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# The ePrivacy Directive: What you need to know

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## Contents

Contents.....	2
Introduction .....	3
What this document covers.....	4
1. An overview of the ePrivacy Directive .....	5
2. What does the Directive mean for affiliate marketing? .....	8
3. The latest UK Government information (May 2011) .....	13
4. The latest ICO (regulator) information (Nov 2011).....	14
5. What the Affiliate Marketing Council is doing.....	15
6. What Affiliate Window and buy.at are doing .....	17
7. FAQs based on most enquiries Affiliate Window has received .....	19
8. What does the future hold?.....	23
9. Bibliography and further reading.....	24

## Introduction

**From the smallest niche bloggers to the largest UK retail companies, the revised ePrivacy Directive requires everyone working within the digital industries to wake up and react to this unavoidable legislation.**

The challenge it has thrown up has seen many of us embark upon a regulatory journey for the first time. In many ways we're still at the start of this journey as much of what has been proposed is evolving and non-prescriptive. This is an important consideration to bear in mind throughout; a blueprint for compliance doesn't yet exist.

When Affiliate Window and buy.at first became aware of the new legislation back in 2010 we didn't anticipate the volume of the work and ongoing commitment we would need to invest in trying to understand its potential impact on our businesses, but ahead of the May 26<sup>th</sup> 2012 enforcement date we're at a point where we can share some of our insights from the last 18 months.

This document includes much of the information you will need to make your own conclusions about what you need to do. It is designed to aid all our partners: publishers, advertisers and agencies; however certain elements will be more relevant than others depending on your company.

Before we explain the background to the Directive and our full suite of documents, it's worth considering:

- We cannot offer legally binding advice: everything we suggest or recommend is exactly that, a best guess based on support and guidance from trade bodies and the UK regulator.
- We believe the regulator (The Information Commissioner's Office, ICO) will be staggering their advice based on industry best practice. Therefore the work contained herein is a starting point: these documents are organic and may evolve over time.
- Part of this staged approach is to build on knowledge and education in order to reach an end goal. As such the initial focus for our recommendations may change as the situation develops.

Remember, Affiliate Window as a third party cannot take responsibility for what you do but we do want to be seen as a consultative and supportive business partner. We have therefore set up the following email address through which you can raise any ePrivacy queries:

[eprivacy@affiliatwindow.com](mailto:eprivacy@affiliatwindow.com).

## What this document covers

**We want to offer you as much information as possible, but we're also aware that forums, noticeboards and websites have been full of comment and speculation, some of it useful and well-worded, some of it inaccurate and misleading.**

We therefore decided to try and be comprehensive and consistent without overloading you with information.

We have included:

1. An overview of the ePrivacy Directive
2. What does the Directive mean for affiliate marketing?
3. The latest UK Government information
4. The latest ICO (regulator) information
5. What the Affiliate Marketing Council is doing
6. What Affiliate Window and buy.at are doing
  - a. Auditing
  - b. List of cookies
  - c. Technical solutions
  - d. Change of T&Cs
7. FAQs based on the most common questions we've been asked
8. What does the future hold?
9. Bibliography & further reading

## 1. An overview of the ePrivacy Directive

**Directive 2002/58 on Privacy and Electronic Communications (otherwise known as the e-Privacy Directive) is an EU directive dealing with data protection and privacy in the digital age.**

In 2009, seven years after the first Directive, a revised version was announced that would be translated into law for each of the EU's member states.

The revised Directive is part of a broader piece of European legislation – the EU Electronic Communications Framework - that comprises a total of five Directives and was required to be implemented into national laws by 26th May 2011.

The Directive passed into UK law by this date, but the Government announced a one year grace period in order for industry to develop its own self regulatory framework.

The reasons behind the perceived need for the revised Directive are numerous but primarily focus on empowering consumers to make the right choices about the information they share about themselves with companies online. In particular, the subject of the Directive is the “right to privacy in the electronic communication sector”.

This therefore covers cookies and how they are used with the exception of those that are ‘strictly necessary’.

Strictly necessary is not defined explicitly but the UK regulator, the ICO, has suggested this refers to those cookies that a website needs to use in order to work properly (formatting of the web page, remembering what is in the basket if you run a transactional website).

