

European Commission: Germany has implemented Cookie Directive! Really?



“This website uses cookies. If you continue using this site we assume that you are happy with that”.

Internet users all across Europe see this or similar notices on a daily basis. European cookie regulations protect them by requiring websites to hassle their users with pop ups about the use of cookies. All across Europe? Well, not entirely. One country still holds out against the cookie regulation invaders. Even almost three years after the expiry of the transposition deadline, Germany still has not implemented the ePrivacy Directive (EC) 2002/58, as amended by Directive (EC) 2009/136, commonly known as the Cookie Directive. At least, that is what everyone believed – until this week, when the European Commission confirmed that the European cookie regulations in fact had been in force in Germany all along, without anyone noticing it.

The ePrivacy Directive

In 2009 the European Parliament adopted an amendment to the ePrivacy Directive. Among other modifications the new version of the directive, (EC) 2009/136, fundamentally changed the provisions about the use of cookies and introduced an obligation for website operators to receive their users’ consent for using cookies and similar technologies.

This new stricter cookie regulation was not very popular. One of the most frequently mentioned concerns was that users would be flooded by pop up messages and banners asking for their consent to use cookies, especially because almost every webpage uses cookies in one way or another. And as probably everyone in digital business knows, unnecessary pop ups, buttons and checkboxes ruin conversion rates. As a result, many European states hesitated to transpose the directive into national law.

Inconsistent implementations in Europe

Nevertheless, as of late 2012, most member states had implemented the European cookie regulations. Many of them also found ways to circumvent the strict opt-in concept of the ePrivacy Directive. In Britain, for example, national regulations do not require explicitly expressed consent. In fact, it is sufficient to clearly inform users about the use of cookies. If the user keeps using the website fully aware of its use of cookies, this is considered sufficient (implicit) consent. The user does not have to click on a button or tick a checkbox. Many countries found similar ways to avoid impractical burdens for their e-commerce

businesses, others stuck to the strict wording of the Directive. The cookie regulations, intended to be uniform in Europe, ended up as an inconsistent mess.

Germany, however, almost vigorously refused to implement the ePrivacy Directive. Until this day, there is no dedicated provision that expressly addresses the use of cookies. There are indeed regulations for specific use cases which may involve cookies, such as tracking and profiling. But the general use of cookies is still unregulated. At least this was the common opinion amongst German lawyers, including regulators and data protection authorities, who were quite unhappy with the non-implementation.

Surprise! The Cookie Directive has been implemented

Earlier this year, after Germany's new government was in place following the September 2013 elections, law blog “Telemedicus” made a press inquiry to the responsible Federal Ministry of Economic Affairs and asked whether the Ministry now intended to implement the ePrivacy Directive. They got a surprising response. According to the Ministry, German data protection and telemedia provisions are sufficient to comply with the ePrivacy Directive. In other words, Germany does not need to implement the Directive – instead, the European cookie regulations have always been in force. The Ministry stated that the German government had answered a European Commission questionnaire on the implementation the ePrivacy Directive last year, and the commission “had not given any indication” that the German provisions were insufficient to comply with the European requirements.

And there was another surprise: The European Commission fully confirmed the Ministry’s statement. “We can confirm that Germany has transposed the revised ePrivacy Directive into national law” was the Commission’s short but quite unambiguous answer to the law blog’s enquiry.

So what happened? It is still unclear how the German Ministry of Economic Affairs and the European Commission come to their mutual conclusion. Although the aforementioned EC questionnaire as such is available on the internet, the German government's answers are not. A request to disclose these answers on the basis of the German Freedom of Information Act is pending, but without any results yet.

Despite UsedSoft – German Court Rules Valve May Prohibit Steam Account Transfers



Germany has cookie regulations – what now?

The current situation is quite knotty. We know that cookie regulations are in force, but we do not know their exact scope yet. It is a fact that German data protection laws do not explicitly address the use of cookies and that the Directive has not been expressively implemented by the German parliament.

However, it is not impossible to find interpretations of existing provisions that could come close to the Directive's requirements. But the exact arguments of the German Ministry and the European Commission are still undisclosed, so it is almost impossible to know exactly how to comply with the unwritten German cookie laws.

However, some indications come directly from the ePrivacy Directive. There are three potential options to deal with this uncertain situation:

1. Allow users to give their explicit consent. This solution means to stay on the safe track, but comes at the price of impaired user experience and probably lower conversion rates. This is the most cautious approach and appears "over-compliant" at the moment.

2. Provide immediate and clear information about the use of cookies and the option to object to their use (e.g. by showing a banner or modal dialog). This corresponds to the British solution of the cookie dilemma and could be a reasonable compromise. We are aware of course that many website operators still do not like this option, as it can also significantly impact design choices and user experience.
3. Wait and see. It is rather unlikely that data protection authorities and courts require immediate action as the situation is completely unclear and the news about the Commission's opinion is very fresh. A risk remains, but we are not currently registering any hints of impending enforcement action by regulators.

With thanks to Adrian Schneider for his very valuable contribution to this article. Full disclosure: Adrian also writes regularly for Telemedicus.



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