

## **PENDING EUROPEAN UNION LEGISLATION WOULD RESTRICT KEY TECHNOLOGY USED BY WEB SITES TO TRACK USERS' ACTIONS ONLINE**

**Proposed new law would require Web sites to obtain affirmative user consent to use “cookies,” the technology employed by many sites to track users’ actions online, thereby imposing significant costs on Internet businesses and adversely impacting the usefulness of Web sites to users.**

On November 13, 2001, members of the European Parliament voted in favor of an amendment (the “Amendment”) designed to restrict the use of “cookies,” small text files that many Web sites use to store information about computer users who access their sites. The Amendment is part of the draft directive on electronic data protection and privacy (“Privacy Directive”) currently being considered by the legislative bodies of the European Union (“EU”). The Amendment would require users’ “prior, explicit consent” to permit Web sites to place cookies on users’ computers, although it contains an exception to this requirement for “any technical storage or access for the sole purpose of carrying out or facilitating” an electronic communication. (As discussed below, the scope of the exception is not clear.) If adopted, the Amendment could have significant negative business implications for Web sites and consequently has drawn widespread criticism from the EU e-commerce community. Although the Amendment is an EU initiative, given the inherently global nature of the Internet, its adoption could have far-reaching consequences for U.S.-based organizations as well.

Cookies are small data files that retain essential information about users of Web sites, such as registration information or user preferences, and permit Web sites to access the information without users having to retype the data each time they access the site. Certain cookies (*i.e.*, “permanent” cookies) are created when a user accesses a Web site and are then saved on the user’s computer hard drive permanently. “Per-session” cookies, on the other hand, are deleted when the user leaves the Web site. (While there is an argument that the Amendment is targeted only at permanent cookies, the proposed language could also be read to cover per-session cookies.) Cookies are widely used by many Web sites to enhance users’ experiences online. For example, cookies are used by online retailers and vendors to permit users to place items in a “shopping cart” or to store name, address, and other information so that the information need not be reentered by the user each time the site is accessed. Cookies can also be used to ensure that users are genuine visitors to a site and are not appropriating someone else’s password. Online advertisers use cookies to cap the number of times that ads are flashed on a user’s screen so that commercial messages are not duplicated during a visit to a site. Also, cookies can be used by advertisers to estimate the reach and frequency of online ads, or, more rarely, to target ads to users.

Following the European Parliament vote, the Amendment will be considered by the Council of the EU ("Council"), a body made up of representatives from the 15 European countries that comprise the "Member States" of the EU. The Council meeting on the Privacy Directive is expected to occur in early December 2001. If the Amendment is adopted by both the European Parliament and the Council, it will become law. Member States must pass their own laws to implement the Amendment within 12 to 18 months of adoption by the EU. Even if a Member State does not adopt implementing legislation within this time frame, however, individual citizens in the Member States may nonetheless invoke the law before their national courts and seek compensation for any damages suffered as a result of a Member State's failure to adopt implementing legislation.

While proponents of the Amendment claim that cookies are a threat to consumers' personal privacy because they collect data on consumers' Internet activity without their explicit consent, the e-commerce industry maintains that cookies are an essential piece of Internet browsing architecture without which many Web sites would not be able to operate. Industry representatives argue that the prior consent requirements contained in the Amendment would force companies relying on cookies to restructure and rebuild their sites to comply with the law, incurring significant costs that could put some Web sites out of business. Many Web sites that rely on registering customers and saving their preferences could become unusable.

Any organization whose Web site uses cookies or similar technologies to facilitate Web browsing, retail sales, targeted advertising, or other online activities should be concerned about the negative consequences that adoption of the Amendment could entail. The Interactive Advertising Bureau U.K. ("IAB"), a trade association for interactive advertising, e-commerce, and online marketing companies in the U.K., is engaging in a lobbying effort called "Save Our Cookies" to remove the Amendment from the Privacy Directive. Like-minded companies or organizations, including Web sites based in the U.S. that use cookies, may wish to consider joining this or similar efforts to derail the Amendment.

If you have any questions concerning the Amendment or need any further information, please contact Frank Buono (202) 429-4749, Demetrios Eleftheriou (202) 429-4739, or Sophie Keefer (202) 429-4730.

Willkie Farr & Gallagher is headquartered at 787 Seventh Avenue, New York, New York 10019. Our telephone number is (212) 728-8000 and our facsimile number is (212) 728-8111.

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