A logical conclusion is to say affiliate cookies are strictly necessary in order for advertisers and affiliates to run affiliate campaigns.

Whilst this is true, they are not strictly necessary for the consumer to navigate the site and it is the consumer that the legislation is focused on, not business: as such, we should logically conclude that affiliate cookies (like web analytics) are not strictly necessary.

Remember, the remit for strictly necessary has been defined in the UK as being narrow, rather than all encompassing.

According to the latest ICO guidance, the strictly necessary exception: “ is likely to apply, for example, to a cookie used to ensure that when a user of a site has chosen the goods they wish to buy and clicks the ‘add to basket’ or ‘proceed to checkout’ button, the site ‘remembers’ what they chose on a previous page.

This cookie is strictly necessary to provide the service the user requests (taking the purchase they want to make to the checkout) and so the exception would apply and no consent would be required”.

Returning to the revised Directive, it will amend the existing one with a requirement now to obtain consent for “the storing of information or the gaining of access to information stored in the terminal equipment of a subscriber or user... having been provided with clear and comprehensive information” (Article 5.3).

So what does consent actually mean?

## Informed Consent

**Much of the confusion surrounding the revisions to the Directive involves the notion of ‘consent’. When the Directive’s amendments were first drawn up, the language used indicated web users would be required to explicitly opt in to cookies when browsing the web.**

This language has subsequently changed to concepts of ‘informed consent’, that is providing sufficient information to consumers about how their data is captured, in order for the consumer to make an informed choice about whether they give permission to do so.

‘Informed consent’ is now the standard we are working towards, NOT ‘prior consent’. According to Government advice published on May 24<sup>th</sup> 2011,

*“‘Consent’ is defined in the Data Protection Directive as “any freely given specific and informed indication of his wishes”... **Article 5 of the revised e-Privacy Directive does not specify that the consent must be “prior consent”**. The original text proposed by the European Parliament did do so but this was removed during negotiation.*

*“Crucially, there is no indication in the definition as to when that consent may be given, and so it is possible that consent may be given after or during processing. It is important that stakeholders are aware that in its natural usage ‘consent’ rarely refers to a permission given after the action for which consent is being sought has been taken.*

*“This absolutely does not preclude a regulatory approach that recognises that in certain circumstances it is impracticable to obtain consent prior to processing.*

*“Crucially, the requirement of the revised Directive is for informed consent. It is this requirement that has shaped the UK approach set out above. It is therefore the firm view of Government that the definition of consent employed in the amending regulation enables rather than precludes the O(nline) B(ehavioural) A(dvertising) Framework developed by industry.”*

### What are the ICO and Government saying?

The critical thing to remember is the UK Government knows the digital industries are vital to the UK’s position as a leader in the online space. They have strongly indicated they want to take a light touch, business friendly approach to the implementation of the Directive. The regulator, the ICO has therefore offered some general advice but on the whole it is non-prescriptive.

This has inevitably led to some commentators accusing the ICO of not offering useful guidance leaving business unsure what it needs to do.

We believe we should take the ICO's approach in good faith and recognise that self-regulation is always preferable to imposed regulation: we would much prefer to set our own standards knowing our industry as we do, rather than have a body that potentially doesn't, take that control out of our hands.

As will be discussed later, the ICO issued further guidance in late 2011 with some possible solutions, but all the evidence suggests the development of practical advice will be organic and ongoing.

At an event hosted by the Department of Culture, Media and Sport in March 2012 that Affiliate Window attended, the ICO explained they would be issuing ongoing guidance. It is their belief that best practice examples will beget best practice examples and businesses will look to their peers and competitors to emulate workable and compliant solutions.

Ultimately they feel that a natural level will be found whereby non-intrusive but useful solutions will be implemented that will drive up overall standards. In other words, the more we embrace best practice the harder it will be to accept bad practice or inaction. Affiliate Window's write-up of this event can be read [here](#).

The Directive is here to stay, so we have to deal with it. We also have to be realistic. As any industry grows so it faces increasing scrutiny and in turn greater regulation: we have the opportunity to shape this so let's turn this burden into an opportunity.

