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The Netherlands' Much-Anticipated Revision of the Cookie Rules Takes Effect

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On March 11, 2015, the Netherlands' long-anticipated revised cookie rules came into force. The broad new rules are an amendment of the previous cookie rules, and provide, among other changes, for a more lenient regime for the use of analytic cookies with low privacy risk.

The day the revised rules entered into force, their primary enforcer, the Dutch Autoriteit Consument & Markt (Authority for Consumers and Markets, or ACM), announced that it will proactively enforce the new cookie rules.

Companies are advised to assess to what extent these broad rules apply to their websites, apps and devices, and how they can comply with, and also benefit from, the amendments.

The Key Points

- Despite their name, the cookie rules apply to various techniques ("any information written or accessed from an end user's device", such as regular html cookies, fingerprinting and pixel tags) and to various digital environments, including websites, apps, smart TVs and other devices.
- Any party placing or accessing cookies must duly inform the user and ask for his or her consent before cookies are placed or read out. "Consent" must constitute an (active) act, thereby excluding opt-out and implied consent constructions.
- Cookies that are required for the transmission and functioning of a website itself, and cookies that are technically necessary to provide specific services over that website (like a web shop), are exempted from the information and consent requirement.
- New: The above-mentioned exemption also applies to cookies that are used to obtain information about the quality and efficiency of a website, under the condition that they do not have any, or have only limited, impact on the privacy of users.
- New: User access to a website provided by, or on behalf of, a legal entity established under public law is not dependent on the grant of authorization referred to in the first paragraph (*i.e.*, a prohibition on so-called "cookie walls").

Companies are strongly advised to reassess their use of cookies, keeping in mind that the revised rules apply to other techniques as well, and that the scope of the new rules is not confined to websites, but also catches apps, smart TVs and other devices.

Background

Cookie rules have proven to be quite the legal and regulatory nightmare throughout the European Union, and particularly in the Netherlands.

The main reason for this was the shift from a so-called opt-out regime under the EU's old ePrivacy Directive (2002/58/EC) to an opt-in regime under the amended ePrivacy Directive (2009/136/EC), which could have a substantial effect on the use of cookies and the online advertisement industry that relies on it.

Moreover, the Dutch legislator implemented the amended ePrivacy Directive via amendments to the Dutch Telecommunications Act, which entered into effect June 5, 2012, that included additional rules for tracking cookies and a notoriously strict consent requirement for the placement of, and access to, cookies (*see report by the authors at W DPR, June 2012, page 22*).

After the first-generation cookie rules came into force in 2010, a long period followed during which both the regulator and the market were staring each other in the eye: The market hesitant to implement the rules, due to their potential effects on revenues, and the regulator undecided on how to enforce the rules. Nevertheless, around 2012, websites slowly started implementing cookie banners, pop-ups and cookie walls, in order to obtain the required consent, or as an attempt to comply with the rules.

Not much later, it became clear that the popping up of banners and permission windows upon entering a website was an annoyance to many Internet users. Websites owners, in turn, considered the cookie rules to be a threat to their online businesses: A substantial number of (seemingly) free websites and services operate on a business model that relies on advertisement revenues through cookies and similar techniques. Any threat to the use and acceptance of cookies is a threat to their revenues.

The complaints prompted the Dutch legislator to act, proposing an amendment of the cookie rules. The original proposal for the amendment was intended to make the cookie rules more user-friendly by clarifying the rules for consent and an providing exemption for analytic cookies (*see reports by the authors, and by Gerrit-Jan Zwenne and Ard Jan Dunnik, of Bird & Bird LLP, The Hague, respectively, at W DPR, May 2013, page 29 and W DPR, April 2014, page 36*).

Below we describe how the legislator has only partly suc-

ceeded, and, what's more, has introduced stricter rules for public bodies through an amendment during the legislative process.

What the New Rules Do and Don't Do

For businesses, the most pregnant changes concern the expansion of the exemption for cookies that 1) have little or no impact on the privacy of users and 2) are used solely to gain information on the quality and efficiency of a website. Since the cookie rules are — in conformity with the amended EU ePrivacy Directive — formulated in technique-neutral terms, the exemption appears rather abstract and requires a translation for practical use.

