

Cookies: a new guide to their use

Isabela Crespo Vitorique and Bárbara Sainz de Vicuña Lapetra

Senior Associates, Intellectual Property and Technology Area, GA_P
Privacy and Technology Sector

Francisco Pérez Bes

Of counsel

Director, Law and Digital Economy Area, GA_P

The new cookie guide presented by the Spanish Data Protection Agency aims to provide guidance on how to comply with the obligations set out in Article 22(2) of the Information Society Services and Electronic Commerce Act 34/2002 of 11 July (“LSSI”), in relation to Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data (“General Data Protection Regulation” or “GDPR”) and the Data Protection and Digital Rights Guarantee Act 3/2018 of 5 December (“LOPDGDD”).

I. INTRODUCTION

Given the many complexities involved in the use of cookies, the guidance contained in the Cookie Guide (the “Guide”) is not intended to provide a general and uniform solution for legal compliance, but should rather serve as a guide for affected entities to reflect on and make decisions on the solution best suited to their interests and business model.

Prior to the study by the entities involved of the most appropriate solutions for complying with the obligations set out in the aforementioned Guide, and in accordance with the provisions

there of, the recommendation involves a review of the *cookies* that have been used to date in order to identify the *cookies* that are being used, analyse whether they are proprietary or third party *cookies*, or session or persistent *cookies*, and to specify their function in order to be able to decide how to proceed. Without forgetting, of course, the need to carry out this review periodically in order to update the information available on *cookies*.

In this sense, the Guide focuses on analysing the content of Article 22 LSSI and on establishing a series of definitions in order to subsequently examine the obligations derived from that article and which must be fulfilled by the website publisher or the webmaster.

2. SCOPE OF THE GUIDE

The regulator is aware that through the use of *cookies* it is possible to collect data from users, which may subsequently be used for the provision of services, in particular the sending of online advertising.

In this regard, transparency and the level of detail of the information to be given to the consumer (including how to obtain the consumer's prior consent) are essential, given that the average consumer does not necessarily have to be a great connoisseur of the technical aspects that characterise elements such as *cookies*.

In this case, the Guide states that it is necessary to implement a system in which the user is fully aware of the use of *cookies* (as well as other similar technologies, such as fingerprinting) and the purpose of their use, that is, knowing the destination of the collected data). This is the foundation upon which the legal obligation of service providers to obtain the prior informed consent from Internet users rests. In this sense, the LSSI is a *lex specialis*, so its application will be prioritized over that of data protection legislation, including its penalty rules, while the data protection legislation will apply in everything that has to do with the purpose and processing of data obtained from *cookies* used.

In addition, account must be taken of the forthcoming entry into force of the ePrivacy Regulation, which will include new obligations requiring the adaptation of the current guide.

Regarding the regulation of the use of this technology, we must refer to Article 22(2) LSSI and Recital 30 of the GDPR. As for the former, the use of devices for storing and retrieving data from users' terminals is permitted, provided that prior informed consent has been given to the use of such *cookies*. As for the way to obtain this consent, use of the tools provided by the browser is allowed. And the provision ends by saying that the storage or technical access needed to transmit communications or to provide services expressly requested by the recipient must be allowed.

G A _ P

Cookies that are used for any of the following purposes are exempt from the fulfilment of the obligations set out in Article 22(2) LSSI:

- Allow only communication between the used equipment and the network.
- Strictly provide a service expressly requested by the user.
- Session and entry cookies (e.g. form or shopping carts).
- Security cookies.
- Multimedia playback cookies.
- Session cookies for load balancing.
- User interface personalization cookies.
- Plug-in cookies for social networks, only if the user keeps the session open.

Notwithstanding the above, the Agency recommends that the use of these types of cookies should also be reported, allowing reporting to be done in a generic manner.

As for polyvalent cookies, the Guide takes the stand that they can only be used if the user accepts all the purposes that are grouped together.

Finally, for information purposes, the Guide incorporates a glossary and classification of cookies according to their type, differentiating between one's own cookies and those of third parties, based on the entity that manages them; as well as technical, preference, analysis or behavioural advertising cookies according to their purpose. It also distinguishes between session and persistent cookies based on the length of time they can remain enabled.

3. OBLIGATIONS: TRANSPARENCY AND OBTAINING CONSENT

As regards the obligations to be fulfilled by the webmaster, the Guide is clear in referring to the two main obligations: the obligation of transparency and the obligation to obtain consent.