### **Key points**

- **Consumers need to be better informed about how they're tracked online**
- **The Directive is here to stay: inaction is not an excuse**
- **We should assume 'strictly necessary' does not cover affiliate marketing cookies**
- **You do not have to seek prior consent**
- **The process of compliance has just started, keep informed and up to date with developments**
- **The challenge is to find compliant but non-disruptive solutions**
- **The ICO is looking for best practice examples**

## 2. What does the Directive mean for affiliate marketing?

**The digital industries, including affiliate marketing, are all affected by the Directive, and some have chosen to pursue their own initiatives.**

Behavioural retargeters recognise they are under significant scrutiny as their cookies can quite feasibly be considered more intrusive than most. We also know that research has consistently shown that consumers are more wary of remarketing and retargeting campaigns based on their previous browser behaviour.

This industry has chosen to embark on a pan-European initiative called the [Online Behavioural Advertising](#) (OBA) framework. This is specifically for banner remarketers and features an icon in the creative linking to a site called [Your Online Choices](#) that enables consumers to find out about the technology, the companies behind it and how to make decisions about whether these ads are served.

Given the scrutiny this area of digital marketing is under, a proactive solution like this was probably necessary. One of the challenges we have in affiliate marketing is to educate consumers about our industry and how it differs to other forms of marketing they may be exposed to online. This will be covered later in the section about what the Affiliate Marketing Council is doing.

Given we know the Directive impacts all websites in the UK and the wider EU (if you're based outside of the EU your business is not subject to these regulations) and affiliate marketing covers many areas of digital marketing we can safely assume that all affiliate sites are impacted.

We know that this has the potential to panic smaller affiliates without technical, legal or financial resource to help them. This is partly why we have put this set of documents together.

So for those engaged in affiliate marketing what practical things can you do today, with little or no additional external help? The ICO has advised the following three points that we have elaborated on with our own comments:

### 1. Check what type of cookies and similar technologies you use and how you use them

These cookies could include analytics, the cookies that make your site function as well as well as third party technology you utilise. They shouldn't be limited to just affiliate cookies. An example advertiser who has done this is [John Lewis](#). An example affiliate is [vouchercodes.co.uk](#). The vouchercodes.co.uk example doesn't make explicit reference to affiliate networks they work with for marketing and commission purposes but it is feasible to add these should you choose to.

Both these sites have chosen to list a number of these cookies on their pages. As well as doing so publicly, it is advisable to keep a comprehensive list for internal purposes, ready to hand should you need to provide evidence of the full range of tracking and other cookies you use.

This is the auditing element that you may have seen as being the first critical step in achieving compliance. We cannot recommend any auditing companies or technology based on our limited exposure to them, but we do know of several that exist including a free tool you can use called [Ghostery](#).

### The 10-step audit

1. Check the cookies operating or that you use on your website.
2. Identify what each of them do (tracking, analytics etc.). ***There's more information on this below.***
3. Make a note of what information is stored, in doing so you will be able to decide how intrusive the cookies are. Most affiliate cookies will just store non-personally identifiable information; you can see what each of them store below as well as via our FAQs.
4. What type of cookies are they? Most affiliate cookies are third party for example.
5. Make a note of the companies that set these types of cookies (Affiliate Window, other networks – or you might want to just say 'affiliate networks' -, Google Analytics etc.)
6. How long do each of the cookies last? We have indicated the length of time each of our cookies is stored for in our accompanying document.
7. Are there any unnecessary cookies that you don't use anymore? You could take this opportunity to carry out a clean-up.
8. How much information do they store? How intrusive are they (or how much personally identifiable do they store) versus whether they're necessary for the site to function. This is an important distinction. ***There's more information on this below.***
9. Keep all this information to hand in one document.
10. Look to make this information available via a link on your site.

