

# ICO, CNIL, German and Spanish DPA revised cookies guidelines: Convergence and divergence

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In July 2019, the U.K. and French data protection authorities published new guidance on the use of cookies and other internet-tracking technologies. In March 2019, the German conference of supervisory authorities published [guidance on internet tracking](#). There is also additional German state-level guidance. In November 2019, the Spanish data protection authority published its guidance on the use of cookies. The table below outlines the respective differences and similarities.

Issue	France	U.K.	Germany	Spain
<b>Similarities</b>				
Rules applicable to cookies only?	No, the authorities consider that the rules apply to any technology that stores or accesses information on the user's device (e.g., pixels, software development kit in mobile applications, local objects, browser fingerprinting technologies, etcetera). In the case of the German guidance, the technology must also involve processing of personal data; so long as that is the case, then the rules will apply to any of the types of technology listed above.			
Implied consent	All authorities stress that if consent is required, users must give specific, freely given and unambiguous consent before the respective activity commences.  The French, U.K. and German authorities highlight that a user continuing to browse a website does not amount to that user's consent. The Spanish authority however understands that users may grant consent to the use of cookies by means of a clear and affirmative action such as, for example, clicking a button or link or scrolling.			
Contractual consent	The French, U.K. and Spanish authorities are clear that terms and conditions cannot be used as a method for obtaining consent, as this breaches Article 7(2) of the EU General Data Protection Regulation (need for clearly distinguishable data-processing consents). The German authorities did not comment on this but likely agree.			

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Global consent	The consent must cover each purpose for which personal data will be processed (i.e., each purpose for which cookies are used). The U.K., French and Spanish authorities accept that organizations can offer a global consent for all cookies for which consent is required in their first consent layers. German authorities do not comment on this.			
Granular consent	The CNIL also requires that a second layer allows the user to give specific consent to each purpose separately. The AEPD also requires that the first layer includes a link to a tool that enables users to give granular consent to each category of cookies (at least, grouped by purpose). This is not spelled out in the ICO guidance but, based on the ICO's own practice, purpose-specific consent options are likely to be regarded as best practice. The German authorities require granular consent but do not specify whether this should be part of the first layer or could be moved to a second layer.			
Consent for whom?	In order for consent to be informed, the user must be able to identify all parties processing their data. For the French, German, U.K. and Spanish authorities, this means that organizations should name all parties who will rely on users' consent.			
<b>Differences</b>				
Grace period	Yes. Companies are expected to comply with the new rules six months after the publication of a (yet to be issued) opinion from the CNIL discussing how to obtain consent in practice. The CNIL expects this opinion to be in a final form in the course of the first quarter of 2020.	No.	No.	No.

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Are cookie walls allowed?	No. Cookie walls are not compliant as the user would suffer adverse consequences if they refused to accept.	ICO notes that consent that is forced via a cookie wall is “unlikely to be valid.” However, it also notes that GDPR must be balanced against other rights, including freedom of expression and freedom to conduct a business. ICO seems to be “sitting on the fence” on this — at least for the moment.	No, similar to the CNIL.	Yes, as long as the user is informed about it and unless the denial means that the user will not be able to exercise a legal right.
Do analytic cookies require consent?	Not always. Certain analytic cookies can be exempted from prior consent requirements if they meet a list of cumulative requirements provided by the CNIL.	Yes. There is no exception. Though ICO states that it is “unlikely that priority for any formal action would be given to uses of cookies where there is a low level of intrusiveness and low risk of harm to individuals,” and first-party analytics cookies are given as an example of cookies that are potentially low risk.	No, unless they lead to a transfer of personal data to a third party. Even in that case, likely no consent would be necessary if users can easily opt out from the data transfer to the third party.	Yes.

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<p>Lawful basis for subsequent processing of personal data</p>	<p>Unlike ICO, the CNIL does not suggest that consent would be the only possible legal basis for the subsequent processing of personal data.</p>	<p>For ICO, in most circumstances, legitimate interest is not the appropriate lawful basis for the processing of personal data relating to cookies. Because consent is required under ePrivacy rules, consent should also be the legal basis under GDPR. Relying on legitimate interests when GDPR-compliant consent is already in place would be unnecessary and would cause confusion to users.</p> <p>Legitimate interests would never be available for profiling related processing of personal data.</p>	<p>Like the CNIL, the German authorities take the view that consent is not always required. They mention contract performance (Article 6(1)(b) GDPR) and the balance-of-interests test (Article 6(1)(f) GDPR) as further possible legal bases.</p>	<p>The Spanish authority does not specify anything with regards to subsequent processing of personal data.</p>

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Prominence of options given to users	No specific guidance. More might be said on this topic in the (yet to be issued) opinion from the CNIL discussing how to obtain consent in practice.	Organizations emphasizing the “agree”/“allow” cookie options over the “reject”/“block” cookie options influences users toward the “accept” option. This is not a compliant way to collect consent. The same would be true if the “reject”/“block” option were located in a second layer and the “agree”/“allow” cookie option were available in the first layer.	A simple banner with cookie information and an “OK” button would not be sufficient; the consent must be recognizable as such. This means that the banner must list specifically all data-processing activities that require consent (and not any other) and that users must be able to decline their consent. The German authorities require granular options (for each data-processing activity) but do not specify whether these options can be part of a multiple-layer concept (where a simple “accept all” option is complemented with more granular “refuse” options on the second layer).	Publishers should include in the first layer: (1) A “Consent”/ “Accept” button or, alternatively, explain how consent could be understood as granted by the user (e.g., “By continued browsing ...”). Including both options is not valid. (2) A tool (or a link to a tool) that enables users to give granular consent to each category of cookies (at least, grouped by purpose) and to reject all cookies. (3) Unless offered in the tool mentioned above, a “Reject all” button. The Spanish authority recommends highlighting the buttons and links (using color, font, size, etcetera) and placing them somewhere visible.

Issue	France	U.K.	Germany	Spain
Cookie lifespan and retention periods	<p>Analytic cookies benefitting from the CNIL prior-consent exemption must not exceed 13 months. Information collected through the trackers can be kept for a maximum of 25 months.</p> <p>All other cookies are not subject to a prescribed lifespan requirement.</p>	<p>The lifespan of cookies must be proportionate in relation to the intended outcome and limited to what is necessary to achieve the purpose.</p> <p>The maximum possible technical duration of a cookie (e.g., “31/12/9999”) would not be regarded as proportionate in any circumstances.</p>	<p>German authorities do not specify the lifespan of cookies, but take the view that a shorter lifespan (aka “recognition period”) is more likely to meet the requirements of the balance-of-interests test (Article 6(1)(f) GDPR).</p>	<p>The lifespan of cookies must be proportionate in relation to the purposes for which they are intended; the AEPD suggests consent should be renewed after 24 months.</p>



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