3.1. Obligation of transparency

The following issues should be taken into account within the obligation of transparency:

G A _ P

a) WHAT INFORMATION SHOULD BE PROVIDED?

At the time of requesting consent, the following information should be provided to the user:

- Definition and generic function of cookies.
- The types of cookies that are used and their purposes.
- Identification of who uses cookies.
- The procedure for accepting, refusing or revoking consent or for deleting cookies.
- Data transfers to third countries by the publisher.
- The logic used, as well as the importance and expected consequences in cases where profiling involves automated decision making with legal effects for the user or that significantly affects the user in a similar way.
- The data retention period.
- For all other aspects of the duty to inform on data protection, referrals to the privacy policy are permissible.

b) HOW SHOULD THE INFORMATION BE DISPLAYED?

Such information or cookie policy must meet a number of requirements:

- 1) The *information must be concise, transparent and intelligible*, as if addressed to an average user.
- 2) *Clear and simple language should be used*, avoiding the use of phrases that lead to confusion or distort the clarity of the message. For example, phrases such as "we use cookies to personalise your content and create a better experience for you" or "to improve your navigation" or phrases such as "we may use your personal data to provide personalised services" to refer to behavioural advertising cookies would not be valid. Terms such as "may", "might", "some", "often", and "possible" should also be avoided.
- 3) The *information should be easily accessible*, by way of:
 - The link format: for example, by increasing the size of the link to the information or by using a different font that distinguishes that link from the normal text of the web page.

- The positioning of the link: the location of the link that redirects to the information can be located in areas that capture the attention of users or in areas where the average user expects to find them because it is general, habitual and generalised practice, helping to guarantee accessibility and visibility.
 - The use of a descriptive and intuitive name for the link: using an explanatory term such as "Cookie Policy" rather than a more general term such as "Privacy Policy" to improve the message's accessibility and visibility.
 - Other options: other techniques that help highlight the importance of that informative link, such as framing or underlining the link, displaying a warning when the mouse pointer passes over the link, or using a clickable image that encourages you to look for more information.
- 4) *Information by layers.* This system can consist of displaying the essential information in a first layer, when the page or application is accessed, and completing it in a second layer by means of a page that offers more detailed and specific information on the cookies.
- a) In the first layer, which for clarity may be identified under a commonly used term (e.g. "cookies"), the following information would be included:
- Identification of the publisher responsible for the website. The company name will not be required, provided that full identifying details appear in other sections of the website.
 - Identification of the purposes of the cookies to be used.
 - Information on whether the cookies are proprietary – owned by the webmaster – or of an associated third party associated, without it being necessary to identify third parties in this first layer.
 - Generic information about the type of data that will be collected and used in the event of creating user profiles (e.g., when behavioural advertising cookies are used).
 - Mode in which the user can accept, configure and reject the use of cookies, with the warning, where appropriate, that if a certain action is taken, it will be understood that the user accepts the use of cookies.
 - A clearly visible link to a second informational layer that includes more detailed information, using, for example, the term "Cookies", "Cookie Policy" or "For more Information, click here". This same link can be used to lead the

user to the cookie configuration panel, provided that access to the configuration panel is direct, i.e. the user does not have to navigate within this second layer to locate it.

In the case of the first layer, it is worth highlighting the three specific examples proposed by the Guide, which will obviously serve as guidance when it comes to revising and adapting the website owner's notice.

- b) In the second layer, the information included in the first layer should be completed and, if necessary, it should be completed with the rest of the information indicated above in the section referring to what information should be provided to the user.

3.2. Obligation to obtain consent

For non-expected cookies, the user's consent needs to be obtained in any case. This consent may be obtained by express formulas, such as clicking on a section indicating "I consent", "I accept" or other similar terms. It may also be obtained by inferring it from an unequivocal action taken by the user, in a context in which the user has been provided with clear and accessible information on the purposes of the cookies and on whether they will be used by the publisher itself and/or by third parties, so that it can be understood that the user accepts the installation of cookies. In no case does mere inactivity of the user imply per se the provision of consent. In order for consent to be valid, it must be given in a free and informed manner. Therefore, it must be borne in mind that:

- a) The manners of giving consent may vary. Obtaining consent through a user click or similar conduct will undoubtedly facilitate proof that consent has been obtained. This formula may be the most appropriate for registered users. Obtaining consent through user conduct is permissible provided that the conditions under which the conduct occurs provide sufficient certainty that informed and unequivocal consent is given (however, this option may present greater evidentiary difficulties as to the obtaining of consent; this will depend, fundamentally, on the clarity and accessibility of the information offered to obtain consent and the type of action from which consent is inferred).
- b) The user must have performed some type of action.
- c) The user must have been informed beforehand and clearly as to with what specific action he accepts the use of cookies.
- d) The user, in any case, may refuse to accept cookies.
- e) The information given to the user so that he can consent to the use of cookies is separate from the information offered to him or her on other matters.

