



European Law on Cookies

Introduction

The law on cookies is complex: international supervisory authorities have adopted varying approaches to the interplay between the GDPR and ePrivacy. Recent Court of Justice of the European Union (CJEU) cases have shown a shift towards the protection of personal data within cookies and other tracking technologies.

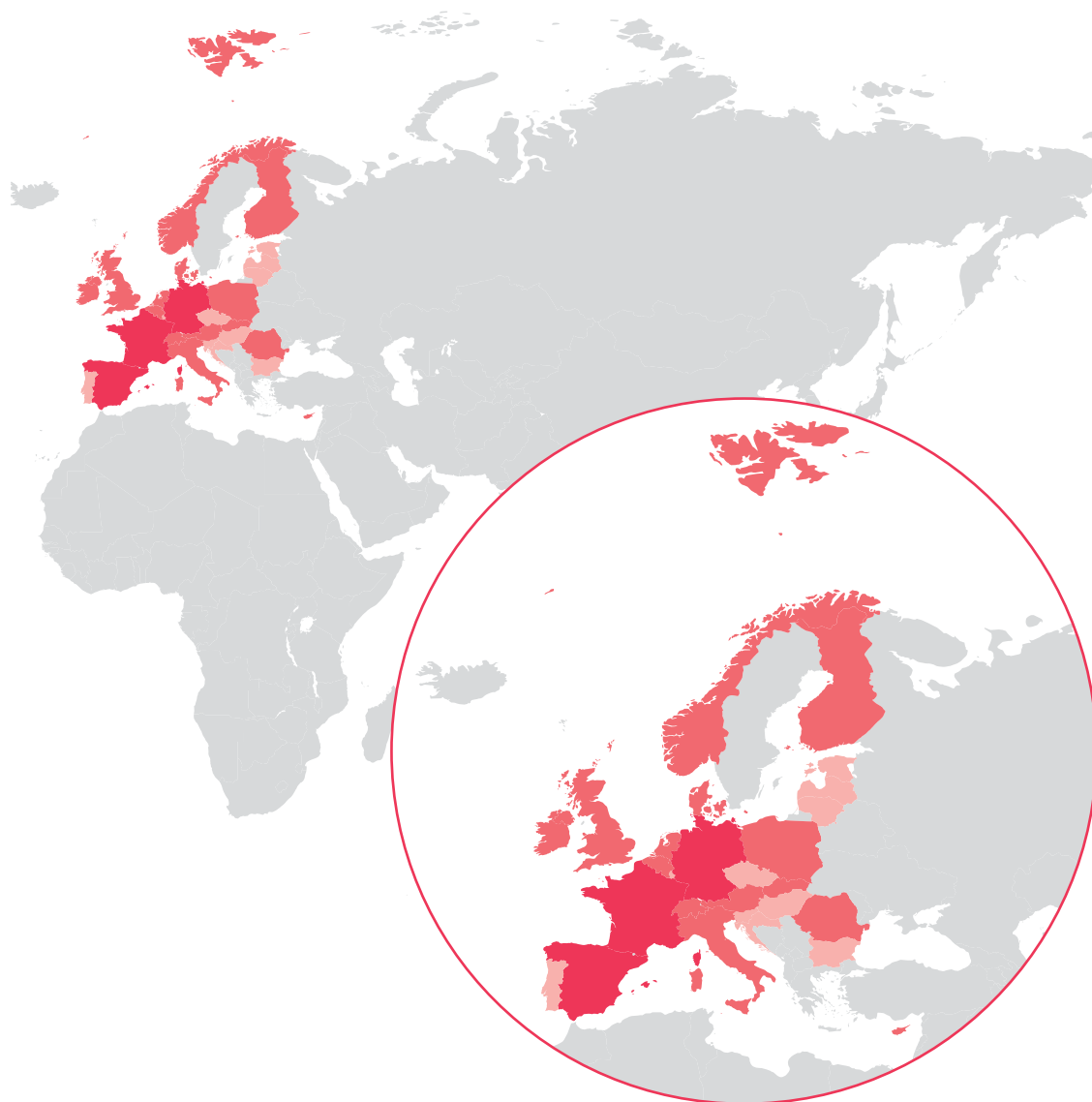
Last year alone, two key cases emphasised the importance of cookies compliance in Europe: *Fashion ID* (case c-40/17) indicated that joint controllership may arise where third-party features or plug-ins are placed on a website; and *Planet49* (case c-673/17) reassessed the standard of consent required to use cookies. Although most regulators have released guidance in this area, their approaches to consent, transparency and enforcement differ.

This guide consolidates the most recent regulatory guidance from across Europe. We have indicated the main areas of focus for each regulator, and noted key enforcement trends which multinational organisations should be aware of. Practical requirements and policy remediation steps are outlined in this guide, as well as the enforcement strategies and timelines of some regulators.




Organisations must therefore carry out cookies audits where required, and implement a gap analysis and remediation program to ensure compliance in line with their supervisory authority's enforcement plan.

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Enforcement heatmap



Key

	Strict enforcement. Regulators actively enforce against non-compliance and the law on cookies is strict with detailed guidance.
	Moderate enforcement. Regulators have issued guidance on compliance with the law on cookies, and have indicated an enforcement strategy.
	Low to no enforcement. There is no regulatory guidance on the law on cookies in this jurisdiction.

Key findings

COUNTRY	HAS THERE BEEN RECENT ENFORCEMENT?	CAN A USER PROVIDE CONSENT VIA BROWSER SETTINGS?	ARE COOKIE WALLS ALLOWED?	CAN CONSENT BE IMPLICIT?
Austria	No.	Unclear, but likely no.	Yes (currently).	Unclear, but likely no.
Belgium	Yes – 1 fine.	No.	No.	No.
Bulgaria	No.	Unclear – no specific rules or guidance.	No.	No.
Croatia	No.	No.	Unclear.	No; however, see additional guidance for exceptions.
Cyprus	No.	No.	No.	No.
Czech Republic	No.	Yes; however, see additional guidance for details.	No.	Yes; however, see additional guidance for details.
Denmark	No.	No.	No.	No.
Estonia	No.	No.	No.	No.
Finland	Yes – 1 case.	No.	Unclear, although it is unlikely (see additional guidance).	No.
France	Yes – 3 fines, 3 court cases.	No.	Unclear, assessed on a case-by-case basis (see additional guidance).	No.
Germany	Yes – 1 case.	No.	Unclear (see additional guidance)	Unclear (see additional guidance)
Hungary	No.	No.	No.	No.
Italy	No.	Yes.	Unclear; however, unlikely (see additional guidance).	Yes.

COUNTRY	HAS THERE BEEN RECENT ENFORCEMENT?	CAN A USER PROVIDE CONSENT VIA BROWSER SETTINGS?	ARE COOKIE WALLS ALLOWED?	CAN CONSENT BE IMPLICIT?
Ireland	No.	No.	No.	No.
Latvia	No.	No.	No.	No.
Lithuania	No.	Unclear, although it is unlikely (see guidance).	No.	No.
Luxembourg	No.	Yes.	No.	No (see additional guidance for exceptions).
Malta	No.	Unclear.	Unclear.	Unclear.
Netherlands	Yes.	No.	No.	No.
Norway	No.	No.	No.	No.
Poland	No.	Yes.	Unclear; however, unlikely (see additional guidance).	No.
Portugal	No.	No.	No.	No.
Romania	No.	Yes.	Unclear (see additional guidance).	No.
Slovak Republic	No.	Yes.	No.	Yes.
Slovenia	No.	Unclear (see additional guidance).	No.	No.
Spain	Yes, 41 fines on non-compliance since 2014.	Yes; however, see additional guidance for details on limitations.	Unclear (see additional guidance).	Yes.
Switzerland	No.	Yes.	Unclear (see additional guidance).	Yes.
UK	No.	No.	No.	No.



Austria



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The E-Privacy Directive was implemented in Austria by amendment of the relevant provisions of the Austrian Telecommunications Act (*Telekommunikationsgesetz 2003*, TKG).

The changes to the TKG came into effect on 22 November 2011. The relevant section of the TKG

states that a user must give informed consent for the storage of personal data.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Unclear, but likely no.

While it is acknowledged that browser settings may be used to pre-emptively reject cookies, there is no case law where consent via browser settings was accepted. The legal doctrine does not view consent via browser settings as sufficient.

ARE COOKIE WALLS ALLOWED?

Yes (currently).

The Austrian DPA dealt with the issue of cookie walls in connection with the website of a popular Austrian daily newspaper, which implemented a “pay or consent” solution. If cookies were not accepted, the website was only accessible with paid subscription.

The Austrian DPA argued that no material disadvantage and no considerable negative consequences were apparent from this practice, as the decision to give consent is deliberate, the data use is described in a sufficiently transparent manner, and the main consequence of not giving consent is that the user may subscribe for the service, which was

considered as not disproportionately expensive. The approach was therefore deemed as acceptable. There was no appeal against this decision and no further case law on this topic.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

Unclear, but likely no.

There is no clear case law on this topic in Austria. While the website which the Austrian DPA assessed in its cookie walls decision also had implicit consent implemented, and the Austrian DPA did not deem this as unlawful, the Austrian DPA clarified later that this issue was not the subject matter of the decision and was not assessed at all. The Austrian practice otherwise follows the CJEU’s approach.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No.

There has been no specific guidance on retention periods. The TKG requires that information on retention period is given when cookies are used to collect or process personal data, but does not specifically regulate exact retention periods.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No.

There is currently no such differentiation in the Austrian case law or practice.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

There have been no court cases on this topic.

As concerns the Austrian DPA, there is currently only one decision on cookie compliance assessing cookie walls implemented on the website of a popular Austrian daily newspaper.

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Belgium



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The ePrivacy Directive was implemented in a piecemeal fashion in Belgian legislation.

The overarching implementing law is the [Electronic Communications Act of 13 June 2005](#) which includes, among other things, the rules on cookies (only available in Dutch and French).

The rules on unsolicited communications are included in [Book VI of the Belgian Code of Economic Law](#) (also only available in Dutch and French).

The following laws introduce certain changes to the implementation law mentioned above, either in general or for specific sectors (e.g. Financial sector).

- http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&table_name=wet&cn=2017073130
- http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2005082434&table_name=wet
- http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=nl&la=N&cn=2014032735&table_name=wet

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes – in 2015, the Belgian Data Protection Authority has issued a recommendation on the use of cookies:

- [Dutch version](#)
- [French version](#)

Subsequently, this recommendation has been updated by new guidance on the website of the Belgian Data Protection Authority which builds on the recommendation mentioned above (only available in Dutch and French) (DPA Guidance):

Section for Citizens:

- <http://www.gegevensbeschermingsautoriteit.be/burger/thema-s/internet/cookies>
- <http://www.autoriteprotectiondonnees.be/citoyen/themes/internet/cookies>

Section for Professionals:

- <http://www.gegevensbeschermingsautoriteit.be/professioneel/thema-s/cookies>
- <http://www.autoriteprotectiondonnees.be/professionnel/themes/cookies>



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No – the DPA Guidance states that browser settings currently do not allow valid consent to be collected with respect to the GDPR. After all, users cannot (yet) give permission according to the purposes pursued by the various types of cookies. The permission that is collected via the browser settings is therefore not sufficiently specific with regard to the GDPR requirements.

ARE COOKIE WALLS ALLOWED?

No – the DPA Guidance states that placing a cookie wall does not comply with the GDPR. The reason is that this practice prevents free consent from being obtained, as the person concerned is required to consent to the installation and/or reading of cookies in order to access the website or mobile application.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – the DPA Guidance states that the continuation of surfing cannot be considered a valid permission for the installation and reading of the “non-functional” cookies.

In order to be valid, the consent that internet users must give for the installation (and consultation) of these types of cookies must comply with the general conditions of legitimacy of consent as provided for in the GDPR. This means, among other things, that consent must be given by means of an affirmative action such as a click or the activation of a button by dragging and dropping.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Yes – in a decision of 17 December 2019 (decision 12/2019, further described below), the Litigation Chamber of the Belgian Data Protection Authority stated that cookie banners should:

- differentiate between different categories of cookies;
- not contain pre-ticked boxes; and
- provide the possibility to accept or refuse specific categories of cookies.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes – it follows from the DPA Guidance that a cookie policy should be published separately.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No – cookies cannot be retained for an indefinite period. The DPA Guidance refers to the fact that cookies should be retained only for the period that would be necessary for fulfilling its purpose. They should be deleted as soon as their purpose has been fulfilled. If it is not possible to delete cookies and metadata, the cookie policy should clearly explain how these can be deleted.

The DPA provides extra guidance for cookies exempted from the consent requirement. For this type of cookies, the retention period should be in direct relation with their purpose. They should expire as soon as they are no longer needed, taking into account the reasonable expectations of the average user. As a general rule, this type of cookies might be expected to expire at the end of a browser session, or even earlier. However, depending on the reasonable expectations of the user or on their explicit request, they can be retained in (a)

subsequent browser session(s). As an example of the latter category, the DPA Guidance refers to cookies related to a shopping basket. Those could reasonably be expected to be retained after the browser session ends or for a couple of hours.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear – the DPA Guidance mentions that a cookie policy should indicate whether or not third parties have access to cookies. In the Jubel-case (described below), the Litigation Chamber of the Belgian Data Protection Authority also confirms that a cookie policy is expected to differentiate between first- and third-party cookies.