If you need to see the full suite of Affiliate Window and buy.at cookies then you can access these here:

1. This file contains the cookies we use when an affiliate logs into our interface together with our tracking cookies. As many affiliates are sole traders we wanted to make this information available (it will feature in our 'Links and Tools' section of the interface):  
<http://blog.affiliatewindow.com/wp-content/uploads/2012/05/AFFILIATE-WINDOW-INTERFACE-DARWIN-WIKI-COOKIES.pdf>
2. If you're an advertiser and want to know what tracking cookies we use you can see the full suite here:  
<http://blog.affiliatewindow.com/wp-content/uploads/2012/05/AFFILIATE-WINDOW-TRACKING-COOKIES.pdf>

3. This file is largely for your reference but shows the cookies we use on our corporate site and blog:

<http://blog.affiliatewindow.com/wp-content/uploads/2012/05/AFFILIATE-WINDOW.COM-BLOG-COOKIES.pdf>

## 2. Assess how intrusive your use of cookies is

Intrusiveness is a concept that has been introduced to account for how information about a consumer is used about them online. The most obvious example of an intrusive use of the data captured is in the behavioural targeted adverts we increasingly see across web portals and elsewhere as explained above.

Affiliate cookies and tracking typically does not capture personally identifiable information and are not used for any form of behavioural retargeted advertising. Therefore we can logically conclude they are low on an intrusiveness scale.

The trade body, International Chamber of Commerce (ICC), has defined its own [classification](#) of cookies and claims affiliate marketing should be categorised as 'Performance'. The ICC has created its own template that has yet to be commented on for its efficacy by the ICO but will probably be praised as a useful framework.

It's important to stress this, as any company using advice contained within it shouldn't necessarily assume it will in turn achieve compliance.

We think it is fair to conclude however, that affiliate cookies are low on an intrusiveness scale. This doesn't exempt them from the Directive enforcement but could mean they are considered less of a priority.

[BT.com](#) has used the ICC guide as a template for its cookie solution (click on the link at the bottom right hand side of the homepage in order to see BT's 'slider solution').

They have included 'performance' cookies with 'strictly necessary' cookies which should be interpreted positively.

## 3. Decide what solution to obtain consent will be best in your circumstances.

And now we come to the crunch question. What should you do technically with your own business? To reiterate we can only supply a 'best informed' opinion but at the time of writing (May 2012) we don't believe businesses should be focused on technical solutions at this stage, especially if you do not have the resource or know how to implement them.

Remember, offering a tick box or 'opt-in' option that could use a short statement such as 'do you accept our cookies?' may achieve consent when someone ticks it but it doesn't necessarily achieve

the main aim of **informed** consent: this can only come when information has been offered in plain English and in an easily digestible format.

The worst case scenario is websites becoming unusable due to a myriad of pop-ups on May 26<sup>th</sup>.

We believe a staged approach is most appropriate and proportionate. Therefore to summarise everything we believe companies should be doing at present:

- A) Audit your site as outlined above and keep this document stored at your home/office
- B) Add a plain English guide to your site that explains what affiliate marketing is and how you monetise your content. The Affiliate Marketing Council has [launched a site](#) that contains all the content you need. Affiliate Window contributed most of this content and we will be sending out more information on it shortly.
- C) Create an 'about cookies' or 'about our site' link that is prominent from your homepage. Don't hide it away (this is one of the main criticisms of many current privacy policies). Use this page to offer links to the plain English guide as well as examples of the cookies you use. Also offer guidance on how to change cookie storage options through browser settings.
- D) Find additional resources you can link to that help those consumers who want to find out more than you've provided. This could be sites such as [www.allaboutcookies.org](http://www.allaboutcookies.org) or [www.aboutcookies.org/](http://www.aboutcookies.org/). Apply a 'layered' approach whereby you make straightforward information easily accessible and then offer deeper links and more granular insights for those consumers who want to read on.
- E) Possible technical solution: if you want to implement this as referenced in the BT.com example. There is nothing definitive on what this should look like but the ICO provides some examples from page 15 in [this document](#). We believe the search for technical solutions is ongoing as referenced earlier and increasing numbers of best practice examples will emerge that Affiliate Window will look to showcase.

It is also worth saying that the latest guidance from Nick Stringer in an [article he wrote in April 2012](#) also added:

*“Consider ways to achieve informed consent in a contextual way. This will depend on what activity you are seeking to derive consent for but a good way to do this is via a simple and discrete one-time ‘banner overlay’ or pop up using clear and simple language and linking to ways for people to control cookies or other technologies.*

As stated earlier, Affiliate Window is digesting what is happening elsewhere but should you feel

confident in creating your own, or emulating something else you've seen then this will (in all likelihood) help you further on the path to full compliance. As mentioned we will, in the near future release our own network wide solution.

