

A New Treat for Your Holiday Season – French-Style Cookies



French-Style Cookies

Impress your French website visitors/app users with mouthwatering cookies, served to their taste buds. Cookies tend to be sweeter in the United States than on the other side of the pond. To build a successful management of cookies and other tracking technologies in France, try the following recipe, and let me know how it works for you. In this newsletter, “cookies” means cookies and similar technologies, and “users” means website visitors or web/mobile application users.

Reading time: 15 minutes

Ingredients

- Cookies sent by your website/app or third parties on your behalf
- The law
- A cookie management solution
- A strong cookie policy template
- Your privacy translator’s expertise

Directions

1. Know your cookies

- **Audit your website/app aimed at a French audience** to discover what cookies are being set on your user’s device. This link [here](#) shows you several ways to do it.
- **Analyze the type of cookies your website/app is using.** Are you using functional or non-functional cookies? Which cookies are “session” and “persistent” cookies? Which ones are first-party and third-

party cookies? See information [here](#). The British data protection authority (the “ICO”) has also issued a list of questions to [audit](#) your cookies.

2. Know the law

The current European Union cookie landscape is based on the [ePrivacy Directive](#), amended by [Directive 2009/136/EC](#), also called the “Cookie Law”. It was implemented in the EU member states’ national laws to varying degrees, e.g. article 5 of the ePrivacy Directive was not implemented in Germany. The meaning of “consent” was interpreted in different ways from one jurisdiction to the other.

An ePrivacy Regulation was drafted to replace the ePrivacy Directive and to sit alongside the General Data Protection Regulation (“GDPR”) and harmonize cookies across all EU member states. It was aiming, among other things, to re-address the meaning of the user’s “consent.” However, on November 22, 2019, the Permanent Representatives Committee of the Council of the European Union [rejected the Council’s position on a draft ePrivacy Regulation](#).

In France, Ordinance nr. 2011-1012 of August 24, 2011 implemented the provisions of the ePrivacy Directive with respect to the French Data Protection Act of 1978, the French Postal and Electronic Communications Code, and the French Consumer Protection Code. On June 20, 2018, a new [French Data Protection Act](#) was enacted to comply with the provisions of [GDPR](#) and the new [Police Directive](#), and amended the [Act of 1978](#). [Under the French law](#), in order to set cookies on a user’s device or to gain access to information stored in a user’s device, the user must be provided with clear and comprehensive information about the purposes of the processing and must be offered the right to refuse such processing by the data controller. Besides, the user must give their consent before a cookie is set on their device or before information already stored on their device is accessed ([article 82](#) of the amended Data Protection Act of 1978).

In 2019, the French data protection authority (“CNIL”) issued a new action plan on online targeted advertisement, focused on direct marketing, and cookies. Under the plan, the CNIL issued [new guidelines](#), repealing its 2013 guidelines. Please note that on top of these guidelines, any cookie management activity implying the processing of the user’s personal data should also comply with GDPR and the French data protection laws (e.g. define the responsibilities of each controller/processor when several data controllers/processors are involved in the cookie management process). Companies doing business in France have a one-year transition period from the issue of the new guidelines to comply with the new guidelines. During the transition period, scrolling down, browsing or swiping through a website or application is considered acceptable (unlike in some other European countries). At the end of the transition period, the new guidelines will need to be followed. Here are the highlights:

Consent for setting cookies or accessing existing information on a website/app user’s device is required and must meet the GDPR criteria ([art. 4\(11\) and 7](#)), except for cookies that are:

- Essential (cookies that are only used to enable or facilitate electronic communications or that are strictly necessary to provide a service explicitly requested by the user)
- Aimed to measure website traffic provided that the following conditions are met:
 - Cookies are first-party cookies

- The user must be informed before cookies are set
- The user must be able to refuse the cookies
- The cookie purpose must be limited to measure the traffic for the content displayed, must not be able to identify an individual, and the data collected must not be used for other data processing activities or transmitted to third parties
- The data must only be used to produce anonymous statistics, can only concern one website or app editor and must not enable to track the user from one website/app to another one
- The IP address must not be more precise than city level. After geolocation, the collected IP address must be deleted or anonymized
- Cookies must not be set for a longer period than 13 months, and this period must not be automatically renewed. Data collected by the cookies cannot be stored for longer than 25 months

Consent must be freely given, specific, informed, and unambiguous, by means of a declaration or affirmative action. Offering the user with the possibility to give one global consent is acceptable as long as the user is also allowed to give their consent independently and specifically for each different purpose. Website operators must be able to prove they collected the user's consent. Cookie walls do not comply with GDPR. The following items are not considered as a valid consent:

- A global acceptance of the general terms of use of the website/app
- A pre-checked box
- To continue scrolling down, browsing or swiping through a website/app
- Configuration of browser settings

The information on cookies must use clear and plain language (no legalese, no technical jargon), and must be provided when the consent is requested.