The Belgian DPA seems to consider that more rules apply to third-party cookies due to the different nature of the processing operations they involve compared to first-party cookies. According to the DPA in the Jubel-decision, third-party cookies imply a data transfer whereas first-party cookies do not. First-party cookies can make use of a (third-party) processor. If the processor does not process the data for its own purposes, first-party cookies are “in principle” considered to be less privacy intrusive. However, as first-party cookies also process (pseudonymised) personal data, the consent requirements of the GDPR and the Electronic Communications Act of 13 June 2005 still apply.

The DPA Guidance does not provide further guidance on this subject.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No – while the Belgian Data Protection Authority's strategic plan for 2020-2025 mentions cookies as a relevant societal subject, no clear enforcement strategies are connected to cookies.

The strategic plan is available in Dutch and French:

- <http://www.gegevensbeschermingsautoriteit.be/publications/strategisch-plan-2020-2025.pdf>
- <https://autoriteprotectiondonnees.be/publications/plan-strategique-2020-2025.pdf>

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Yes – on 17 December 2019, the Belgian Data Protection Authority issued a fine of EUR15,000 to a website owner for varying offenses in relation to cookies (decision 12/2019, also known as the Jubel-case). The key takeaways from this case in relation to cookies are that:

- analytical cookies require consent and consent must be obtained before the cookies may be placed (even if they are first-party cookies);
- the cookie banner should: (i) differentiate between different categories of cookies; (ii) provide the possibility to accept or refuse specific categories of cookies; and (iii) not contain pre-ticked boxes;
- the cookie policy should be shown in the correct language (for Belgian websites Dutch and French should be an option);

- the cookie policy should differentiate between first- and third-party cookies;
- the cookie policy should indicate per cookie, the purpose and the retention term; and
- legitimate interest should not be used as a legal ground for non-essential cookies.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Yes – in 2015, the Belgian Data Protection Authority brought a case against Facebook for alleged infringements against Belgian and European data protection laws with regard to the use of certain cookies. The Belgian Data Protection Authority argued that Facebook violates the law because it tracks both Facebook users and non-users through the cookies that are implemented in Facebook plug-ins, without obtaining appropriate consent and without providing sufficient information.

The Court of First Instance of Brussels rendered a decision on 16 February 2018, where it agreed with the position of the Belgian Data Protection Authority. Facebook lodged an appeal on 2 March 2018 with the Brussels Court of Appeal who referred a question for preliminary ruling to the [CJEU](#) on whether or not the Belgian Data Protection Authority can proceed with its action against Facebook as Facebook has its main establishment in Ireland.



Additional information

The Belgian Data Protection Authority has only recently commenced its enforcement efforts, indicating that a more active position regarding enforcement of GDPR and ePrivacy requirements is on the horizon.

Its strategic plan for 2020-2025 mentions cookies as a societal topic of particular interest, but does not connect any specific enforcement goals to this topic.

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Bulgaria



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Bulgarian Electronic Commerce Act

Bulgarian Electronic Communications Act

Bulgarian Consumer Protection Act

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

There is no explicit guidance of the national regulator referring to the use of cookies.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Unclear – no specific rules or guidance. From a practical perspective and considering that implicit consent cannot be justified for non-essential cookies, provision of consent via web browser settings would not be a stable legal basis for use of cookies due to the fact that the website operator would not be in a position to prove that the user has given their consent.

ARE COOKIE WALLS ALLOWED?

No. Cookie walls are not allowed. This is because in order for a data subject to give a valid consent, the consent shall be given “freely” as per the General Data Protection Regulation (GDPR). Thus, use of a cookie wall on the “take it or leave it” principle shall be in breach with the consent requirements under the GDPR and shall not be admissible.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No. In accordance with the [Planet49](#) regarding the [use of cookies](#) ruling of the CJEU, implicit consent shall not be allowed for cookies, which are not essential for the functioning of the respective website. All other cookies shall be turned off by default and shall be explicitly activated by the respective user.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Unclear – no specific rules or guidance. Considering the fact that some of the cookies may process data, which is not personal and in order to ensure transparency of data processing (including personal data processing), it is advisable to implement two separate policies.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No. To the extent that cookies may process personal data, the storage limitation period as per art. 5(e) of the GDPR shall be observed. In addition, to the extent that such cookies are stored based on the user's consent, cookies shall be deleted upon withdrawal of consent as well.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes. Website operators shall provide information to their users under art. 13 of the GDPR, which includes third parties, about which information may be disclosed. In addition, third parties should also be in a position to provide the relevant information to users (i.e. under art. 14 of the GDPR).



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No. Use of cookies may fall within the following enforcement authorities, depending on the respective types of cookies: (i) The Bulgarian Personal Data Protection Commission when personal data is processed through cookies; and (ii) The Bulgarian Consumer Protection Commission when cookies may lead to other consumer protection rights.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Currently there is no publicly available information on imposed fines specifically with regard to non-compliance with cookies rules by the Bulgarian authorities.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Currently there is no publicly available information on Bulgarian court cases addressing cookie compliance.



Additional information

Regardless of whether cookies collect personal and/or non-personal data, website operators shall provide users all information as per art. 13 of the GDPR in order for the users to be able to make an informed decision when giving consent.

Users shall have the option to withdraw their consent for cookies at any moment. In the light of this, it would be advisable for website operators to implement tools allowing segmented management of cookies (e.g. to allow marketing cookies but not to allow third parties' cookies).

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Croatia



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The ePrivacy Directive was implemented in Croatia through the Croatian Electronic Communications Act (Official Gazette nos. 73/2008, 90/2011, 133/2012, 80/2013, 71/2014 and 72/2017 – *Cro. Zakon o elektroničkim komunikacijama*).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No. According to article 100, paragraph 4 of the Croatian Electronic Communications Act, the use of electronic communications networks for the purpose of data storage or in order to gain access to stored data in the terminal equipment of a subscriber or user of services is allowed only when the subject subscriber or user of services has given consent, after being provided with clear and comprehensive information in accordance with special regulations on personal data protection, and especially on the purposes of the data processing.

The above does not apply to the technical storage of data or access to data for the sole purpose of carrying out the transmission of communication over an electronic communications network, or if that is necessary to provide information society services at the explicit request of a subscriber or user of services.

ARE COOKIE WALLS ALLOWED?

Unclear.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – except in cases of the exceptions reflected under the answer to the first question above.

In Croatian practice some companies use the banners which read: "If you continue to browse this site, you agree to the usage of cookies." Although this suggests that website operators rely upon implied consent, a resolution of the relevant authority as of November 2019 provides that implicit consent is not allowed. For more information on the respective resolution, please refer to the section below.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Unclear.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

Apart from misdemeanour provisions contained in the Croatian Electronic Communications Act which provide only for the amount of the penalty, no other strategies have been implemented in Croatia.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No examples of fines issued for non-compliance of cookie rules have been made public in Croatia.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No court case law or examples have been made public in Croatia. However, the Croatian Regulatory Authority for Network Industries rendered a resolution on 4 November 2019 which established that a company did not accurately implement the general rule of consent provided under article 100, paragraph 4, of the Croatian Electronic Communications Act.

In particular, the webpage entailed a banner that: "By pressing any link on this page you agree to the usage of cookies" which suggested the implicit consent of users to allow the gathering of information. As the authority considers such conduct incompliant with the relevant laws, the company in breach has been instructed under the resolution to align the cookie policies with the relevant data protection rules in Croatia and Croatian Electronic Communications Act within 30 days as of rendering the resolution. In case of further non-compliance, the resolution provided for a fine of HRK50,000 (approx. EUR6,600). Within the reasoning of the resolution, the authority quoted the European Court judgement of 1 October 2019, case C-637/17.



Additional information

Apart from the Croatian Electronic Communications Act and related legislation, clients should respect and abide by the rules and restrictions applicable to data protection rules in Croatia. Croatia has not implemented any regulatory guidance or any rules on cookies in addition to the scope of the ePrivacy Directive.

However, the latest trends may suggest that the authorities are starting to review the accurate implementation of the general provision of the Croatian Electronic Communications Act quoted above.

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Cyprus



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The ePrivacy Directive was implemented in Cyprus through Law 51 (I)/2012 which amended the Regulation of Electronic Communications and Postal Services Law, No. 112(I)/2004 as amended.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

The Electronic Communications Commissioner and the Commissioner for the Protection of Personal Data (the CPPD) have indicated that the Article 29 Working Party's opinion on the cookie consent exemption (WP194) and the working document providing guidance on obtaining consent for cookies (WP208) can be used as guidance on the use of cookies.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No. Browser settings allowing storage and use of cookies will not be considered as sufficient consent. The storage and use of cookies and similar technologies is permitted only if the subscriber or user concerned has been provided with clear and comprehensive information, inter alia, about the purposes of the processing, and has given consent in accordance with the Cyprus Processing of Personal Data Law.

Consent must be freely given, express, specific, informed and unambiguous. Consent must be obtained before to processing and be revocable.

The above shall not prevent any technical storage or access for the sole purpose of carrying out or facilitating the transmission of a communication over an electronic communications network, or as strictly necessary to provide an information society service explicitly requested by the subscriber or user.

ARE COOKIE WALLS ALLOWED?

No. There must be opt-in consent for each purpose for which cookies are used. Cookie banners should not indirectly force a user to accept cookies in order to enter the website.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No. The mere notification of the use of cookies by the website and that by using the website the users accept the cookies does not satisfy the requirements of the law as regards consent. The consent must be signified through a positive action or other active behaviour.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Consents should not be bundled. Where consent for multiple purposes is bundled together, such consent will not be valid. Consent must be provided for each purpose for which a cookie is used. Cookie banners should not indirectly force a user to accept all cookies and users should have the ability to change their preferences in the future.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

It is best practice to maintain both. Users should be provided with all necessary information regarding the use of cookies. Such information must include, inter alia, the purposes of use of cookies, the retention periods for data held by cookies/deletion of cookies and details regarding other third-party cookies.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No specific retention periods have been provided for data held by cookies. However, the CPPD has advised that retention periods depend on the category of cookies. The CPPD explained that cookies which are not “strictly necessary” in order to provide an information society service explicitly requested by the subscriber or user; for example, data used by

“session cookies” and cookies used for shopping cart purposes, may be retained for one or two hours in case the browsing program is accidentally turned off by the user, so that the user returns to the website and proceeds to the purchase of the products selected in the shopping cart.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

The CPPD has advised that website operators will have to consider all relationships with third parties who they may interact with and provide details to website users on such third parties storing cookies through the website (through plug-ins, widgets, or social media sharing tools). Third-party cookies are not usually considered as “strictly necessary” due to the fact that they are connected to a service which is separate from the one explicitly requested by the subscriber or user.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

Currently no regulatory strategy on the enforcement of cookies has been announced by the authorities. However, the CPPD issued an announcement on 30 July 2017 in response to complaints received regarding the use of cookies by websites without obtaining consent, emphasising the importance of freely given consent. In our view this is an indication that one of the areas that the CPPD will monitor and focus on in regards to enforcement of rules regarding cookies, is consent. In the same announcement, the CPPD explained, inter alia, that simply notifying the user that a specific website uses cookies and that in the event they continue browsing they would automatically accept all cookies, is not considered satisfactory.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

Consent is required for analytics cookies providing statistical data in relation to visiting a website.

The CPPD indicated that although they are considered as a useful tool for website operators, they do not

constitute “strictly necessary” cookies, as they are not necessary in order for the user to receive all services provided by a website.

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Czech Republic



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Czech Act No. 468/2011 Coll., which amended the Czech Act No. 127/2005 Coll., on Electronic Communications.

The abovementioned amendment was effective as of 1 January 2011.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

There is guidance (dated May 2018) of the Czech data protection authority (UOOU) – (in Czech only), concerning processing of cookies in relation to the GDPR, available [here](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes – but only for cookies necessary for operation of such website, for any other cookies (usually for marketing and/or statistical purposes) it is obligatory for the user to provide explicit consent.

ARE COOKIE WALLS ALLOWED?

No – cookie walls cannot directly or indirectly force a user to accept cookies in order to enter the site.

CAN CONSENT BE IMPLICIT, (I.E. USE OF WEBSITE)?

Yes, it is possible, but the user has to be properly informed about this (for example via using the wording: “by continuing using this website you consent to the store and use of cookies for the specified purpose by the website operator”).



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Consents cannot be bundled – consent must be gained for each purpose for which a cookie is used. Organisations should adopt a layered approach to gaining and explaining consent to users. Consent must be revocable.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No, cookie policy can be included in the website privacy policy (but for the sake of clarity is often kept separate).

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear – there is no specific guidance issued by the Czech regulator as per the obligatory/recommended length of retention period for data held by cookies.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear – there is no specific guidance issued by the Czech regulator as per the difference between handling first-party and third-party cookies.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

Unclear – there is no specific guidance issued by the Czech regulator as per the regulatory strategy on the enforcement of cookie rules.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

The Czech Regulator (UOOU) has in October 2019 issued an [inspection report](#), (available in Czech only) concerning cookies for remarketing – the inspection report included (inter alia) the following conclusion:

“The Czech Republic has incorrectly transposed the amended Directive 2002/58/EC into national law. From the EU law point of view, the person does not proceed in accordance with this Directive, which requires the consent of the data subject, resp. does not comply with Regulation (EU) 2016/679 laying down requirements for this consent, as the phrase ‘Cookies help us to provide our services.’ By using the Website, you consent to the use of ‘consent’ in the footer of the inspected person’s website (and the mere continuation of your use of the Website cannot be construed as ‘unequivocal

expression of will by the data subject giving his or her consent to process his or her personal data’ or as provided for in Article 4 (11) of Regulation (EU) 2016/679. At the same time, however, EU case law does not allow the application of the Directive and its effects on individuals. The inspectors thus assessed the processing of personal data (cookies) according to a valid and effective national one legislation, i.e. according to Act No. 127/2005 Coll. and its relevant provision § 89 par. 3.”

