

[espc-announce] FYI: EU WP29 Opinion on Cookies Consent (6-12-12)

1 Attachment, 151 KB

All --

The Article 29 Working Party, the consortium of EU data protection regulators that provides nonbinding opinions on European data protection policy, has adopted a formal opinion on the exemptions to the consent requirements under Article 5(3) of the amended ePrivacy Directive (the "cookies provision"). Opinion 04/2012 on Cookie Consent Exemption sets out the conditions under which consent is not required by the new legislation, and will provide considerable guidance to an approach across the EU. Member State implementation legislation and DPA guidance currently provide for various interpretations of the exemptions to the consent requirement.

The Opinion states that it is the "purpose and the specific implementation or processing being achieved that must be used to determine whether or not a cookie can be exempted from consent," according to the criteria the Opinion sets out. The Opinion states that Article 5.3 allows cookies to be exempted from the requirement of informed consent, if they satisfy one of the following criteria:

- the cookie is used "for the sole purpose of carrying out the transmission of a communication over an electronic communications network" (i.e., the transmission of the communication must not be possible without the use of a cookie), OR

- the cookie is "strictly necessary in order for the provider of an information society service explicitly requested by the subscriber or user to provide the service".

Provision of a service/functionality: The Opinion notes "that the test for qualifying for such an exemption must remain high". The Opinion also refers to Recital 66 of the amended ePrivacy Directive, which is to be read together with Article 5(3). The Recital states that "exceptions to the obligation to provide information and offer the right to refuse should be limited to those situations where the technical storage or access is strictly necessary..." The Opinion goes on to better clarify what is meant by a "service." It chooses the term "functionality," as in a functionality provided by the information society service, for example specific functional features of an online newspaper available once the user is logged in. Thus, for cookies to fall under this exemption (i) the functionality must be explicitly requested by the user as part of the information society service; and (ii) the cookies must be necessary to provide that specific functionality to the user. Further, the web operator must examine what is "strictly necessary" from the point of view of the user.

Session cookies vs persistent cookies: The Opinion also makes an important distinction between session cookies and persistent cookies: "a cookie that is exempted from consent should have a lifespan that is in direct relation to the purpose it is used for," and must expire once such purpose has been fulfilled. Thus, cookies that fall under the Criterion A or Criterion B will "likely" be session cookies. In general, third party cookies do not qualify for the exemption, and third party advertising cookies "cannot be exempted from consent." As a consequence, "first party" session cookies are far more likely to be exempted from consent than "third party" persistent cookies.

Cookies used for multiple purposes: The Opinion states that while a cookie may in some circumstances be used for multiple purposes, it may only be exempted from consent if all the distinct purposes for which the cookie is used are individually exempted from consent. This does not mean, however, the a website using a cookie for several purposes must obtain consent from the user for each cookie or purpose, as long as the user is provided with a single point of information in a clear and comprehensive manner.

The Opinion analyzes and applies the consent exemption to different types of cookies.

Exempt Cookies Non-exempt Cookies

User input cookies (session ID) used to keep track of the user's input in a series of message exchanges with a service provider in a consistent (e.g., for keeping items in an online shopping cart or filling in online forms) **Social plug-in tracking cookies**

Authentication cookies used for identifying a user once he has logged on to a website (e.g., for online banking) are only exempt where session cookies **Third party**. Consent is also required for all related third party operational cookies used in advertising (e.g., frequency capping, financial logging, ad affiliation, click fraud detection, research and market analysis, product improvement and debugging).

User centric security cookies increasing the security that has been explicitly requested by the user **First party analytics** used for statistical audience measuring. However, the Opinion states that **first party analytics cookies** are not likely to create a privacy risk when they are strictly limited to aggregated statistical purposes and when clear information is provided to the users whereas **third party analytics**, which collect navigation information related to users across different websites pose a higher privacy risk.

The Opinion suggests that if the ePrivacy Directive is amended or revisited in the future, legislators should consider including a third exemption from the consent requirements under Article 5(3) for the use of web analytics where "strictly limited to first party anonymized and aggregated statistical purposes."

Multimedia content player session cookies ("flash cookies") used to enable audio and video content to be played provided cookies do not contain other supplementary information.

Load balancing session cookies

Purpose: to enable the technical distribution of data across multiple servers to provide the electronic communication.
Exempt under Criterion A.

Persistent customization cookies used to store a user's preferences to provide a service across webpages (e.g., language preferences or search results display preferences) where not linked to persistent identifiers such as username, and only where the cookies are session cookies

Third party social plug-in content sharing cookies used to identify members of a social network when they interact with these plug-ins (but not for non-members or logged-out members)

Finally, the Opinion states that in case of doubt as to whether cookies qualify for one of the exemptions, "website operators should closely examine if there is not in practice an opportunity to gain consent from users...thus avoiding any legal uncertainty."

The Article 29 Working Party's June 7, 2012 *Opinion 04/2012 on Cookie Consent Exemption* is attached.

Best regards,

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