With regards to the obligation to obtain consent, the Guide focuses on additional issues such as:

- Who should give consent in general and in the case of children under 14 years in particular or, which is the same, the website user or the parent or guardian.
- Which are the methods for obtaining consent.
- When *cookies* may be used and installed, i.e. when the user has information about *cookies* and how to obtain consent and therefore not before that time.
- How to obtain consent when the publisher provides services through different pages.
- How to act in the event of changes in the use of *cookies* or the no need to re-inform and obtain consent.
- How to proceed for an update and withdrawal of consent.
- What to do in case of rejection of *cookies* or the possibility of denial of access to the service in the event of rejection of *cookies*.

4. LIABILITY OF THE PARTIES IN THE USE OF COOKIES

The Guide includes a final section on the liability of the parties in the use of *cookies*, distinguishing two situations according to the purpose of the *cookies*:

4.1. Use of Cookies for Excepted Purposes

If all proprietary and third party *cookies* used on the website are used for purposes other than those stated, it will not be necessary to inform of their use or obtain consent. The Agency advises the publisher, in cases in which third party *cookies* are used for the provision of services, to establish contractually with those third parties that they will not process the data collected through their *cookies* for any purpose other than of providing the service to the user since, otherwise, it would be necessary to inform on these other purposes and obtain consent.

4.2. Use of *cookies* for non-expected purposes

A distinction should be made between the following cases:

- If the publisher uses *cookies* for non-expected purposes, it will be responsible for informing the user and obtaining his or her consent.
- If third party *cookies* are used for non-expected purposes, in principle, both the publisher and the other entities involved in cookie management will be responsible for

ensuring that users are informed and give their consent. Therefore, in all cases where the website uses *cookies* from non-exempt third parties, the publisher must ensure that it complies with the information to inform and obtain consent, either by contractually obliging third party cookie holders to comply with such requirements, or through the installation of consent management platforms.

- The following points should be taken into account when determining liability in cases where non-exempt third party *cookies* are used:
 - a) If the publisher employs a CMP that creates an environment in which the intervening entities can comply with the duty to inform and obtain consent, those entities will be individually and directly liable for non-compliance.
 - b) When information about third party *cookies* is offered through a link to this third party's page, the publisher is accountable for ensuring that the links are not broken while the holder of the *cookies* will be accountable for the information included in the link (e.g. whether it is current, in Spanish or in the co-official language of the website etc.).
 - c) The owners of the *cookies* will be controllers for the processing of the personal data collected through them insofar as they determine the purposes and means of processing. For example, advertisers, agencies and other intervening agents may be controllers for the processing of personal data collected through third party *cookies* when they participate in determining the purposes and means of processing. However, if these agents limit their actions to following the instructions of a data controller, they will be considered data processors regardless of whether they use proprietary or third party *cookies*.
 - d) Each controller shall be accountable for the specific processing it carries out. Where several data controllers are involved, each will assume its respective accountability. For example, the publisher will be accountable for fulfilling the duty to inform and obtain consent with respect to third party *cookies* in relation to the processing for which it is the controller. But its accountability will not extend to the processing of data that the third party owner of the *cookies* carries out without the intervention of the publisher (for example, processing carried out by third parties with the aim of offering audience creation services based on the processing of data obtained through *cookies*).

In this respect, it is important to note that, as stated by the Agency, administrative liability for non-compliance with the obligations set out in this Guide lies with each party and cannot be shifted contractually.

G A _ P

Finally, all that remains is to finish as we began this analysis, that is, recommending the carrying out of a review of the *cookies* that have been used to date in order to identify the *cookies* that are being used, to analyse whether they are proprietary or third party *cookies*, or session or persistent *cookies*, and to specify their function in order to be able to decide how to proceed. Without forgetting, of course, the need to carry out this review periodically in order to update the information available on *cookies*.