Therefore, in this particular case, the UOOU has confirmed that consent to the processing of personal data through cookies used for remarketing can be granted by browser settings, if the information obligation is sufficiently fulfilled.

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Denmark



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Danish act on Electronic Communication and Services (consolidated act no. 128 of 7 February 2014), under which the Ministerial Order on the Information and Consent Requirements when Storing or Accessing Information on End User Terminal Equipment (the Cookie Order) has been issued.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Guidance to the [Cookie Order](#) by the Danish Business Authority (December 2019).

Guidance to the [Processing of Personal Data of Website Visitors](#) by the Danish Data Protection Agency (February 2020).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No – browser settings allowing access to and storing of cookies does not amount to a valid consent for use of cookies on a specific website. The question has not been explicitly addressed in the Danish Business Authority or the Danish Data Protection Agency, but consent for use of cookies generally requires an affirmative action by the user.

ARE COOKIE WALLS ALLOWED?

No – cookie banners cannot indirectly force a user to accept cookies in order to enter the site. There must be granular, opt-in consent for each purpose for which cookies are used.

Furthermore, while the Danish Data Protection Agency acknowledges that cookie banners (e.g. pop-up boxes) will always distract the user to some extent, cookie banners must not unnecessarily distract the user.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – since the CJEU case C-673/17 (Planet49), the Danish Business Authority has changed its position on this question and now both the Danish Business Authority and the Danish Data Protection Agency state that implicit consents are not valid.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Consents cannot be bundled – consent must be gained for each purpose for which a cookie is used. Organisations should adopt a layered approach to gaining and explaining consent to users. This may be achieved by a cookie banner; however, the guidance notes that the banner must not indirectly force a user to accept all cookies: a reject option should also be clear if such an accept option is available on the banner.

Furthermore, according to the Danish Business Authority, the cookie banner must at least contain following information:

- the purpose(s) of using cookies; and
- which third-parties can access and use the information stored in the cookies.

The Danish Data Protection Agency has further elaborated on this information requirement and requires – in addition to the above – following information to be stated:

- the identity of the website owner (if this is not obvious from the website);
- the categories of personal data processed (if any); and
- information on the right to withdraw the consent.

Last, the Danish Data Protection Agency finds that the user must easily be able to decline giving their consent and layouts that significantly push the user towards giving consent (so-called dark patterns) may not be compliant.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No – neither the Danish Business Authority nor the Danish Data Protection Agency requires the cookie policy and privacy policy to be separated.

However, the information requirements stated by the Danish Business Authority are slightly different from the ones required under the GDPR, but currently neither authorities require the information to be stated in two separate policies – assuming both information requirements can be met in a single policy in a clear and transparent manner.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No – neither the Danish Business Authority nor the Danish Data Protection Agency has issued any specific statements regarding the retention periods for data held by cookies.

The retention period for cookies subject to Danish data protection law (the GDPR and the Danish Data Protection Act) must be based on the general principle of “storage limitation” found in Article 5(1)(e) of the GDPR.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes – third parties placing or accessing cookies on the user’s device must be named in the cookie banner (doing so only in the cookie policy is inadequate).

Furthermore, the Danish Data Protection Agency finds that the full legal name of the third-party entity must be stated, and referring to the website, product names or short name is inadequate.

If a significant number of third parties are involved, the Danish Data Protection Agency finds that storing their names in a collapsed menu revealing the names by a single click or mouse-over is acceptable.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

In Denmark, the Danish Business Authority oversees the enforcement of the Cookie Order. However, historically the Authority's enforcement of the Cookie Order has been relatively weak and currently there are no indications this will change. The supervising of the Cookie Order is done through dialogue rather than formal decisions and fines.

The Danish Data Protection Agency does not enforce the Cookie Order *per se* but does supervise the processing of personal data using cookies. Hence, from a practical point of view, the Danish Data Protection Agency does to some extent enforce the use of cookies but does so with reference to applicable data protection laws (the GDPR and the Danish Data Protection Act). Importantly, the Agency has recently had a relatively strong focus on the processing of personal data using cookies (namely tracking cookies) and further enforcement actions could be expected (but have not yet been formally announced).

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No – the Danish Business Authority has not issued any publicly available decisions regarding non-compliance of the cookie rules.

The Danish Data Protection Agency has issued approximately five publicly available decisions since 2007 addressing the processing of personal data through cookies – none of which has been sanctioned with fines.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No – at least none that are publicly available.



Additional information

The Danish Data Protection Agency states in its *Guidance on the Processing of Personal Data of Website Visitors* that the Agency normally considers the collection and use of data on website visitors (through cookies or similar tracking technologies) to be governed by Danish data protection law (the GDPR and the Danish Data Protection Act), unless specific circumstances indicate otherwise.

Furthermore, the Danish Data Protection Agency finds that a data controller must be able to 1) document each individual consent provided and 2) be able to demonstrate the consent mechanism, hence demonstrating that the consent has been validly provided. Regarding 1), the Agency finds that the controller must retain information about a) the time and date of the consent, b) the type or version of consent mechanism used (including information provided to the user), and c) the purpose(s) the user has consented to.

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Estonia



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Electronic Communications Act (available in English [here](#)).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

N/A.

Although Article 5(3) of the e-Privacy Directive has not been expressly transposed into Estonian law, and formally the opt-out principle applies, lately the common practice is to obtain the user's consent for using any cookies that are not strictly necessary. Consent cannot be given via web browser settings, as under the GDPR consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement. Silence, pre-ticked boxes or inactivity should not therefore constitute consent. If a user's browser settings allow access to and storing of cookies generally, this does not amount to deemed consent for use of cookies on a specific website.

ARE COOKIE WALLS ALLOWED?

No – cookie walls cannot indirectly force a user to accept cookies in order to enter the site.

Although Article 5(3) of the e-Privacy Directive has not been transposed into Estonian law, and formally the opt-out principle applies, lately the common practice is to obtain the user's consent. The consent must be granular for each purpose for which cookies are used.

In Estonia there is no case law or a specific guidance, but in 2018 the European Data Protection Board issued the statement that cookie walls should be explicitly prohibited. See [here](#).

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

N/A.

Although Article 5(3) of the e-Privacy Directive has not been transposed into Estonian law, and formally the opt-out principle applies, lately the common practice is to obtain the user's consent for using any cookies that are not strictly necessary. According to the GDPR, consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement. Use of the website or other implicit actions do not therefore constitute consent.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No. Cookie banners must comply with GDPR, i.e. provide a user with full information about data collection, use and storage.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No, but the use of cookies should be transparent, therefore the information about cookies should be provided to the data subject. This can be done either in the privacy policy or in the cookie policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear (No specific rules or guidance).

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear (No specific rules or guidance).



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Not to our knowledge.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Not to our knowledge.



Additional information

In Estonia, Article 5(3) of the e-Privacy Directive has not been expressly transposed into national law, therefore formally the opt-out regime applies for the use of cookies. However, it is now common practice

and therefore recommended to ask for the user's consent for the use of cookies. In any case, the use of cookies must be transparent.

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Finland



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The requirements for consent set in the e-privacy Directive have been implemented in Finland in the [Information Society Code \(917/2014\)](#) enforced by the Finnish Transport and Communications Agency Traficom. The GDPR's provisions on consent do not include a national margin of manoeuvre, meaning that they are applied by the Member States as they are. In Finland, compliance with the GDPR is enforced by the Data Protection Ombudsman.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes, a [brief Guidance](#) by the Finnish Transport and Communications Agency Traficom. In addition, the Data Protection Ombudsman has provided its position in relation to consent for the use of cookies through an [order](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No. According to the Data Protection Ombudsman, the method for telling users about the opportunity to disable the saving and use of cookies in their browser settings is not considered consistent with the active and specific indication of agreement required by valid consent.

ARE COOKIE WALLS ALLOWED?

Unclear. Although it is unlikely that consent given in connection with a cookie wall can meet the requirements for valid consent, the relevant supervisory authorities have not provided any opinion or guidance on them.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No. Consent must be a specific, informed and unambiguous indication of the data subject.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No. However the European Data Protection Board has given Guidelines on consent: [Guidelines 5/2020 on consent under Regulation 2016/679](#).

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes. The obligations regarding the information notification can be fulfilled with a separate cookie policy. Website users must be provided with clear and comprehensive information about cookies and the purposes of saving or using user data. Users must also be given information on at least how long the cookies are used and whether third parties may have access to the cookies.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No. The storage time can be derived from the industry's code of practice. The essential thing is to define the storage time in a manner that enables the data subject to evaluate the specific purposes of the different processing activities.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No. The official guidance in Finland is quite general by nature. First-party and third-party cookies have not been addressed yet.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

The Data Protection Ombudsman's Office has quite recently (as of May 2020) started enforcement action in relation to cookies.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Yes. The Deputy Data Protection Ombudsman has ordered a company to change the way in which it asks for the user's consent for the use of cookies. The company's cookie banner stated that the user accepts the cookies by continuing to use the website. Choosing the Additional Information button instead

of the OK button opened the controller's privacy statement. In the statement, users were told that they could block the cookies by changing their browser settings. The Deputy Data Protection Ombudsman found that the controller's method for obtaining the consent required for the use of cookies was not compliant with the GDPR. Giving consent through the banner was not considered to meet the requirements of freely given consent, nor had refusing or withdrawing the consent been made as easy as giving it. Telling users about the opportunity to disable the saving and use of cookies in their browser settings was not considered consistent with the active and specific indication of agreement required by valid consent. The Deputy Data Protection Ombudsman ruled that users cannot give consent by not changing their browser settings, and ordered the controller to bring its practices for obtaining consent into compliance with the GDPR.

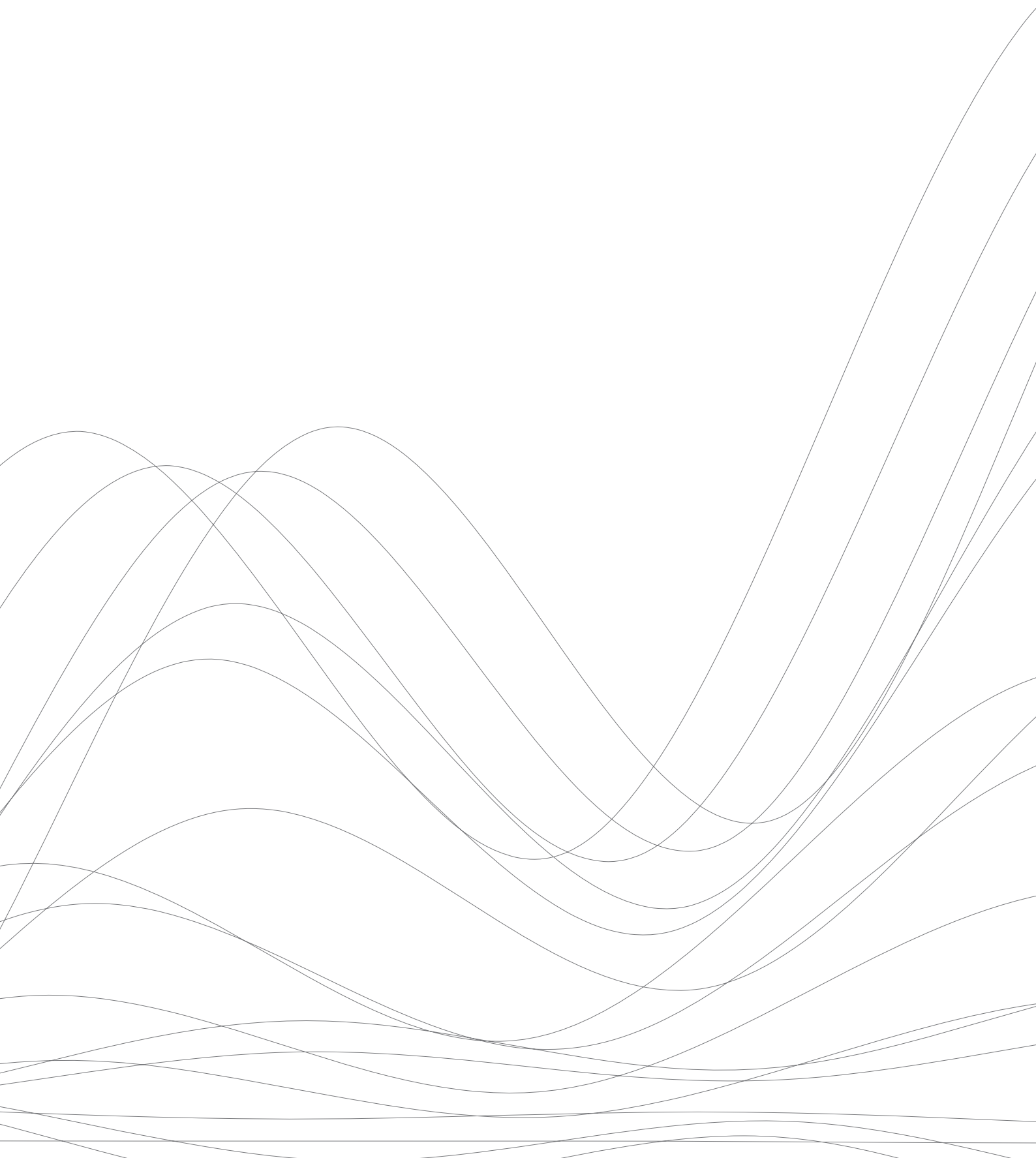
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France



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The e-Privacy Directive rules regarding cookies are implemented within the French legal framework under Article 82 of Act No. 78-17 of 6 January 1978, as last modified (the French Data Protection Act).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes.