It's worth mentioning that consent only needs to be obtained once, however, the expectation is you will obtain consent for all the cookies, technologies, companies and information stored or used. The key is to ensure this information is easy to find on site.

### 3. The latest UK Government information (May 2011)

**The UK Government as previously mentioned has indicated it wants to take a 'light touch and business friendly' approach to the enforcement of the Directive.**

In May 2011 they issued an open letter to industry outlining how they planned to ensure the Directive was effectively implemented.

The key highlights from this letter are:

- Industry is best placed to create its own solutions (rather than have them externally enforced).
- The Government believes browser settings could, in the long term, offer sufficient functionality to obtain informed consent but industry should not rely on this or see this as an excuse not to do anything.
- The UK approach has also been built around support for the cross-industry work on third party cookies in behavioural advertising (the OBA as explained earlier in this document). The UK has championed this in Europe and also in the Government response. The Government believes that this work helps address one of the uses of cookies of most concern to users.
- Often it is impractical to obtain consent prior to processing. Crucially, the requirement of the revised Directive is for informed consent.

You can read the letter in full [here](#).

You can see the IAB's interpretation of the stage of implementation by the EU's member states and how stringently they feel the Directive has been transposed into respective states' laws [here](#).

## 4. The latest ICO (regulator) information (Nov 2011)

**The Information Commissioner's Office (ICO) is the regulator charged with the enforcement of the Directive.**

They have issued ongoing guidance for industry and have sent a clear message that they expect the digital industries to develop a robust self-regulatory framework.

The latest ICO guidance was published in late 2011.

The ICO claimed some progress had been made but more needed to be done. Their findings are summarised by the Chief Commissioner [here](#):

The full report can be seen [here](#).

## 5. What the Affiliate Marketing Council is doing

**The Affiliate Marketing Council (AMC) is comprised of affiliate marketing companies. In order to be an active player you must be a paid for member of the Internet Advertising Bureau (IAB), the online trade association.**

Affiliate Window is one of seven affiliate networks who play a role in the AMC and through our involvement have helped shape the industry through a programme of self-regulation.

As part of this self-regulation we have worked for the past eighteen months to address the ePrivacy Directive. The initiatives launched so far include:

### 1. [The AMC Five Point Plan](#)

1. Establish a Policy & Legislation Working Group
2. Conduct Cookie Audits
3. Publish a Consumer Guide to Affiliate Marketing
4. Develop standardised wording as industry good practice for affiliates and publishers to inform consumers about the use of cookies for this purpose.
5. Working with the UK Government and Web Browser Manufacturers to Enhance Browser Settings

### 2. [The Consumer Transparency Framework](#) (for publishers)

### 3. [A consumer facing site explaining the mechanics of affiliate marketing](#)

This site features plenty of consumer-facing information including how the affiliate marketing industry works, what typical affiliate sites look like, how the industry is different from behavioural advertising and further information about the commercial models.

Affiliate Window has contributed much of the content for this site and the purpose is to give (primarily) publishers something to link to that offers standardised copy and presents the affiliate model in a positive and easily accessible way. It also ensures a consistency across the industry.

This site launched in mid-May. Some of the content is subject to change.

### 4. Future initiatives

We will be liaising with the Affiliate Marketing Council ongoing and continuing to play a central role in shaping the self regulatory framework.

We are also keen to showcase best practice examples with the AMC and the ICO. If you'd like any solutions you're developing to be presented to either body please [drop me an email](#).

We will look to offer additional help, functionality and possible technical solutions. In order to keep up to date with all the developments please ensure you follow the work of the AMC by checking out the blog: [www.iabaffiliatemarketing.com](http://www.iabaffiliatemarketing.com). There is already significant resource and guidance available on the blog.

You are also welcome to attend full Council meetings. These are scheduled to take place in July and October 2012, with a possible additional meeting before the end of the year. Please check the website for forthcoming events.

We will also be looking to other councils within the IAB to see what initiatives they launch. Cross-collaboration between different digital disciplines is something we believe will occur in order to provide consistency across the online landscape.

We will be looking to the ICO for their comments about the work of the AMC. We believe their feedback will be invaluable in shaping our future direction.

