'unambiguous' from the legislative proposal the sting seems to have been taken out of the legislative proposal. According to the Explanatory Memorandum, consent is considered to have been given if the browser is configured such that it automatically stores and allows the cookies offered. This is in line with the current legislation, which includes an opt-out.

In the past the obligation to inform users about a cookie was limited to the purpose for which the data in the cookie were processed. This time more information has to be provided.

The Telecommunication Act provides that information has to be given 'in accordance with the Dutch Data Protection Act'. This Act provides that in any event also the identity of the entity on whose instructions the information is collected is disclosed. Other data that have to be provided are those that are necessary to enable 'a fair processing', for example the fact that the data are sent outside the European Union.

The Explanatory Memorandum to the legislative proposal states that this information must be

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easy to find on the website. An inconspicuous link to this information at the bottom of a web page is not considered sufficient.

When discussing the legislative proposal the Lower Chamber will obviously still be able to make changes. Considering the period of time that is usually involved in the implementation of European directives in the Netherlands the law will probably become effective in the course of 2012.

The ePrivacy Directive, however, has to have been implemented on 25 May 2011. As of that moment the new rules will have to be taken into consideration.

**If you have any queries regarding this newsletter, please do not hesitate to contact one of our privacy specialists.**



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