The French data protection supervisory authority, the *Commission Nationale de l'Informatique et des Libertés* (CNIL) has issued two documents providing guidance as regards cookies:

Guidelines regarding “the application of Art. 82 of the French Data Protection Act to operations of writing and reading information in the equipment of a user, in particular regarding cookies and other tracers” (the Cookies Guidelines) – available [here](#).

A document regarding “practical compliance methods in the event of use of cookies and other tracers” (the Cookies Recommendation) – available [here](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No.

Article 82 of the French Data Protection Act provides that user consent to the use of cookies and other tracers may result from “appropriate settings” of the equipment used to connect or from any other device placed under the user’s sole control. The above includes web browser software.

However, the CNIL position is that users cannot provide consent to cookies via web browser settings. The CNIL highlights in its Cookies Guidelines that currently available web browsing software do not enable users to (i) express a consent that meets the GDPR standard (insufficient prior information, no possibility of consent per cookies purposes) and (ii) control other tracking technologies (e.g. fingerprinting) used to track users on the internet.

ARE COOKIE WALLS ALLOWED?

Lawfulness to be assessed on a case-by-case basis.

The CNIL highlights in its Cookies Guidelines that cookie walls may not enable users to benefit from a genuine choice as access to services and functionalities is made conditional on that user’s consent to the storing of information, or gaining of access to information already stored, in their terminal equipment.

The Cookies Guidelines specify that the lawfulness of cookie walls must be assessed on a case-by-case basis, provided notably that:

- the information provided to users clearly indicate the consequences of their choice and in particular the impossibility of accessing the content or service in the absence of consent (notably impossibility to access certain content or service);

- there is no simultaneous collection of a single consent for several processing operations serving distinct purposes (purpose bundling), without the possibility of consenting or refusing per cookies purpose, as such practice is likely to affect users' freedom of choice and therefore the validity of their consent.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No.

The CNIL highlights in its Cookies Guidelines that implied consent (e.g. through the use of a website or mobile application, pre-ticked boxes or bundled

consent to terms of use) does not meet the GDPR standard of consent, since the user's agreement does not result from "a statement of clear affirmative action" as required under Article 4.11 GDPR.

In that respect, the CNIL has specified that continuous browsing of a website or use of a mobile application (i.e. without any choice from the user) can no longer be construed as consent but must be construed as a refusal.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Yes.

The CNIL highlights in its Cookies Guidelines that information pertaining to the use of cookies and other tracers must:

- be brought to the user's attention prior to the collection of the consent and include at least the following information:
 - the identity of data controller(s) regarding the operations of writing and reading;
 - the different purposes of operations of writing and reading;
 - the available manners to accept or refuse cookies or tracers;
 - the consequences of a refusal or consent to cookies or tracers;
 - the user's right to withdraw their consent;
 - a list of all of the entities using cookies or tracers placed on users' equipment (an exhaustive and up-to-date list of such entities must be made easily available to the user) and information regarding the extent of browsing monitoring allowed by the tracers, indicating the different sites and applications involved;

- be provided in terms that are simple and understandable to all users (i.e. use of overly complex legal or technical terminology may not meet the transparency requirement); and
- be thorough, visible and highlighted upon collection of users' consent (note that consent bundled with agreement to terms of use or service or the sole reference to terms of use or service do not suffice).

The CNIL provides templates of information notices, including a cookie banner, on its [website](#).

The Cookies Guidelines highlight that, pursuant to Art. 82 of the French Data Protection Act, any writing or reading operation based on cookies or other tracers are subject to users' consent. However, the consent requirement does not apply to certain cookies and tracers whose sole purpose is to carry out or facilitate the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the user. In addition, when a processing of personal data occurs further to the reading or writing operation based on cookies and other tracers, such processing must comply with the French Data Protection Act and the GDPR.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No.

The CNIL specifies, in its Cookies Recommendation, that a layered approach to information should be implemented, the first layer being a cookie banner or similar method. However, the CNIL does not expressly require that the second layer of information be provided using a separate or standalone cookie policy. As a result, the second layer of information regarding cookies may be provided as part of the website privacy policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Yes.

The CNIL makes a distinction between various retention terms in its Cookies Recommendation:

- the cookie itself is subject to a maximum retention term of 13 months (this duration cannot be automatically renewed with each visit of the website by the user); and
- the maximum retention term of the data collected through the cookies is 25 months from the date they have been collected.

The Cookies Recommendation also highlights that such retention terms must be subject to a periodic review.

In France, the CNIL highlights in its Cookies Recommendation that consent to the use of cookies and other tracers should be renewed every six months as a best practice.

The CNIL considers that evidence regarding the consent and evidence regarding the refusal should be retained by the data controller, in line with its accountability obligation under the GDPR, for a duration of six months as a best practice.

If the user refuses to consent to the use of cookies, the data controller will be able to ask the user again to collect such consent, but only after a certain period of time. The CNIL considers this time period must be identical to the duration for which the consent would have been recorded (i.e. six months).

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No.

The CNIL highlights in its Cookies Guidelines that third parties using their own cookies and/or tracers (i.e. third-party cookies) on a given website will be fully and independently responsible for the cookies/tracers that they use, meaning that they will be under the obligation to independently collect user consent as mandated by the French Data Protection Act and provide them with mandatory information about the conditions of processing through the cookies banner displayed on the website. Such third parties and the publisher of the website or mobile application must determine the capacity under which they are acting with respect to the writing and reading operations carried out using cookies (i.e. independent controllers, joint-controllers, processors) and comply with the GDPR obligations corresponding to that status (e.g. joint-controllers arrangement of Art. 26 GDPR or data processing agreement of Art. 28 GDPR).

In the Cookies Recommendation, the CNIL strongly recommends that, when third-party cookies or tracers allow for tracking of the user's browsing beyond the site or mobile application where they are initially deposited, users' consent should be collected on each of the websites or applications concerned by this browsing tracking, to ensure that the user is fully aware of the scope of their consent.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

Yes.

The CNIL has announced a transition period of six months starting with the publication of the Cookies Guidelines and the Cookies Recommendation, during which Data controllers will not risk sanction regarding breaches to their new obligations regarding cookies and other trackers (i.e. no implicit consent, obligation to retain evidence of consent and refusal collection).

However, the CNIL has announced that breaches of pre-existing obligations regarding cookies (e.g. data subject information, collection of prior consent) will still be sanctioned during that transition period.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Yes.

• CNIL, Deliberation SAN-2017-006 of 27 April 2017

Administrative fine of EUR150,000 for:

- failure to collect a valid consent to the use of cookies;
- unfair processing by a social network service provider by way of cookies installed on third-party websites and enabling it to collect and process personal data concerning users that are not subscribers of the social network service provided by the data controller, with whom said users have no direct relationship; and
- failure to provide an effective mechanism enabling users to object to the writing and reading of cookies on their equipment.

• CNIL, Deliberation SAN-2017-007 of 18 May 2017

Administrative fine of EUR25,000 (Confirmed in appeal by the French Supreme Administrative Court (*Conseil d'Etat*) on 6 June 2018, n° 412589) for:

- failure to comply with the obligation to inform users and to provide a mechanism enabling users to object to the writing and reading of cookies on their equipment; and
- failure to comply with the obligation to define and implement retention periods that are proportionate to the purposes for which the personal data are processed.

• CNIL, Deliberation SAN-2019-001 of 21 January 2019

Administrative fine of EUR50 million (sanctioning various breaches of the GDPR, initiated by a class action) for:

- failure to comply with transparency and information requirements as regards the use of cookies; and
- failure to collect a valid consent to the use of cookies.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Yes:

- District Court of Paris, 7 August 2018, UFC Que Choisir v. Twitter ([link](#))
- District Court of Paris, 12 February 2019, UFC Que Choisir v. Google ([link](#))
- District Court of Paris, 9 April 2019, UFC Que Choisir v. Facebook ([link](#))

The Paris District Court (*Tribunal de Grande Instance*), seized by a consumer defence association regarding the data protection practices of three providers of social network services, held a similar reasoning in three different decisions. Notably, the Paris Court considered that the social network services failed to provide mandatory information to users regarding the use of cookies and tracers and the processing of their personal data by way of such cookies and tracers (notably because such information was scattered

across different documents, including terms of use, privacy policies and cookies policies, as the case may be). As a result, the Court considered that users' consent did not meet the consent standards set out by EU and French data protection rules.

The provisions of the providers' terms of service and data protection policies have been considered unfair as regards the French Consumer Code rules and in breach of data protection requirements.



Additional information

The CNIL emphasises that it is irrelevant whether personal data exists within the information access or stored in cookies. The Cookies Guidelines highlight that Article 82 of the French Data Protection Act applies to information stored on or accessed via such equipment, irrespective of whether such information includes personal data. Personal data may not always exist in cookies; however, when it does, GDPR obligations apply in addition. The CNIL also emphasises in the Cookies Guidelines that sanctions applicable to breaches of the French Data Protection Act under Article 82 of the same act apply, irrespective of whether the information stored on or accessed via cookies and tracers includes personal data. Examples of relevant GDPR considerations given by the CNIL include transparency requirements, joint-controllers arrangements (Art. 26 GDPR) and data processing agreements (Art. 28 GDPR).

LIMITED EXEMPTION TO COLLECT CONSENT FOR CERTAIN COOKIES AND TRACERS

The CNIL highlights in its Cookies Guidelines that, pursuant to Art. 82 of the French Data Protection Act, cookies and tracers whose sole purpose is to carry out or facilitate the transmission of a communication over an electronic communications network, or as strictly necessary in order to provide an information society service explicitly requested by the user, are not subject to user prior consent.

The CNIL has considered that the following categories of tracers benefit from the above exemption:

- cookies and tracers recording the choice expressed by users on the use of cookies and tracers;
- cookies and tracers intended for authentication to a service, including those intended to ensure the security of the authentication mechanism, for example by limiting robotic or unexpected access attempts;
- cookies and tracers intended to store the contents of a shopping basket on a merchant site or to invoice the user for the product(s) and/or service(s) purchased;
- cookies and tracers enabling the customization of the user's interface (for example, choice of language or presentation of a service), where such customisation is an intrinsic and expected element of the service;
- cookies and tracers for load balancing of equipment contributing to a communication service;
- cookies and tracers enabling paying sites to limit free access to a sample of content requested by users (predefined quantity and/or over a limited period of time); and
- certain audience measurement cookies and tracers, subject to the reservations mentioned below.

LIMITED EXEMPTION TO COLLECT CONSENT FOR ANALYTICS COOKIES

The CNIL considers that consent is not required for analytics cookies and tracers that are strictly necessary for the operation and day-to-day administration of a website or application, provided that the following conditions are met:

- The cookie or tracer must be implemented by the website publisher or on its behalf (e.g. by a data processor).
- Its scope must be limited to a single website or mobile application and must not allow tracking of the user's browsing through different applications or websites.
- Its use must also be strictly limited to the production of anonymous statistics and any personal data collected using such cookies and tracers may not be used for other purposes or combined with other processing operations or transmitted to third parties.

In addition, in its Cookies Recommendation, the CNIL specifies regarding analytics cookies and tracers, that:

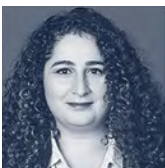
- Users should receive appropriate information regarding such cookies and tracers and their purpose before their implementation, for example via the privacy policy of the website or mobile application.

- The cookies and tracers used must not have a duration exceeding 13 months and this duration should not be automatically extended with each new visit to the website or use of application by the same user. The information collected through the cookies and tracers must be kept for a maximum duration of 25 months.

The CNIL has announced a transition period until end of March 2021, during which it will not enforce the new obligations regarding cookies and other tracers resulting from the Cookies Guidelines (i.e. additional data subject information, no implicit consent, obligation to retain evidence of consent and refusal) and Cookies Recommendation.

However, breaches of pre-existing obligations applicable to cookies and other tracers (e.g. data subject information, prior consent collection) can be sanctioned during such transition period.

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Germany



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The ePrivacy Directive is implemented by various local laws, in particular by certain provisions in the German Telecommunications Act (*Telekommunikationsgesetz*, TKG) and the German Act Against Unfair Competition (*Gesetz gegen den unlauteren Wettbewerb*, UWG).

However, provisions relevant with respect to cookies (namely Art. 5 (3) ePrivacy Directive) were never explicitly transposed into German law. Instead, the German lawmaker took the view that the legal situation in Germany already complied with the provisions of the Directive. In light of this, in its Planet49 decision of 28 May 2020, the German Federal Court of Justice (*Bundesgerichtshof*, BGH) interpreted a provision in the German Telemedia Act (*Telemediengesetz*, TMG) very broadly. The court is of the opinion that the requirements of Art. 5(3) of the Directive on privacy and electronic communications, namely the requirement to obtain consent before storing information or accessing information already stored on the user's device, should be read into Section 15(3) sentence 1 TMG. For details see [here](#).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes, but only to a very limited extent.

