

ECIJA

August 2020

# Use of Cookies: Spanish Data Protection Agency Guidelines: new conditions

---

Report

[www.ecija.com](http://www.ecija.com)

## Update of the AEPD Guidelines concerning the use of cookies

The Spanish Data Protection Agency ("AEPD") published on 28 July 2020 an update of the Guidelines on the use of cookies, with the aim of updating the criteria of the previous Guide published on 12 November 2019. There are some changes in the criteria regarding what was previously established, while following the interpretations provided by other European Union control authorities. These changes have a strong impact on those entities that had been governed by the previous Guideline's criteria, having until the next 31 October to adapt.

On July 28, the AEPD published an update of its Guide regarding the use of cookies (its previous version was published in November 2019), which sets out criteria defended by different European Control Authorities that were reinforced by the European Supervisor's opinions in its Guidelines 05/2020 regarding the user's consent.

It is necessary to highlight that **the AEPD establishes the 31st October 2020 as the date on which these measures will be mandatory**, a period during which the companies must carry out the relevant proceedings to comply with the new measures required by the Control Authority.

The main updates included in this Guide, apart from highlighting, as in the previous one, the importance of informing the users duly of the nature and purpose of the cookie, are the following:

1. Need for a positive action from the user in order to consider the user's consent valid. In this sense, **it suppresses the simple navigation and the pre-marked boxes as a method of providing a valid consent.**
2. **Mechanisms should be implemented so that the rejection of the cookies is just as accessible as the acceptance.** The insertion of a button or mechanisms to reject all cookies is mandatory.
3. In case of cookies processing **special category data**, separate information has to be provided, including the special category of use, and the user has to accept the use of such cookies separately.
4. **It generally prohibits the use of the so called "Cookie Walls".** It can only be accepted, if: (i) the user has been correctly informed, (ii) an alternative to access to the offered service is provided, without accepting the cookies, and (iii) it is offered by the same publisher.
5. If cookies from third parties are used, **the possibility of informing the user that these cookies can be deleted through the systems offered by these third parties is established**, as well as through the configuration in the browser, which are additional mechanisms to those implemented in the cookie configurator.

Having the main new features of the updated Guide identified, **an overview of the requirements to comply with the Guide is presented below.**

### Cookies exempted from the informed consent requirement

Firstly, the AEPD establishes the exact scope of article 22.2 of the Law of Information Society Services ("LSSI"), according to which cookies can only be used if the user provides



his/her informed consent. Therefore, the only cookies that are exempted and, consequently, can be used without informing the user or obtaining his/her consent, are those that **(i) are used for the sole purpose of carrying out the transmission of a communication through an electronic network or (ii) are strictly necessary to provide a service that has been expressly requested by the user.**

### **Information to be provided**

The article 22.2 of the LSSI specifies that, before requesting the user's consent, **they must obtain a clear and complete information about the use of cookies and, if necessary, about the processing of their personal data in accordance with the regulations on personal data protection.** The user must be aware of the mechanism and the purposes of the cookies used on a website.

Due to the fact that the information must be provided in a first stage for the consent to be valid, the AEPD recommends its visualisation in **two layers**, so that the essential data regarding the use of the cookies appear automatically in a banner or in a consent management platform ("**CMP**" or "**Cookie Configurator**") starting from the moment the user accesses to the website, while in a second layer ("**Cookie Policy**") more information could be available to the user on a voluntary basis.

The first layer should include the following details:

- (i)** Identity of the publisher of the website (only a name or trademark; a registered company name is not necessary), as this information will be available in the second layer;
- (ii)** The purposes for which cookies will be used;
- (iii)** Information whether the cookies will be used only by the publisher (own cookies) or also by third parties (third party cookies).
- (iv)** Information on the type of data used for advertising purposes, where applicable;
- (v)** The manner in which the user may consent to or refuse the use of the cookies (the conditions for obtaining consent are explained below);
- (vi)** A clear visible link to the cookie policy

About the second layer or **cookie policy**, it should be easily and permanently accessible from any section of the website and should gather the necessary information so that the average user of the website understands how the cookies work and for which purpose will be installed, together with all the information required by Article 13 of Regulation (EU) 2016/679 (General Data Protection Regulation or "**GDPR**") in case personal data is collected

### **Requirements for the consent**

The AEPD points out that, in accordance with Article 4 of the GDPR, a valid consent must be given for each specific purpose through a clear positive action made by the user that is fully aware of the consequences of such action.

Therefore, according to the new update:

- **A system to accept cookies in granular form must be implemented.** The user must have the possibility to accept or reject all the cookies or to select the specific purposes for which the cookies can be installed. This can be achieved through a Cookie Configurator or Consent Management Platform
- **It should be just as easy to withdraw as it is to give the consent.** In this sense, whether in the first or second layer, a button to refuse all the cookies must be installed. In



order to meet this requirement, in the second layer a button to save the choice made by the user can also be implemented (it must be expressly stated that if the user saves his/her choice without having selected any cookies, this will be equivalent to the rejection of all the cookies

- Likewise, **the installation of unnecessary cookies should not be carried out without the user's prior consent.**
- **The consent will not be valid either for non-action or for continuing the navigation.**

#### **Conditions applicable to the minor's consent**

For those websites where the average user is under the age of fourteen, publishers will be required to **make an extra effort to verify that the user's consent is given by his/her parents or legal tutors.** Furthermore, it shall take into account the need to reinforce the guarantees of users' data protection, especially regarding the data minimisation principle.

#### **Possibility to deny the access if the consent is not given**

**Access to a website or access to its services may not be conditioned by the acceptance of the installation of the cookies.** However, there may be certain cases in which non-acceptance of cookies prevents access to the website. These cases require that i) the appropriate information in a proper manner about this aspect must be given to the user and ii) that an alternative way to access to the services must be offered without the need to accept the use of the cookies.

#### **Liability**

**Both the publisher and the third parties managing the cookies as processors will ensure that these duties are fulfilled.**

In this sense, the management of the information and consent management responsibilities, whatever the relationship between the parties, may be defined contractually, although the administrative liability enforceable before the control authorities for the compliance with the obligations derived from the use of cookies belongs to each obliged party and cannot be contractually transferred.

---

#### **Privacy and Data Protection Area**

+ 34 91 781 61 60  
info@ecija.com

# E C I J A



EXPANSIÓN  
2016, 2017,  
2018 y 2019

Proyecto más innovador  
Mejor Firma de  
Economía Digital

---



FINANCIAL  
TIMES  
2019

Entre las 20 Firmas  
más innovadoras  
de Europa

---



Banda 1 en TMT por  
Chambers and  
Partners y Legal 500

---

**THE LAWYER**  
2019

Mejor Firma en TMT  
de Europa

---



FORBES  
2017

Mejor Firma de  
Tecnología de España

---

Torre de Cristal  
Pº de la Castellana, 259C  
28046 Madrid