## 6. What Affiliate Window and buy.at are doing

**As networks we understand we have a commitment to our clients and that's why we're offering this guide.**

We share responsibility for seeking informed consent but realistically consumers will not have any idea what an affiliate network is and their interaction will be with your brand and not our tracking. Therefore we strongly urge you to assume responsibility for informing your consumers and customers.

### Auditing

In order to help you we have listed all our tracking and cookie functionality. This may be something you want should you be carrying out an audit as mentioned and linked to earlier in this document.

This [link](#) contains all our Affiliate Window tracking, Wiki and interface cookies. If you require a buy.at guide please contact me, although these links are largely obsolete now and will eventually be phased out altogether. Here is the link in full:

<http://blog.affiliatewindow.com/wp-content/uploads/2012/05/AFFILIATE-WINDOW-TRACKING-INTERFACE-WIKI-COOKIES.pdf>

You may want to reference this when **auditing** or should you want to link to some of the cookies you may be using on site. For these purposes it's likely you will only need information regarding our tracking cookies. These are clearly signposted in the document.

This [link](#) is more for your information but highlights the cookies we use on our publicly available sites (corporate blog and site):

<http://blog.affiliatewindow.com/wp-content/uploads/2012/05/AFFILIATE-WINDOW.COM-BLOG-COOKIES.pdf>

You may want to use the template in these documents for any auditing you carry out.

### FAQs

We have also put together this list of FAQs for anyone who requires further information about what our cookies do. These are similar but there are several small differences according to status:

[Advertiser cookies FAQs](#)

[Publisher cookies FAQs](#)

### Technical Solutions

Affiliate Window has discussed at length whether we should offer our own technical solution.

We debated internally about creating different functionality such as a check box, BT.com style 'slider' or a pop-up solution.

We have built a solution that we will be pushing out shortly. It will be available for both advertisers and publishers and we will be in contact with details in the near future. In doing so we are endeavouring to set a best practice example for the industry.

### **Changes to our T&Cs**

Affiliate Window will be changing our T&Cs for publishers and new advertiser/agency contracts. The publisher T&Cs have been completely overhauled with a specific focus on plain English and one addition: a reference to the ePrivacy Directive.

Essentially our T&Cs have always required publishers to act within UK law so we don't see any serious issues with the amended version.

We do, however, appreciate this new legislation has the potential to confuse and that is why we're issuing this document and making ourselves available for non-legally binding advice and guidance via this email address: [eprivacy@affiliatewindow.com](mailto:eprivacy@affiliatewindow.com).

We will also be updating everyone as and when changes or useful guidance is issued. This information will also be featured in the newsletter the Strategy Team sends out every month. To register to receive this please subscribe [here](#).

### ***The new T&Cs:***

The [new affiliate terms and conditions](#) have been shortened with a focus on plain English. They also make reference to the ePrivacy Directive:

<http://blog.affiliatewindow.com/wp-content/uploads/2012/05/Publisher-TCs-and-Code-of-Conduct-May-2012.pdf>

## 7. FAQs based on most enquiries Affiliate Window has received

Over the past year or so, Affiliate Window has received a range of questions and enquiries regarding the ePrivacy Directive. In light of this, we have collated these here:

### 1. How much detail should we go into about the Directive?

In a sense it might be better not really to think about the Directive in how you formulate your response. At the heart of this legislation is a need to educate consumers about how they can be savvier about the way they share data online. Therefore we think it's fine to talk about informed choices and explain how tracking works, cookies are used and so on without any particular reference to the specifics of a piece of legislation which (if we're honest) few people will be aware of or be interested in the minutiae of.

### 2. What if we do nothing?

Doing nothing isn't an option if you want to minimise risk of penalty. Doing *something* however, needn't be onerous, expensive or complicated; certainly not in the short term. If you follow the simple process of 1) audit and document your cookies (all, not just affiliate cookies), 2) make available a visible link on your homepage and/or throughout your site that explains how your site is monetised and what information you do (or don't) capture and 3) use supplied links from the Affiliate Marketing Council that explains the affiliate model we believe this goes a significant way to achieving compliance, certainly for now.

Technical solutions coupled with additional feedback from the ICO and industry will help shape the next phase of compliance. Remember this is a long haul initiative and we're at the start of the process, not the end.