The joint conference of German data protection authorities (*Datenschutzkonferenz*, DSK) issued guidance for telemedia providers which also contains some information about cookies ([DSK Guidance](#)), but which does not specifically address cookie requirements. This is due to the fact that up to now the DSK was of the opinion that in Germany no cookie consent requirement existed, as Art. 5 (3) ePrivacy Directive had not been transposed into German law. It remains to be seen if and how they will adapt their views in light of the recent Planet49 decision of the BGH (see above). The DSK Guidance, however, contains specific guidance with respect to the processing of personal data in connection with tracking and analytics tools operating on the basis of cookies or similar technologies.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No. If a user's browser settings allow access to and storing of cookies generally, this does not amount to deemed consent for use of cookies on a specific website. Consent obtained for the use of cookies must meet the requirements for consent constituted under GDPR and as specified by the European Court of Justice (CJEU) in its Planet49 decision of 1 October 2019 (C-673/17); for background information see [here](#). This means, in particular, that users need to actively (e.g. by activating check-boxes) provide consent for the specific cookies in use on a website. These requirements are not met by such browser settings.

ARE COOKIE WALLS ALLOWED?

Unclear. There are no German specific rules or guidance publicly available. According to the European Data Protection Board's (EDPB) [Guidelines on consent under Regulation 2016/679](#) (p. 12), "in order for consent to be freely given, access to services and functionalities must not be made conditional on the consent of a user to the storing of information, or gaining of access to information already stored, in the terminal equipment of a user (so called cookie walls)." However, some German data protection authorities (unofficially) accepted hybrid solutions which grant users the option to either consent to cookies or to pay for content (similar to the Austrian data protection authority in a decision of 2019; for details see [here](#)).

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

Unclear, but likely no, as consent can only be provided by an unambiguous indication of the user's wishes by which the user, by a statement or by a clear affirmative action, signifies agreement to the use of cookies.

Therefore, a preselected checkbox was deemed insufficient in this regard, as it does not imply active behaviour on the user's part (CJEU, Planet49, C-673/17). However, the CJEU has otherwise not discussed in detail what kind of consent mechanisms may otherwise constitute "active consent" and a "clear affirmative action," and has especially not addressed practices such as consent by continuing to surf or consent by browser settings. However, based on the argumentation, it is not likely that such practices would be suitable for obtaining active consent, except perhaps in very specific cases.

According to the EDPB's Guidelines on consent under Regulation 2016/679 (p. 19) "actions such as scrolling or swiping through a webpage or similar user activity will not under any circumstances satisfy the requirement of a clear and affirmative action: such actions may be difficult to distinguish from other activity or interaction by a user and therefore determining that unambiguous consent has been obtained will also not be possible. Furthermore, in such a case, it will be difficult to provide a way for the user to withdraw consent in a manner that is as easy as granting it."



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Yes. According to the [DSK Guidance](#), a cookie banner should appear the first time a user opens a website (e.g. as a separate HTML element). It in particular must allow the user to choose to which cookies they wish to consent; the selection options must not be pre-selected as "active" (e.g. by an already checked checkbox). The user must be adequately informed about the usage of cookies (in particular about the duration for which the cookies are stored) within the banner or on a webpage to which the banner contains a link. The cookies may not be stored and used on the terminal device before the user consented accordingly. Access to the imprint and privacy policy may not be prevented by cookie banners.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No. A separate cookie policy is not required in addition to the website privacy policy as long as the necessary information is provided within said privacy policy or via a consent management platform (CMP).

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear. The German data protection authorities have so far not provided clear guidelines on the storage period of cookies. In the [DSK Guidance](#) they only stated that in the context of the assessment whether the processing of personal data (user profiles) can be based on legitimate interests, short life spans of cookies may compensate for other deficiencies (thus potentially tipping the balance test in favour of the telemedia provider).

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes. If data collected via cookies is shared with third parties (e.g. analytics tool provider), which typically is the case with third-party cookies, the users must be informed about the recipients of the data (CJEU, Planet49, [C-673/17](#)).



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No. There is no regulatory strategy on the enforcement of cookie rules yet due to the fact that (i) the situation regarding cookies was unclear until the BGH decided on 28 May 2020 that cookie consent is required, and (ii) the German data protection authorities currently cannot enforce cookie rules (however, they can take measure with regard to the processing of personal data in relation to cookies).

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No (as far as publicly known).

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Yes.

The BGH in the Planet49 proceeding had to decide on the requirements that must be met for valid consent to storage of cookies on a user's terminal device.

The court submitted the question to the European Court of Justice (CJEU). As already discussed above, the CJEU issued its [decision](#) in October 2019. In this decision it states that consent cannot be obtained with an already activated checkbox because the fact that a user simply does not deactivate the checkbox cannot be classified as a clear affirmative action. On 28 May 2020 the BGH confirmed the European judge's view regarding activated checkboxes. Particularly relevant, however, was the question of whether cookie consent is required under German law in the first place, which was uncertain and disputed at the time. On 28 May 2020, the BGH decided that consent must be obtained in Germany for the use of (non-essential) cookies (see [here](#) for details).



Additional information

Cookies do not necessarily contain personal data and/or are used in the context of the collection of personal data. However, typically cookies contain an ID which might be combined with other personal data (e.g. IP addresses). And, even more important, cookies are typically the means to create user profiles based on surfing habits. In such cases, GDPR applies (e.g. web analytics, tracking for marketing purposes). Therefore, it is necessary to ensure in such cases that:

- there is a legal basis for processing (e.g. consent or legitimate interests);
- information as well as documentation obligations are adhered to;
- recipients of personal data processed in the context of cookies (e.g. provider of analytics tools) are engaged as processors if relevant; and
- recipients of personal data processed in the context of cookies based in non-EEA countries are subject to transfer mechanisms in accordance with Art. 44 et. seq. GDPR.

While German data protection authorities cannot enforce cookie rules, they might start taking action with regard to the processing of personal data enabled and/or facilitated by cookies. Furthermore, concerned users, competitors and particularly consumer protection associations might initiate civil actions over the lack of cookie consent respectively invalid cookie consent (however, it is yet unclear – and there are good reasons against it – whether competitors and consumer protection associations have the right to initiate such civil action).

Furthermore, the DSK might issue new guidance for telemedia providers in the light of the Planet49 decision of the BGH; this should be monitored.

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Hungary



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Act C of 2003 on Electronic Communications.

Data Protection and Freedom of Information, guidance available in Hungarian [here](#).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes, on privacy requirements with respect to web shops issued by the National Authority for

Further guidance given by the Authority in a concrete case is available in Hungarian [here](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No.

ARE COOKIE WALLS ALLOWED?

No, and the European Data Protection Board confirmed that consent given via a cookie wall is not valid, as the individual is not presented with a genuine choice, so consent is not freely given.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Consents cannot be bundled, granular consent (separate checkbox) is required.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No, data should be stored for a strictly necessary period of time only.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No, controllers shall meet cookie requirements independent from third parties. Website operators may only use cookies for which they are able to determine what kind of data is being processed, for what purpose, and by whom.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.



Additional information

Section 155(4) of Act C of 2003 on Electronic Communications only partially implemented Article 5(3) of the e-Privacy Directive as the Act only regulates that prior consent is required for the placing of cookies (“the storing of information, or the gaining of access to information on the electronic terminal equipment of a subscriber or user obtained via electronic communications networks is only allowed on the condition that the subscriber or the user

concerned has given his or her consent, after having been provided with clear and comprehensive information which also includes the purpose of the data processing”). The exclusions as set out by the Directive are only established by the Hungarian Data Protection Authority, accepting legitimate interest as an appropriate legal basis for the placing of functional cookies.

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Italy



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Italian Legislative Decree n. 196 of 30 June 2003 (Privacy Code).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes – Decision of the Italian Supervisory Authority on [Simplified Arrangements to Provide Information and Obtain Consent Regarding Cookies](#) – 3 June 2014 (the Decision).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes – according to the Decision, users can provide their preferences to the use of cookies via browser settings. To that end, the extended information notice must at least include (i) a reference to such possibility, (ii) a description of the procedure to be followed to configure those settings, and (iii) a direct link with the settings configuration section in the browser.

ARE COOKIE WALLS ALLOWED?

Unclear – although the Italian Supervisory Authority does not expressly refer to cookie walls, in its Decision it states that the measures implemented must ensure “as low-impact as possible in terms of interfering with users’ seamless navigation experience and the provision of IT services.”

In light of the absence of a clear and specific provision, it should be kept in mind that the latest *Guidelines 05/2020 on consent under Regulation 2016/679* issued by the European Data Protection Board (EDPB) – 4 May 2020 (the Guidelines) specifically underline that cookies banners cannot indirectly force a user to accept cookies in order to enter the website, since the data subject is not presented with a genuine choice. Therefore, such consent should be considered as not freely given and should not constitute valid consent.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

Yes – the Italian Supervisory Authority considers that if the user continues browsing by accessing any other section or selecting any item on the website (e.g. by clicking a picture or a link), they consent to the use of cookies.

However, the validity of such provisions needs to be evaluated in the near future in light of the EDPB Guidelines, which clarify that the action by which consent is given must be distinguished from other actions, and merely continuing the ordinary use of a website (e.g. scrolling or swiping through a webpage) will not under any circumstances satisfy the requirement of a clear and affirmative action, as it is not conduct from which one can infer an indication of wishes by the data subject to signify agreement to a proposed processing operation.

In light of the above, the aforementioned provision under the Decision might be considered as no longer applicable. However, no clear indication has yet been provided by the Italian Data Protection Authority.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

According to the Decision of the Italian Supervisory Authority, the user shall be provided with a short information notice as well as an extended privacy information notice.

The short information can be included in a banner and shall: a) clarify whether the website uses profiling cookies to send advertising messages in line with the user's online navigation preferences; b) clarify whether the website also allows setting third-party cookies; c) provide a clickable link to the extended information notice, where information on technical and analytics cookies, if any, must be provided, along with tools to select the cookies to be enabled; d) clarify that on the page with the extended information notice, the user may refuse to consent to the installation of the relevant cookies; and e) clarify that if the user continues browsing by accessing any other section or selecting any item on the website (e.g. by clicking a picture or a link), the user consents to the use of cookies.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes – as per the position of the Italian Supervisory Authority, the cookie policy is generally provided separately from the privacy policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes – in its Decision, the Italian Supervisory Authority points out that publishers should be considered as technical intermediaries between third parties and users, since they may hardly be considered to act as joint controllers with the third parties in respect of the cookies the latter install by way of the publishers: it is in this capacity that they must provide information to online users and acquire users' consent as for third parties' cookies. In light of the above, the extended information notice must contain (i) an updated link to the information notices and consent forms of the third parties that set cookies through the operator's website and (ii) if the operator is not directly contracting with such third parties, it will have to include the links to the websites of the intermediaries or brokers that are in turn liaising with such third parties. In order to keep publishers' responsibilities separate from those vested in third parties, it is considered necessary for the publishers to acquire the aforementioned links from the third parties at the time of entering into the respective agreements.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

Cookie verification is carried out periodically by the Italian Data Protection Authority.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.



Additional information

The Decision of the Italian Supervisory Authority was issued before 25 May 2018. As a general rule, any decision, provision or guidance of the Italian Supervisory Authority issued before such date remains applicable to the extent that it complies with the GDPR provisions. In light of the above, given that

the Guidelines recently issued by the EDPB conflict with some of the provisions of the Italian Supervisory Authority Decision, there is the possibility that the Decision will be challenged or modified in the near future.

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Ireland



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

S.I. No. 336/2011 – European Communities (Electronic Communications Networks and Services) (Privacy and Electronic Communications) Regulations 2011 (2011 Regulations).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes – Data Protection Commission Guidance note on cookies and other tracking technologies which was published [here](#) and the corresponding report is available [here](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No – if a user's browser settings allow access to and storing of cookies generally, this does not amount to deemed consent for use of cookies on a specific website. The guidance notes that merely referring to such cookies which are usually enabled in browser settings (often third-party analytics), in a privacy policy for example, will not meet the transparency and information requirements under the relevant cookie laws.

ARE COOKIE WALLS ALLOWED?