The Explanatory Memorandum provides concrete examples of types of cookies that are likely to fall under the exemption. For example, website owners who use analytic cookies may benefit from the exemption, as well as a third party to which the placement and reading of such cookies is outsourced, as long as it does not impact, or impacts only slightly, the privacy of the user.

The exemption might also apply to affiliate cookies, which are used to keep track of the success rate of advertisements in order to reward the affiliated advertiser. Also A/B testing cookies, which help websites to pick the most effective design or commercial, are mentioned in the Explanatory Memorandum.

The Explanatory Memorandum notes that relying on the exemption might become more complicated when multiple parties are involved in trafficking a palette of different cookies.

All other cookies (that substantially impact privacy and/or serve other or further goals) still require consent from the user.

Though some believed that the strict consent requirement would go away with the new rules, it is now clear that the notorious strict consent requirement in the Netherlands is here to stay.

Lastly, the new rules still do not clarify who is the party that needs to comply. This is important, because a website is not always the party placing and reading the cookie. For example, in the case of advertisement networks, the ad network is generally placing these cookies on the publisher's website. This is an important point which was left unaddressed in the legislative history. Hence, the best answer might be: Both parties need to comply. Due to the general administrative complicity clause, ad networks as well as websites that make use of such "third party" cookies might be held accountable.

Significantly, the ACM has shown that it is willing to enforce the rules governing such affiliate networks, fining the online marketing firm Daisycon 810,000 euros (U.S.\$ 486,783) in September 2014 for violations of the anti-spam regulations.

Dual Enforcement and Fines

The cookie rules will primarily be enforced by the ACM. However, the new cookie rules introduce an onus of

proof that personal data is processed when tracking cookies are used, thereby underlining the regulatory realm of data protection which is enforced by the Dutch data protection authority (College bescherming persoonsgegevens, or CBP). Consequently, two regulatory authorities are entrusted with enforcement of the new cookie rules.

Until recently, both regulators have engaged in only limited supervision. Recently, however, an increase in regulatory activity has been discernible, with investigations into the advertisement network of YD (now Yieldr) and the use of cookies by the Dutch public broadcaster (NPO). Moreover, as noted above, the very day the new cookie rules came into force, the ACM announced that it will actively enforce the new rules.

The ACM can impose fines of up to 450,000 euros (U.S.\$486,783), whereas the CBP currently has little competence to impose fines.

However, this situation might change in the near future. A proposed amendment of the Dutch Data Protection Act (Wet bescherming persoonsgegevens) currently pending in the Dutch Senate would give the CBP the power to impose fines of up to 810,000 euros (U.S.\$876,209). It appears likely that the proposed amendment will be adopted, and that the changes will come into force as of July 1.

Guidelines Forthcoming

In the background of these changes in legislation, regulators and stakeholders have been in talks for a few months now over forthcoming guidelines aimed to improve and assist with compliance with the rules. Though it is unsure how these guidelines will turn out, with the involvement of both regulators, the guidelines could be something to look out for in the coming year.

Consequences of the New Cookie Rules for Companies

If it wasn't clear already, it is clear now that the five years of anticipation and reluctance are over.

Companies are strongly advised to reassess their use of cookies, keeping in mind that the revised rules apply to other techniques as well, and that the scope of the new rules is not confined to websites, but also catches apps, smart TVs and other devices.

The text of the new amendments to the cookie rules is available, in Dutch, at <https://zoek.officielebekendmakingen.nl/stb-2015-100.html>.

The text of the Explanatory Memorandum is available, in Dutch, at <https://zoek.officielebekendmakingen.nl/behandeldossier/33902/kst-33902-3?resultIndex=22&sorttype;=1&sortorder;=4>.

The full legislative history of the amendments is available, in Dutch, at <https://zoek.officielebekendmakingen.nl/dossier/33902>.

The text of the amended Dutch Telecommunications Act is available, in Dutch, at http://wetten.overheid.nl/BWBR0009950/geldigheidsdatum_21-03-2015.

The ACM's statement on enforcement of the amended cookie rules is available, in Dutch, at <https://www.acm.nl/nl/publicaties/publicatie/13986/ACM-gaat-nieuwe-cookieregels-actief-handhaven/>.

Additional information from the ACM about the new cookie rules is available, in Dutch, at <https://www.acm.nl/nl/publicaties/publicatie/13987/Veelgestelde-vragen-over-de-cookiebepaling/>.

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