The law does not state that website/app operators must provide the user with means to refuse essential cookies. However, the usage of such cookies must be disclosed to the user.

Under the Action Plan, the CNIL will have a consultation phase in December 2019/early 2020 on the operational aspects of the collection of consents.

Alongside the CNIL, other EU regulators have introduced their own new guidance based on GDPR consent standards:

- United Kingdom: On July 3, the ICO updated their [guidance](#) on the use of cookies and similar technologies. The guidance implies that website owners must identify the cookie uses, explain what the cookies do and obtain user consent for all cookies that are not functional, whether they are anonymized or not.
- Spain's [new guide on cookies](#)

3. Review the important EU regulatory actions, court decisions, and user complaints in 2019

2019 Highlights:

- [France](#): On January 21, the CNIL imposed a EUR 50 million fine against Google for GDPR violations including targeted marketing using Android user data.
- [Germany](#): On February 6, the Bavarian data protection authority conducted a website cookie practices sweep and announced it was considering fining several German websites for their cookie practices.
- [Netherlands](#): On March 7, the Dutch data protection authority [announced](#) cookie walls are not GDPR compliant.
- [Spain](#): On October 1st, Vueling Airlines received a EUR 30,000 fine from the [Spanish data protection authority](#) for not allowing their users to configure the cookies that are set on their devices.
- [Court of Justice of the European Union \(CJEU\)](#): On October 1st, the CJEU delivered a preliminary ruling for Planet49. The court ruled that pre-ticked check-boxes allowing the use of cookies and similar technologies do not constitute valid consent. Where consent is required for cookies under the ePrivacy Directive, a consent must fulfill the GDPR consent criteria, even if the cookies do not contain personal data. Article 5(3) of the e-Privacy Directive (i.e. the cookie consent rule) applies to any information set on or accessed from an individual's device. Website visitors must be informed about the retention period of the cookies, and whether third parties will have access to the cookies.
- [France](#): On December 10, the advocacy group NOYB filed three complaints with the CNIL, against the eCommerce website CDiscount, the movie guide Allocine, and the fashion magazine Vanity Fair, alleging the web sites turn the rejection of cookies by users into “fake consent” signals to tracking companies claiming users have agreed to be tracked.

4. Manage your website/app cookies for France

4.1. Cookie Management Platform

Choose a cookie management platform that effectively allows the user to accept/refuse the non-essential cookies used by your website. Refer to step 2 to see which cookies can be set before you receive the website/app user’s consent. See the CNIL’s cookie management solution as an example (click on “Cookies Management” on <https://www.cnil.fr/en/home>).

4.2. Cookie Policy

To comply with the French law, make sure your cookie policy (which could be embedded in your privacy notice):

- Gives the identity of the data controller(s)
- Explains which cookies your website/app is setting on your user’s device, their purpose, and their retention period, or which information is accessed from your user’s device
- Tells users that they can withdraw their consent, and explains how
- Lists all entities using cookies

Need a strong template? See:

- The CNIL’s cookie policy (<https://www.cnil.fr/fr/donnees-personnelles>) (in French)
- The [Belgian data protection authority’s cookie policy](#)

5. Be clear and transparent

Give your users your perfectly crafted cookie notices in the language they understand

To ensure transparency, make sure the information regarding your cookie management is available in your user's language. Have your cookie policy and management platform translated by a privacy translator. Your privacy translator deeply understands how cookies work and will make informed translation decisions (e.g. draw your attention on different children's age requirements if your website cookies are collecting personal data, keep expressions like "cookie" and "cookie wall" in English as used in the French law). Need a piece of information to design your cookie management? Ask your translator to supply you with a summary in English if the law only exists in a language you do not master, or ask them to supplement their translation with the information you need for your targeted jurisdiction and that will allow you to provide your users the cookie experience they're expecting.

6. Stay tuned on evolving cookie rules

Cookies rules will continue to evolve in 2020. More information will be published in further issues of this newsletter.

For best results, always serve cookies to your users with care. I wish you a Happy Holiday Season and a successful cookie management abroad!

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