No – cookie banners cannot indirectly force a user to accept cookies in order to enter the site. There must be granular, opt-in consent for each purpose for which cookies are used.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – the DPC highlights in its guidance that consent cannot be implied from use of the website: it must be clear that a user has actively engaged with the cookie banner and given unambiguous consent to use of cookies.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Consents cannot be bundled – consent must be gained for each purpose for which a cookie is used. Organisations should adopt a layered approach to gaining and explaining consent to users. This may be achieved by a cookie banner; however, the guidance notes that the banner must not indirectly force a user to accept all cookies: a reject option should also be clear if such an accept option is available on the banner.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes – the DPC guidance acknowledges that although some of the information within a cookie policy and a privacy notice may overlap, it is best practice to maintain both. Privacy and cookie policies should be accurate and kept up to date, and should be visible and readily available to users: the DPC warns that banners and other pop-ups should not obscure these.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Yes. The DPC indicates that six months is the longest period for storing user consent for cookies, and recommends that users have a readily available tool on the relevant website allowing them to regularly amend cookie consents.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes. The DPC reminds organisations to consider all relationships with third parties who they may interact with. This could be through plugins, widgets, or social media sharing tools, for example. Organisations should know what personal data is being shared with third parties via cookies (or other means), and where controller-controller or controller-processor relationships may exist.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

The DPC has indicated that enforcement action on compliance with the new guidance will begin in October 2020, by which time organisations must bring their websites, apps, and other products which use cookies, into compliance. The areas which may be examined by the DPC in a potential enforcement include compliance and adherence to the key data protection principles, which apply where the cookies contain personal data. Examples given by the DPC in its report include accountability and transparency, as well as regarding data subject rights and general security obligations under the GDPR.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

The DPC emphasises that it is irrelevant whether personal data exists within the information access or stored in cookies. The guidance notes that the ePrivacy Regulations apply to information stored or access on such equipment, irrespective of whether the information includes personal data. Personal data may not always exist in cookies; however, when it does, GDPR obligations apply in addition. Examples of relevant GDPR considerations given by the DPC include transparency requirements, Article

28 contracts where appropriate and ensuring relevant processing is recorded in an Article 30 Records of Processing Activities (RoPA).

Consent is required for Analytics cookies. The DPC does indicate, however, that when carrying out enforcement action on cookie compliance, it is unlikely that first-party analytics will be an immediate priority for the DPC.

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Latvia



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Law On Information Society Services.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No. According to the GDPR and Personal Data Processing Law, consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement. Silence, pre-ticked boxes or inactivity should not therefore constitute consent.

ARE COOKIE WALLS ALLOWED?

No. A cookie wall forces users to decide between visiting a website by accepting all cookies, or to leave with their privacy intact. Thereby, consent is not freely given, as specified in Article 7 of the GDPR.

In Latvia there is no case law or a specific guidance but in 2018 European Data Protection Board has issued the statement that cookie walls should be explicitly prohibited. See [here](#).

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No. According to the GDPR and Personal Data Processing Law, consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement. Silence, pre-ticked boxes or inactivity should not therefore constitute consent.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No. Cookie banners must comply with GDPR, i.e. provide a user with full information about data collection, use and storage.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear (No specific rules or guidance).

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear (No specific rules or guidance).



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

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Lithuania



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Law on Electronic Communications No. IX-2135.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No valid regulatory guidance.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No specific local rules or guidance.

According to the GDPR, consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement. Silence, pre-ticked boxes or inactivity should therefore not constitute consent.

ARE COOKIE WALLS ALLOWED?

No specific local rules or guidance.

According to the GDPR, a cookie wall forces users to decide between visiting a website by accepting all cookies, or to leave with their privacy intact. Thereby, consent is not freely given, as specified in Article 7 of the GDPR.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No specific local rules or guidance.

According to the GDPR, consent should be given by a clear affirmative act establishing a freely given, specific, informed and unambiguous indication of the data subject's agreement. Silence, pre-ticked boxes or inactivity should therefore not constitute consent.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No specific local rules or guidance.

Cookie banners must comply with GDPR, i.e. provide a user with full information about data collection, use and storage.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Not required. Information on cookies can be provided in a separate cookie policy, or be part of the website privacy policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No specific retention periods set out locally.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No specific local rules or guidance on different types of cookies.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No specific local regulatory strategy on enforcement on cookies.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Not to our knowledge.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

Not to our knowledge.

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Luxembourg



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Luxembourg Law of 30 May 2005 as modified by the Law of 28 July 2011 implements the provisions of the ePrivacy Directive.

However, at European level, the Article 29 Group (then replaced by the EDPB) has provided some guidance on the matter that are referred to [on the CNPD website](#).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No – as of now, the National Commission for Data Protection (*Commission Nationale pour la Protection des Données, CNPD*) has not provided regulatory guidance regarding the use of cookies.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes – Article 4 paragraph 3 (e) of the Luxembourg Law of 30 May 2005 as modified provides that the user's consent can be expressed by the use of specific settings from the browser or another application provided that they have received clear and complete information notably about the purposes of the processing of their data.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – except when the use of cookies is required for the transmission of a communication through an electronic communications network or is strictly necessary in order to provide an information society service explicitly requested by the subscriber or user.

ARE COOKIE WALLS ALLOWED?

No – the right to refuse the use of cookies should be offered to the user.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No – however, in compliance with Luxembourg regulations, the user should be offered the possibility to refuse the use of cookies. Therefore, if a cookie banner is used, it must include a refusal option.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No – however, the user must be provided with clear and precise information about the use of their data through cookies. Therefore, it is recommended to provide a cookies policy containing this information, which can be separate or included in the privacy policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear (No specific rules or guidance) – data collected should be retained only for the necessary period according to the purposes. In this case, guidance provided by other Member States about recommended retention period for data held by cookies should be considered applicable in Luxembourg.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear (No specific rules or guidance).



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

Unclear. The CNPD has not made any public declaration about the implementation of a specific strategy to enforce cookies rules but has recently increased the spectrum of its investigating powers in regard to GDPR enforcement. Therefore, it remains to be seen if the CNPD will apply the same strategy in matters related to cookies.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

Although the CNPD has not formally made a public announcement about a possible enforcement strategy of cookies rules, please note that cookies also fall under the scope of the GDPR.

As such, they can be investigated like any other form of data collection.

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Malta



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Subsidiary Legislation 586.01 – The Processing of Personal Data (Electronic Communications Sector) Regulations.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Unclear.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

Unclear.

ARE COOKIE WALLS ALLOWED?

Unclear.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Unclear.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Unclear.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Not all fines issued by the Information and Data Protection Commissioner are made public; however, to our knowledge, no fines have so far been issued for non-compliance of cookie rules.



Additional information

While cookie compliance remains a grey area in Malta and there are no specific rules or guidance on a national level, all relevant GDPR rules and principles should nonetheless be adhered to where these

are applicable to the implementation of cookies, particularly with regard to obtaining consent for cookies (where necessary).

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HEMPSTORY

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Netherlands



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Article 11.7a of the Dutch Telecommunications Act.

Information provided by the Dutch Data Protection Authority (Dutch DPA) is available [here](#) (general information) and [here](#) (information about cookie walls).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Information provided by the Authority for Consumers and Markets (ACM) is available [here](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No – at this moment in time this is not sufficient. It cannot be assumed that each visitor can configure their browser settings to adequately reflect their preferences in relation to the setting of cookies. As such, consent cannot be deemed to be given freely, specific, informed and unambiguous.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – implicit consent cannot be regarded as given unambiguously. Consent should be given by means of an affirmative action (i.e. by means of clicking a button or ticking a box). The mere continuation of browsing a website no longer constitutes valid consent.

However, please note that this might change in the future. Consent may be provided or obtained through default browser settings, provided that all conditions for a valid consent have been fulfilled.

ARE COOKIE WALLS ALLOWED?

No – the Dutch DPA has issued clear guidance that cookie walls are not allowed, as consent cannot be deemed to be freely given. Although the placement of cookies can be refused in case of a cookie wall, this cannot be done without detriment (as refusal means that the website cannot be visited at all). Hence, there is no “real” and free choice.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

Yes – information about cookies should be clear and complete and must be provided in accordance with the GDPR. Providing information and obtaining consent can be done in various ways. Examples include using a header bar or a pop-up, which provides the relevant information and which allows the website visitor to accept or reject cookies (or to otherwise adjust the cookie settings).

In any case, the cookie banner should appear on the first page a website visitor lands on. Furthermore, consent must be granted before any non-functional cookies are placed.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No – as mentioned above, the information about the cookies that are placed and the personal data that is collected must be clear and complete and in accordance with the GDPR. The GDPR requires that information is easily accessible. Therefore, an easily accessible cookie policy is a suitable option to provide the relevant information. However, a separate policy is not required.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Yes – in the form of a Q&A on its website, the Dutch DPA states visitors should be informed of the storage period per cookie. The lifespan of the tracking cookies that are placed through your website should be checked and it should be assessed whether the retention period is necessary for the purpose.

Furthermore, the Dutch DPA states that it considers a retention period of six months or longer to be excessive. According to the Dutch DPA, this is also due to the fact that the period is extended by six months each time a user visits your website or another website that places this cookie.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No specific rules or guidance.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

The use of cookies in the Netherlands is largely regulated by the Telecommunications Act (regulating the use of cookies). The Consumer and Market Authority (ACM) is responsible for monitoring and enforcement of the Telecommunications Act.

The Dutch DPA is responsible for monitoring and enforcement of the GDPR. On its website the Dutch DPA mentions that the foregoing does not affect existing legislation and regulations or the mandate of other regulators. However, there will be consultation between the Dutch DPA and other supervisory authorities in cases where there may be overlap.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Yes – on 15 July 2014 the ACM imposed a penalty payment on the Dutch Public Broadcaster (NPO) in order to enforce compliance with the cookie rules. In November 2014 the infringement had not ended and therefore the penalty of EUR25,000 had to be paid.

Furthermore, on 7 March 2019 the Dutch DPA issued its viewpoint with respect to the impermissibility of cookie walls. The Dutch DPA sent a letter with the explanation of the standard to the organisations

about which it has received the most complaints.

In this letter, the Dutch DPA also announced that it will intensify monitoring in the coming period to see whether the standard is being applied correctly in the interests of privacy protection.

On 10 December 2019 the Dutch DPA announced it has checked approximately 175 websites of webshops, municipalities and media, among others, whether they comply with the requirements for placing tracking cookies. Almost half of the websites that use tracking cookies did not meet the consent requirements. Virtually all of the webshops checked did not meet these requirements. The organisations behind these websites have received a letter from the Dutch DPA calling on them to adjust their working methods if necessary. The Dutch DPA announced that in the short term it will start an investigation into whether cookies are being used lawfully.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

Please note any additional information which may be relevant for clients when ensuring cookies compliance in your jurisdiction.

Firstly, it must be possible to demonstrate that visitors have given their consent to the placing of cookies.

Secondly, an exception to the aforementioned consent requirement applies to the use of cookies:

- that are necessary for carrying out communications over an electronic communication network;

- that are strictly necessary to provide the service requested by the user; or
- to obtain information on the quality/effectiveness of a service when the cookies have little or no impact on the internet user's privacy.

These functional and analytical cookies may be placed without obtaining prior consent.

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Norway



General

WHICH LOCAL LAW IMPLEMENTS THE PRIVACY DIRECTIVE?

LOV-2003-07-04-83 Act on electronic communication (E-com Act) (*Lov om elektronisk kommunikasjon (ekomloven)*).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

The National Communications Authority (Nw. Nasjonal Kommunikasjonsmyndighet Nkom) is the regulatory

authority responsible with the oversight of the E-com Act. Act has issued a guidance on cookies available [here](#) (Norwegian only).

The Norwegian Data Protection Authority (NDPA) has also issued a guidance for the instances where the placement on cookies entails processing of personal data (Norwegian only).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Pursuant to the E-com Act section 2-7:

“Retaining information in the user’s communication equipment, or gaining access to this, is not permitted unless the user is informed on which information is processed, the purpose of this processing and who will process the information and consents to this. The first point is not an obstacle for technical storage or access to information:

1. exclusively for the purpose of transferring communication in an electronic communications network; and
2. which is necessary to supply an information societal service in accordance with the user’s explicit request.”

Based on the position of Nkom and the preparatory work to this provision, it has been held that sufficient consent can be provided through browser settings and continued use.

However, Nkom’s guidance page has been updated after the recent decision of the CJEU, C-673/17 (Planet49).

While the Norwegian interpretation has not officially been changed, Nkom now “recommends” that where the placement of cookies constitutes processing of personal data one should use GDPR-compliant consents, which entails that consent through web browser settings is not sufficient.

ARE COOKIE WALLS ALLOWED?

No, at least not if the placement of the cookies in question constitutes personal data, cf. the most recent guidelines from EDPB, [example 6a](#).

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No, at least not if the placement of the cookies in question constitutes processing personal data.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

The information provided must give the user clear information about which cookies are placed, which information they process, the purpose and who performs the processing – but there are no specific rules or guidelines on how this information is provided. The information must be easily visible when a user enters the site and may be provided through an easily visible link in the header, footer, a text box on the front or a pop-up where the word cookies or cookies are mentioned so that it is clear what one is informing about.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No, as long as the information obligation is fulfilled.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No, not more specific than what follows from section 2-7 of the E-com Act:

“Traffic data, localization data and data necessary to identify the subscriber or user shall be deleted or made anonymous as soon as they are no longer necessary:

1. for communication or invoicing purposes;
2. to comply with the obligation according to section 2-7 a for retaining data; or
3. to comply with other demands laid down in accordance with law.”

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes, as regards information requirements Nkom states that it is the data controller who is responsible for fulfilling the information requirement. In the case of third-party cookies, the third party who sets the cookie is responsible for meeting the information requirements for their own website. However, a site that allows the placement of third-party cookies on their own website must also ensure to disclose this in a transparent matter in addition to information about their own cookies.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No fines issued yet.



Additional information

We note that the regulatory guidance is a moving target in light of the recent legal development, especially the Planet49 decision from CJEU, and it

is not unlikely that Nkom will update their formal guidance in line with what is now a recommendation.

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Poland



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Act of 16 July 2004 Telecommunications Law (Telecom Act).

Act of 18 July 2002 on Electronically Supplied Services.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes, under Art. 173 sec. 2 of the Telecom Act this is explicitly allowed.