### 3. How do we stop this sounding like what we're doing is somehow sinister?

This is a key point. Affiliate marketing is non-intrusive and, whilst using cookies that are not 'strictly necessary' for the consumer, does not capture personally identifiable information: we are not behavioural advertisers. The wording of the [affiliate marketing portal](#) from the AMC makes this clear and creates a differentiation from other online channels.

Some of the language used needs to be carefully considered as well, for example the use of the word 'download' (when referring to cookies captured on a machine) can have worrying connotations but really isn't anything more than a non-intrusive function. If you're putting together your own text on site you should consider this.

Interestingly, BT.com in implementing the aforementioned ICC solution has included affiliate cookies alongside their strictly necessary cookies: in other words, the least intrusive and akin to reporting and analytics cookies.

#### **4. What are the penalties should we be investigated?**

The ICO can impose a fine of up to £500,000 for breaches of the law. However, this is only likely to occur for companies who, upon investigation and consultation, refuse to do anything to comply with the law. Companies are only likely to be investigated following consumer complaints. We believe a penalty will be a last resort and any company facing a fine will have to have shown a complete lack of willingness to do anything.

#### **5. Who is the ICO likely to investigate?**

At this stage we don't know, however, this law applies to all websites. We can safely assume the more intrusive the activity the more likely a site or activity is to be investigated.

#### **6. How does affiliate marketing fit into the grand scheme of things?**

It is difficult to say. We have been liaising closely with the IAB and ICO and the ICO is aware of our industry and initiatives. We have thus far received positive feedback from the ICO regarding our efforts to educate publishers, advertisers and consumers. We are also confident the forthcoming AMC consumer website will be very positively received.

To reiterate a previously made point, we do not believe affiliate marketing cookies to be particularly intrusive.

#### **7. Who does the responsibility lie with to obtain consent?**

To the letter of the law for publishers using networks to promote advertisers there is a joint responsibility with network and publisher. However, the ICO has indicated that consumer logic dictates that the onus will be on the website they're interacting with to obtain consent as it cannot be assumed the consumer will be aware of third party networks.

This is not a case of networks shirking their responsibility but following the advice of the ICO in ensuring the message is conveyed to consumers whilst minimising the potential risk of commissions being hit through interruptive messaging when a consumer clicks on an affiliate link.

For advertisers affiliate cookies will be one element of their online activity. They need to make a call on how they perceive affiliate cookies based on ICO and AMC guidance. Our previously mentioned publisher and advertiser FAQs documents help provide some context.

#### **8. What if we offer a tick box for people to accept our cookies?**

There is no doubt that companies will offer this. The ICO on their homepage do this however they have not advised companies necessarily emulate their example. Every case is different and various factors such as 'implied consent' (see Q.13) and how much information is being used and captured come into play.

We also do not believe that a simple tick box helps inform the consumer anymore than they are already. We are focused on the information element rather than technical solutions. That said we are not responsible for what publishers or advertisers choose to do.

#### **9. What are the browser manufacturers likely to do?**

There seems to be little industry insight into what browser manufacturers are doing. Initially there was an assumption that browser companies would launch initiatives that would negate the need for the rest of us to have to do anything. This is now unlikely, certainly in the short term, and the ICO has indicated we shouldn't rely on browser companies to help us achieve consent.

We are keeping an eye on what browser companies are doing and will keep you updated but for the time being are not relying on them to supplement the work we're doing.

#### **10. If my business is based outside the UK what do I need to do? I'm running a publisher business from Australia, what do I need to do?**

The law applies to UK companies or those based in other EU territories.

#### **11. What do I need to do in just two lines?!**

See point Q.2: we want to ensure we're offering comprehensive advice but in an easily accessible and interpretable way. Advertisers should audit their affiliate network for their cookies (see earlier documents) and decide how they want to classify them (see the ICC document for some guidance, although this is not definitive and only an interpretation).

Publishers should look to audit their site, offer very clearly worded and plain English language about how their site works and make access to this information easy. Typical privacy policies tend to be very legalistic and impenetrable, part of the legislation is an attempt to demystify these and offer easy to understand and easy to access information. For further guidance on this please refer to the work of the AMC and this document. Also you're able to contact us via [eprivacy@affiliatewindow.com](mailto:eprivacy@affiliatewindow.com).