A subscriber or end user may give the consent to use of cookies by adjusting the settings of the software installed in the telecommunications terminal equipment used by that subscriber or end user, or by adjusting the configuration of the service.

This rule may be changed under the new legislation (see Additional Information), as it has been pointed out in the legal literature that such consent is not explicit and granular and may not be compliant with personal data regulations. However, no official draft confirming this has been published as of yet.

ARE COOKIE WALLS ALLOWED?

Unclear.

No specific official guidance on cookie walls has been published as of yet; however, under Art. 174 of the Telecom Act, the provisions on personal data protection apply to obtaining the consent of a subscriber or an end user, i.e. cookies consent.

Therefore, it may be argued that a cookie wall may not comply with all obligations for valid consent under GDPR (e.g. a voluntary, granular character) and is not lawful.

However, we are not aware of any specific case law or official guidelines from the data protection authority that would confirm this.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No.

Under Art. 174 of the Telecom Act, the provisions on personal data protection apply to obtaining the consent of a subscriber or an end user, i.e. cookies consent.

Implicit consent would not constitute valid consent under GDPR, therefore it would not be considered lawful under local law.

Consent via browser settings is permitted.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No.

This is typically done in a separate cookie policy; however, if the privacy policy included a separate section on cookies (with the information listed above), this would also be acceptable.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes, under Art. 173 sec. 1 of the Telecom Act, the end user must be informed of:

- the purpose for which the information is stored and accessed; and
- the possibility of defining the conditions under which this information is stored and accessed, by adjusting the settings of the software installed in the telecommunications terminal equipment used by that subscriber or end user, or by adjusting the configuration of the service.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No, general GDPR rules would apply instead.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.



Additional information

As mentioned, Article 174 of the Telecom Act established the applicability of personal data protection rules to consent of a subscriber or end user. Therefore, general GDPR rules should be considered while establishing cookie policies for Poland. In particular, an implicit or unclear consent mechanism may be considered unlawful. Furthermore, due to the provisions of the Telecom Act, potential liability for cookies non-compliance may be based on both the Telecom Act (including administrative fines of up to 3% of the revenue generated by the entity concerned in the previous calendar year) and GDPR.

Additionally, please note that a new law implementing the Directive (EU) 2018/1972 of the European Parliament and of the Council of 11 December 2018

establishing the European Electronic Communications Code (Recast) is under legislation in Poland. The new regulation will combine all provisions related to electronic communications in one act and will substitute the current regulations (including the Telecom Act). No official draft has been published as of yet; however, it is scheduled to be released in the second half of the year. The new law must be passed before the deadline set out in the Directive (21 December 2020). Our answers are based on the currently applicable regulations; however, as the new law will include regulations on cookies, we would recommend to conduct an additional review of this table in the second half of 2020.

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Portugal



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Law 41/2004, of 18 of August 2004 on the protection of personal data and privacy in telecommunications, amended by Law 46/2012, of 29 August 2012 (ePrivacy Law).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No, Portuguese Data Protection Authority (CNPD) has not issued any guidance specifically addressing cookies.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No. For purposes of Portuguese ePrivacy Law, the definition of consent is the definition provided by GDPR. Therefore, where consent for cookies is necessary, it must be freely given, specific, informed and unambiguous and be given by a statement or by a clear affirmative action. As such, a user's browser settings allow access to and storing of cookies generally, this does not amount to consent for use of cookies on a specific website.

ARE COOKIE WALLS ALLOWED?

No, please note that there are no specific rules or guidance. However, considering that, pursuant to GDPR, consent must be granular (for each purpose

for which cookies are used) and freely given (the provision of a service cannot be conditional on consent to the processing of personal data that is not necessary for the performance of that contract), we consider that cookie walls are not allowed.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No. Consent must be unambiguous and be given by a statement or by a clear affirmative action. Thus, implicit consent is not accepted.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No, there are no specific rules or guidance for cookie banners.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No, there are no specific retention periods for data held by cookies.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No. The cookie policy may be separated from the website privacy policy or may be a section included in the website privacy policy. However, it is common practice to have a separate cookie policy.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No, there is no difference between first-party and third-party cookies.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No, currently there is no regulatory strategy on the enforcement of cookie rules.

However, it should be noted that decisions from CNPD applying any fines were not public until 25 May 2018. As of this date, although the decisions are publicised on the CNPD's website, the same may not be up to date.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

According to Portuguese ePrivacy Law, consent is not necessary for technical cookies whose sole purpose is carrying out the transmission of a communication over an electronic communication network or which are strictly necessary for the provider of an information society service to provide a service expressly requested by the subscriber/user.

As to the cookies that require consent, such consent is required for the information stored or access on such equipment, irrespective of whether the information includes personal data or not.

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Romania



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Law no. 506/2004 on the processing of personal data and the protection of privacy in the electronic communications sector.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No regulatory guidance issued to specifically address cookies.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes, the consent can be given by using the appropriate settings of the web browser or other similar technologies, by which it may be deemed that the user or subscriber expressed their consent.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No.

ARE COOKIE WALLS ALLOWED?

No specific rules or guidance.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No specific rules or guidance.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No specific rules or guidance.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No specific rules or guidance (although the legislation provides for a specific scenario – request of access to data and preservation of data made by authorities and subsequent obligation of maintaining the data for a specific period of time).

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

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Slovak Republic



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The following acts implement the ePrivacy Directive:

- Act No. 351/2011 Coll. on Electronic Communications, as amended;
- Act No. 222/2004 on Value Added Tax, as amended;
- Act No. 428/2002 Coll. on the Personal Data Protection, as amended (this act was abolished as of 30 June 2013 and replaced by the Act No. 122/2013 Coll. on the Personal Data Protection, which was abolished as of 24 May 2018 and replaced by the Act No. 18/2018 Coll. on Personal Data Protection and on Amendments and Supplements of certain acts, as amended as amended);

- Act No. 22/2004 on Electronic Commerce, as amended; and
- Act No. 99/1963 Coll. Code of Civil Procedure, as amended (this act was abolished and replaced by the Act No. 160/2015 Coll. Civil Dispute Code, Act N. 161/2015 Coll. Civil Non-dispute Code and Act No. 162/2015 Coll. Administrative Procedure Code, as amended).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

The Office for Personal Data Protection of the Slovak Republic (Supervisory Authority) has not issued any guidance in which it would regulate this area to this date. We are not aware of any upcoming guidance by our Supervisory Authority.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes – Article 5(3) of the ePrivacy Directive has been implemented by Section 55(5) of the Act No. 351/2011 Coll. on Electronic Communications, as amended which states that:

“Every person that stores or gains access to information stored in the terminal equipment of a user shall be authorised for that only if the user concerned has given his consent on the basis of clear and comprehensive information about the purpose of the processing; for this purpose the consent shall be also the use of a respective setting of the web browser or other computer programme. The obligation to gain the consent shall not apply to a body acting in criminal proceedings or other state

body. This shall not prevent any technical storage of data or access thereof for the sole purpose of the conveyance or facilitation of the conveyance of a communication by means of a network or if it unconditionally necessary for the provider of an information society service to provide information society services if explicitly requested by the user.”

It follows from the above, that the user’s consent to the use of cookies, which are not personal data, is also considered in the browser settings. It is assumed that each user determines in the settings of their browser whether they allow the website to store cookies on their device (e.g. smartphone) or not.

Pursuant to the Judgment of the Court of Justice of the EU dated 1 October 2019 in case C – 673/17, it is necessary that consent to the use and storage of cookies is actively granted by each user (i.e. that the user ticks the box that they agree to the use and storage of cookies or clicks on “I agree” button). As of 1 October 2019, the pre-ticked consent to the storage of cookies on the website is therefore invalid.

ARE COOKIE WALLS ALLOWED?

No – the European Data Protection Board adopted on 4 May 2020 the Guidelines 05/2020 on consent under Regulation 2016/679 (Guidelines). This Guidelines stipulated the following:

In order for consent to be freely given, access to services and functionalities must not be made conditional on the consent of a user to the storing of information, or gaining of access to information already stored, in the terminal equipment of a user (so-called cookie walls).

Example: A website provider puts into place a script that will block content from being visible except for a request to accept cookies and the information about which cookies are being set and for what purposes data will be processed. There is no possibility to access the content without clicking on the “Accept cookies” button. Since the data subject is not presented with a genuine choice, its consent is not freely given.

This does not constitute valid consent, as the provision of the service relies on the data subject clicking the “Accept cookies” button. It is not presented with a genuine choice.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

Yes – regarding cookies, in addition to GDPR, the provisions of Act No. 351/2011 Coll. on Electronic Communication, as amended must also be considered.

For cookies that are not personal data, the obligations under the Act No. 351/2011 Coll. on Electronic Communication, as amended (consent) will apply. Using the corresponding settings of a web browser or another computer program is also considered consent for this purpose.

No consent from the user needs to be obtained for cookies that are necessary for the operation of websites and internet services (technical cookies).

In order to process cookies that are personal data (i.e. if they are linked to a specific person and can identify such person), it is also necessary to have a suitable legal basis for this processing (Art. 6 (1) lit. a, b or f of GDPR).



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No – please note that Supervisory authority did not issue any guidance and there are also no specific rules in this matter.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes – please refer to answers regarding Section 55 (5) of the Act No. 351/2011 Coll. on Electronic Communication, as amended.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No, but please note that cookies which are not technical cookies have to be processed in accordance with GDPR and the Act No. 18/2018 Coll. on the

Protection of Personal Data and on Amendments and Supplements of certain acts, as amended regarding retention of personal data (e.g. personal data must be retained at the latest for as long as is necessary for the purpose for which the personal data are processed).

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Unclear – please note that Supervisory authority did not issue any guidance and there are also no specific rules in this matter.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

At present we are not aware of any regulatory strategy in force. However, the Supervisory authority is conducting, according to its yearly plan, a series of control aimed at compliance of liable persons with data protection legislation in force.

Also, the Supervisory authority is not explicitly entitled to sanction operator of website if violation of article 55 (5) of Act No. 351/2011 Coll. on Electronic Communication, as amended is found. If the cookies processed on the website are considered to be personal data and they are processed without consent, the Supervisory authority may sanction liable person under the rules of the Act No. 18/2018 Coll. on the Protection of Personal Data and on Amendments

and Supplements of certain acts, as amended. Please note that such procedure is highly theoretical and to this date we are not aware of any such proceedings.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

The Supervisory authority notes that the processing of cookies of an individual has to be subjected to certain procedures. Individuals have to be notified that the cookies are processed and if cookies are in the form of personal data (analytical or marketing cookies), consent of individual is required.

If the site use only necessary cookies for its technical functionality (technical cookies), the consent of individual is not required and liable person has to only comply with the notification obligation.

If the cookies are in the form of personal data, the fundamental principles on processing and storing of personal data has to be taken into account in accordance with GDPR and Act No. 18/2018 Coll. on Protection of Personal Data and on Amendments and Supplements of certain acts, as amended.

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Slovenia



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Act on Electronic Communications (*Zakon o elektronskih komunikacijah*; ZEKom-1); Personal Data Protection Act* (*Zakon o varstvu osebnih podatkov*; ZVOP-1).

*Please note that ZVOP-1 is a pre-GDPR act and the a new personal data protection act is yet to be adopted in Slovenia.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

The pre-GDPR guidance specifically relating to cookies was recently made unavailable by the Slovenian DPA as it is largely obsolete. The post-GDPR [guidance on the privacy statements on websites](#), however, includes a chapter on the cookies notice but also refers to the old and now unavailable guidance.

The DPA also published some FAQ regarding cookies which can be accessed [here](#), but is also largely obsolete.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Unclear. The DPA has previously stated that the browsers currently do not provide sufficient technology and protection to allow for implicit consent but has indicated that in the future such an approach would be preferred. Such an opinion may be obsolete and is subject to the upcoming update.

ARE COOKIE WALLS ALLOWED?

No, unless some specific cookies are required for the functioning of the website.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No, consent needs to be compliant with the conditions under the GDPR.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No. Guidance has not been issued and the GDPR applies.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Unclear, the notice for the user would however usually be separate from the general privacy policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No, such guidance has not been issued and the general regulation regarding personal data applies.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes, the relevant first-party website must ensure users are informed about any third-party cookies and the consent for their use must be obtained for their use as with the first-party cookies.

Consent is not required for specific “session cookies” which enable the integration of third-party scripts into the website, as long as such cookies are strictly limited to provide the service requested by the user.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

The DPA is the authority that monitors compliance with the cookies rules. Non-compliance with the provision of the ZEKom-1 would be sanctioned by the DPA usually in form of a warning. A fine may follow in case of continued non-compliance.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No data confirming existence of such fines is available.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

As the cookies regulation is partially subject to the GDPR, the Member States have to implement certain aspects in the domestic legislation. As of May 2020, Slovenia has not yet adopted the new Personal Data Protection Act (ZVOP-2) which will replace the largely obsolete old Personal Data Protection Act (ZVOP-1). ZVOP-1 still contains certain aspects applicable to the regulation of cookies and has to be interpreted within the framework provided by the GDPR. Due

to this situation, the Slovenian DPA (*Informacijski pooblaščenec*) has not yet updated their guidance regarding cookies.

The old guidance is largely obsolete (and also unavailable in its entirety). Partially, some guidance is provided through the guidance on the privacy statements on websites and some FAQ regarding cookies which are both referenced above.

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Spain



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

Spanish Information Society Services and E-Commerce Act 34/2002 (LSSI).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes – the Spanish Data Protection Commissioner (AEPD) published on November 2019 a Guide on the use of cookies (the AEPD Guide).

Please find it [here](#).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

Yes – with certain limitations.

The AEPD Guide has been recently modified in the light of the EDPB criteria and from 31 October 2020 onwards, the mere browsing of the user on a site will not be considered as lawful form of consent collection. Consequently, the user consent shall be explicit and collected through activation boxes or marking buttons (“I accept” or “I consent”), or through any other formula that requires an explicit and unequivocal action by the user.

The AEPD Guide states that this option may be valid only if the browser settings are able to be used in such a way that allows users to (i) separately give their consent for each of the purposes envisaged and (ii) the identity of the relevant data controllers is provided (there is no need to specify the complete corporate name of the controller but rather its trade name or business name).

ARE COOKIE WALLS ALLOWED?

Unclear.

According to the AEPD Guide, there may be certain cases in which non-acceptance of the use of cookies prevents the total or partial use of the service, provided of course that the user is properly informed about this fact.

However, access to the service may not be denied in the event of rejection of the cookies in those cases in which such rejection prevents the exercise of a legally recognised rights of the user (e.g. cancellation of a given e-service), as access to this website is the only means provided to the user to exercise their rights.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

Yes.

Implicit consent shall be valid only if it is clearly established in the first cookie information layer (e.g. cookie banner) and the user performs a clear affirmative action (i.e. navigate to a different section, other than the second cookie information layer or privacy policy, slide the scroll bar, close the first layer notice, or click on any service content).

Nevertheless, implicit consent will not be valid when (i) processing special categories of personal data, which may require explicit consent; or (ii) other explicit acceptance/consent mechanisms (i.e. checkbox, acceptance buttons) are set out in the site.

Please take into account that this implicit consent approach/interpretation set forth in the AEPD Guide may change or even be challenged due to the publication of the recent EDPB consent guidelines on 4 May 2020.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

The AEPD Guide recommends the provision of the relevant cookies information in two different layers:

First layer: The cookie banner displayed when entering a given site.

Second layer: The cookie policy implemented on the site.

The AEPD Guide provides a list of the different elements that the cookie banner should include as well as different cookie banner examples already aligned with the indications and requirements listed in the AEPD Guide. In particular, the minimum content that the cookie banner shall in any event include is as follows:

- identity of the controller;
- purposes;
- if own and/or third parties cookies are used;
- generic information regarding the categories of data to be collected and processed in case of user profiling (i.e. when behavioural advertising cookies are used);
- means of acceptance, configuration and rejection of the use of cookies, which shall include, when applicable, that certain actions may be understood as effective consent (i.e. further browsing); and
- a clearly visible link directed to a second information layer including more detailed information (i.e. cookie policy).

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

Yes.

The AEPD Guide establishes that to maintain the visibility of the information about cookies, it should be highlighted and separated (by a different hyperlink, for example) from the rest of information such as (i) the terms and conditions of the site or (ii) the privacy notice.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

Yes.

The AEPD Guide establishes as a good practice that 24 months is the longest period for storing user consent and preferences for cookies. Consequently, it will be recommended for data controllers to re-collect the user's consent after a 24-month period from the last consent collection.

Having said this, the AEPD Guide includes the existence of two different types of cookies depending on how long they remain active, session cookies and persistent cookies.

Session cookies will collect and store data only while the user accesses a website. The information stored will only be used for the sole purpose of providing a specific service and shall be erased once the service has been provided and the user closes their session.

Persistent cookies on the other hand are those where the data collected will be kept stored in the terminal and be accessed and processed during a period of

time defined by the service provider (entity responsible of the cookie). No specific limit of time is included in the AEPD Guide. In this sense, the AEPD Guide highly recommends the use of session cookies rather than persistent ones, and in case persistent cookies are installed, its temporary duration must be reduced to the minimum in view of the purpose of its use.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

No.

The AEPD Guide does not include any separate rules or has not published any separate guidance specifically applicable to third-party cookies. However, it includes certain provisions to duly implement the same and protect users' rights.

For instance, the entity providing the service and using third-party cookies shall include all the relevant information about these third-party cookies implemented through the cookies policy and cookie banner in order for the user to be fully informed of the existence, use and purpose of these types of cookies. Additionally, the AEPD Guide establishes that the service provider must indicate how users can erase third-party cookies, and that to do so they must do it from their own browser or by using the system enabled by the relevant third parties for this purpose.

Finally, contractual relationships between the service provider and the third party must state clearly that this party will not process data with any other purpose more than the provision of the service agreed. This agreement limits the service provider responsibility of complying with the obligations of informing and obtaining consent related to the third-party cookies to the processing that it is responsible for on behalf of the agreement.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

Yes – the AEPD has imposed a total of 41 fines for non-compliance of cookie rules since 2014.

In particular, the AEPD has recently issued the following:

- PS/00469/2019 – SOLO EMBRAGUE S.L. – 27.02.2020 – EUR2,800

- PS/00127/2019 – IKEA IBÉRICA S.A.U. – 28.11.2019 – EUR10,000

- PS/300/2019 – VUELING AIRLINES, S.L.– 1.10.2020 – EUR30,000

- PS/00175/2019 – VF JEANSWEAR ESPAÑA S.L. (Vans) – 13.08.2019 – EUR5,000

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

- New consent collection is required when the cookie policy is updated.
- It is considered a good practice, and hence recommendable, to re-collect consent after 24 months period from the last consent collection.
- Consent is required for analytic cookies.
- Consent is required for preferences cookies.

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Switzerland



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

- Switzerland is not a member of the EU. There is no local law implementing the ePrivacy Directive.
- The provisions of the Swiss Telecommunications Act (TCA) apply to the use of cookies.
- If the cookies collect personal data, the Federal Act on Data Protection (FADP) also applies.

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

No.

There exist some – non binding – recommendations about cookies from the Federal Data Protection and Information Commissioner (FDPIC) which is, however, outdated.



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

- Yes. According to article 45c(b) TCA, at least opt-out consent is required. Opt-out in this context means that users must have the opportunity to object to the use of cookies (e.g. by rejecting the cookies via web browser settings).
- Website operators are obliged to inform users about their right to object. The users have to be informed that they can object by changing the browser settings. It is best practise to provide a short explanation on how to change the browser settings.

ARE COOKIE WALLS ALLOWED?

Unclear.

A cookie wall might conflict with the right of the users to refuse cookies. On the other hand, there is no right to use a website and it is not prohibited under the FADP to make the performance of a contract (and the provisioning of services, respectively) conditional on consent to the processing of personal data that is not necessary for the performance of that contract and the services.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

- With regard to ordinary personal data or other than personal data: yes. However, users must have the opportunity to object to the use of cookies.
- With regard to sensitive personal data or personality profiles: the disclosure of such data to third parties requires explicit consent (unless there is another justification according to article 13 FADP). Mere silence (i.e. only by use of website) is not sufficient.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

No.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No. According to article 45c(b) TCA website operators are obliged to inform users about the processing and its purpose. This can be done in a separate cookie policy or in a website privacy policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No. According to the FADP, personal data must be deleted as soon as it is no longer used for the purposes it was collected.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes. To the extent third-party cookies collect personal data, the following applies:

- It is necessary to clarify the role of the third-party provider (controller, processor, joint controller), to assign responsibilities (e.g. who has to inform the data subjects) and – depending on the role and location of the third-party provider – to enter into a data processing agreement or data transfer agreement with the provider and ensure compliance with the statutory provisions regarding cross-border disclosures.
- It is best practice (however, with regard to ordinary personal data, not mandatory) to disclose the third-party providers to the users by name.
- To the extent sensitive personal data or personality profiles are disclosed to third-party providers, explicit consent is necessary according to article 12 para. 2 (c) in connection with article 4 para. 5 FADP (unless there is another justification). Explicit consent in this context means that the users should know the names of the data recipients before they give their consent.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.



Additional information

If Swiss website operators monitor the behaviour of individuals within the EU, e.g. by applying the cookies in EU countries, and if personal data is collected with these cookies, the provisions of the GDPR also apply.

Further, Swiss website operators may have to comply with the new ePrivacy Regulation as soon as this Regulation enters into force, considering the extraterritorial scope set forth in the respective draft.

Finally, it is noteworthy that the FADP is currently under revision. The assessment might be different after the revised FADP comes into force, which is expected to happen in due course of 2021.

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UK



General

WHICH LOCAL LAW IMPLEMENTS THE EPRIVACY DIRECTIVE?

The Privacy and Electronic Communications (EC Directive) Regulations 2003, as amended by the Privacy and Electronic Communications (EC Directive) (Amendment) Regulations 2011 (PECR).

IS THERE ANY REGULATORY GUIDANCE ISSUED TO SPECIFICALLY ADDRESS COOKIES?

Yes – the UK Information Commissioner has issued [Guidance on the Use of Cookies and Similar Technologies](#) (ICO Guidance).



Consent

CAN A USER PROVIDE CONSENT TO COOKIES VIA WEB BROWSER SETTINGS?

No – the GDPR standard of consent applies. This means consent must be a freely given, specific, informed and unambiguous indication of the individual's wishes by a statement or by a clear affirmative action. If an individual's browser settings allow access to and storing of cookies generally, this will not be sufficient to meet the GDPR standard of consent for use of cookies on a specific website. The guidance notes that the individual must take a clear and positive action to give their consent to non-essential cookies – continuing to use a website does not constitute valid consent.

PECR does contain two exemptions to the cookie consent rules. The requirement to obtain consent does not apply to the technical storage of, or access to, information (a) for the sole purpose of carrying out the transmission of a communication over an electronic communications network; or (b) where such storage or access is strictly necessary to provide the service requested by the user. Activities likely to

fall within the strictly necessary exemption include those that relate to the specific functionality of the service – i.e. without them, the user would be unable to undertake certain activities.

ARE COOKIE WALLS ALLOWED?

No – users must be provided with controls over any non-essential cookies, and be able to access the website if they don't consent to these cookies. ICO Guidance states that general access to a website should not be subject to conditions requiring users to accept non-essential cookies – certain content can only be limited if the user does not consent. Individuals must be provided with a genuine free choice; consent should not be bundled up as a condition of the service unless it is necessary for that service.

CAN CONSENT BE IMPLICIT, (I.E. THROUGH USE OF WEBSITE)?

No – the user must take a clear and positive action to give their consent to non-essential cookies – continuing to use a website does not constitute valid consent.



Transparency and retention

ARE THERE SPECIFIC RULES OR GUIDANCE FOR COOKIE BANNERS?

In order for consent to be valid, individuals must take a clear and positive action to give their consent to non-essential cookies. The website cannot use any pre-ticked boxes (or equivalents such as 'on' sliders) for non-essential cookies and clear information must be provided to individuals about what cookies are used and the purpose of these cookies before they consent to them being set. This may be achieved by a cookie banner. However, the ICO Guidance notes a consent mechanism that emphasises agree or allow over reject or block represents a non-compliant approach, as the online service is influencing users towards the accept option.

IS A SEPARATE COOKIE POLICY REQUIRED IN ADDITION TO THE WEBSITE PRIVACY POLICY?

No – ICO Guidance states that detailed information about cookies can be provided in a privacy or cookie policy. However, the cookie information must be provided in such a way that the user will see it when they first visit the website and it must be clear and prominent. To meet this standard, best practice is to provide a separate cookies policy.

ARE THERE ANY SPECIFIC RETENTION PERIODS FOR DATA HELD BY COOKIES?

No – however, the ICO Guidance confirms that use of a cookie must be:

- proportionate in relation to the intended outcome; and
- limited to what is necessary to achieve the purpose.

The ICO Guidance does not provide a specific timeframe where fresh consent to the use of cookies must be obtained from users. However, it recognises that there are a range of reasons why visitors should re-consent to cookie settings, which will depend on a number of factors, such as frequency of visits or updates of content or functionality. The ICO Guidance also states that the consent mechanism for cookies has to have the technical capability to allow users to withdraw their consent with the same ease that they gave it, otherwise it will not be compliant with the GDPR's consent requirements.

DO ANY COOKIE RULES OR GUIDANCE APPLY DIFFERENTLY FOR FIRST-PARTY AND THIRD-PARTY COOKIES?

Yes, companies setting third-party cookies must be specifically named. The ICO Guidance also confirms that if a website sets third-party cookies, both the website owner and the third party have a responsibility for ensuring users are clearly informed about cookies and for obtaining consent.



Enforcement

IS THERE ANY REGULATORY STRATEGY ON THE ENFORCEMENT OF COOKIE RULES?

The ICO has confirmed that cookie compliance will be an increasing regulatory priority for the ICO in the future. In addition, the ICO has indicated that its approach to enforcement will prioritise the use of cookies which are perceived to cause a high level of intrusiveness.

HAVE THERE BEEN ANY FINES ISSUED FOR NON-COMPLIANCE OF COOKIE RULES?

No.

HAVE THERE BEEN ANY COURT CASES ADDRESSING COOKIE COMPLIANCE?

No.



Additional information

The ICO Guidance also applies to the use of cookie-like technologies in Internet of Things devices. The ICO Guidance states that since these services can also store or access information on the user's

device just like any website, the cookie rules apply to all such devices where cookies or similar technologies are in use.

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