#### **12. What are the other networks doing?**

We recommend you speak to your contacts at other networks for further guidance on what they are individually doing. Please note Affiliate Window, Affilinet, buy.at, Commission Junction, Linkshare, OMG, Tradedoubler and Webgains are all members of the Affiliate Marketing Council and are supporting the joint ePrivacy Directive AMC initiatives.

#### **13. What does 'implied consent' mean?**

Implied consent is something the ICO believe could happen over time: that is consumers will be aware in the longer term of how they are tracked online and what they need to do to make

choices about this and therefore a climate of implied consent will emerge with consumers confidently navigating the Internet.

There is also an element of implied consent that is dependent on the relationship a consumer has with different websites they use and this is quite a grey area. Take a cashback site for example, a consumer must know there is a tracking mechanism and information has to be captured in order to receive their reward. Similarly voucher code sites need to source exclusive codes and offers and again, it could be contended, that consumers have to appreciate that a commercial model exists in order for them to do so. Therefore we could potentially argue implied consent applies here.

For the moment, we shouldn't assume implied consent will be sufficient. This is a concept that will take on more meaning in time.

**14. What timeframes and additional advice can the ICO give us for further action or guidance?**

The ICO has indicated they will issue further guidance in May 2012 and ongoing. As previously mentioned they believe best practice will beget best practice and this could have a domino effect with companies not doing anything being in the minority.

We will endeavour to keep everyone informed of any updates.

## 8. What does the future hold?

This is a critical question that we don't really know the answer to at the time of writing.

To reiterate something that has been stated in this document several times, we are at the start of the journey, not the end.

We believe that the solutions in dealing with the Directive are staged. The first step is to carry out your own due diligence, understanding what cookies you use and what they do. Next, focus on your consumers and what information they need to know. This may be enough in the longer term but for now we can't see far enough into the future to know what end compliance looks like.

The key elements in time will be how well consumers react to the plethora of solutions and information they will be subject to from the end of May 2012. That will in turn shape what implied consent looks like. Similarly the actions of browser companies will need to be monitored.

Ultimately we need to get to a place where the ICO feels business has been active in self-regulating, by offering clearly worded and engaging advice to consumers rather than dragging its heels in order to pursue its own agenda.

Achieve the former and we have nothing to fear.

## 9. Bibliography and further reading

### 1. Affiliate Window documents

[Advertiser cookies FAQs](#)

[Publisher cookies FAQs](#)

[Our tracking and interface cookies](#)

[Our website cookies](#)

[A message of compliance: article written by Kevin Edwards on recent DCMS event](#)

### 2. Other documents

[The International Chamber of Commerce framework](#) (an interpretation of the law to aid compliance)  
[The ICO half term report](#) (contains examples of what technical solutions could be possible, as well as additional clarity on implied consent, strictly necessary and enforcement)

[Open Letter from Government](#) (outlines the Government's approach from May 2011)

[The Online Behavioural Advertising framework](#) (what the behavioural retargeting/advertising industry is doing. This is distinct from affiliate marketing due to the levels of 'intrusiveness associated with this marketing channel).

[Your Online Choices](#) (the consumer facing site for the companies working to the OBA frameworks)

[What John Lewis is saying](#) (an example of how one advertiser has chosen to make cookie information available)

[What vouchercodes.co.uk is saying](#) (an example of how one publisher is focusing on information to achieve 'informed' consent)

[The IAB's interpretation of how European countries are interpreting the Directive](#) (this data may be out of date).

### 3. The Affiliate Marketing Council

[The Five Point Plan](#) (the approach of the IAB's Affiliate Marketing Council in addressing the Directive)

[The Consumer Transparency Framework](#) (a guide for publishers to aid compliance)

[The AMC blog](#) and [Consumer facing website](#) (keep up to date with the latest information on industry initiatives as well as the launch of the consumer facing website).

### 4. Contact us

If you have any questions please don't hesitate to contact us via this email address:

[eprivacy@affiliatewindow.com](mailto:eprivacy@affiliatewindow.com). You can also sign up to the Strategy newsletter for our general

monthly updates and insights including any ePrivacy developments: [strategy@affiliatewindow.com](mailto:strategy@affiliatewindow.com)