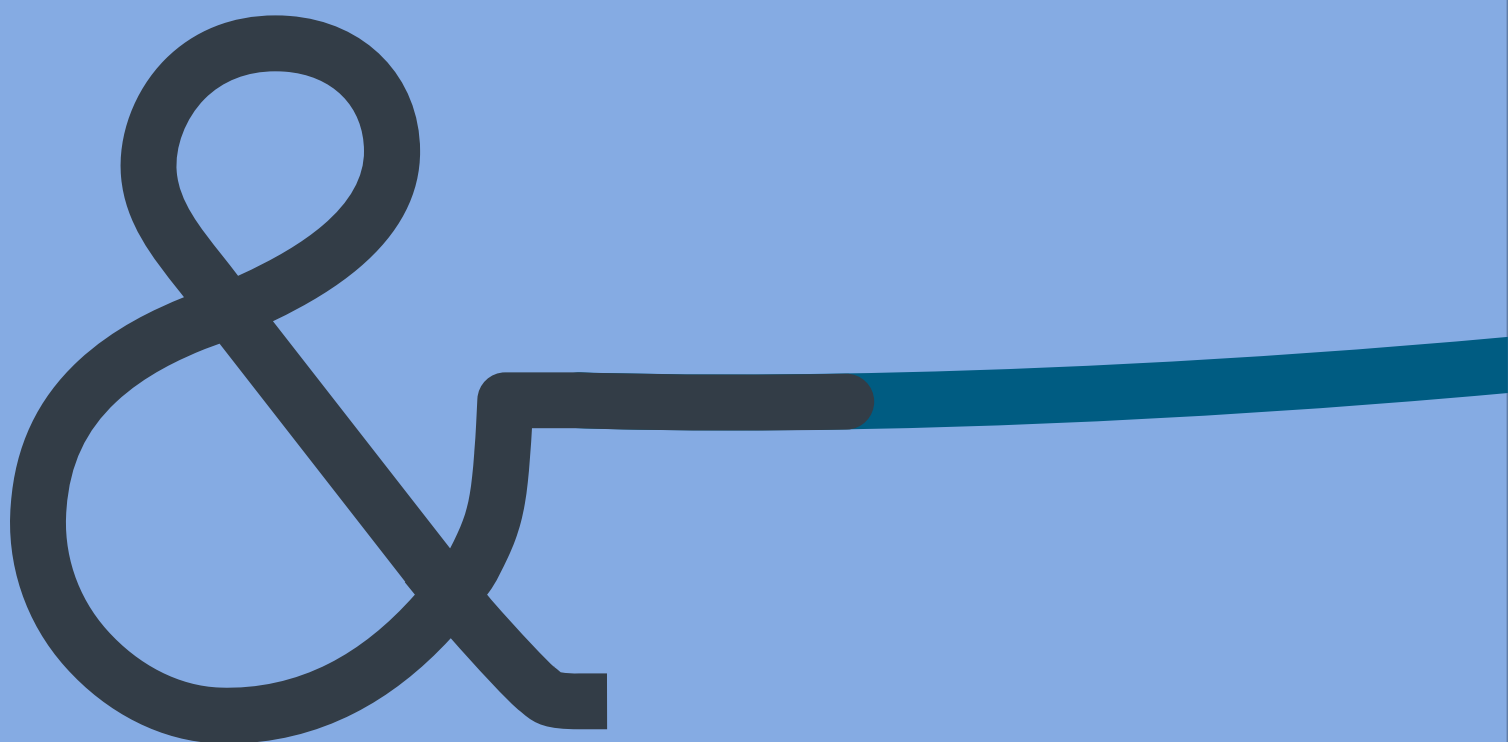


Bird & Bird

Global Cookie Review

Winter 2022



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Welcome to the Winter 2022 edition of the Bird & Bird Global Cookie Review

Welcome to the Winter 2022 edition of our Global Cookie Review. This updated report is the second of a regular series providing a global overview of the legal and regulatory landscape relating to the use of cookies and similar technologies. This report will continue to be regularly updated with new developments and trends, together with analysis of additional territories.

As regulators across the world continue to increase their focus on the use of cookies and other similar devices for targeted advertising, we are seeing an increasing amount of regulation that both directly and indirectly governs the use of these technologies. Such regulations often (but not always) follow a similar path to that historically set by the EU within the GDPR, ePrivacy Directive and forthcoming Privacy and Electronic Communications Regulation. Common themes unsurprisingly include transparency and consent requirements, with cookie banners (including consent management platforms) being an increasingly frequent sight across the globe. In EMEA, we are also seeing an increasing number of individual complaints from data subjects and privacy activists, leading to a greater focus than ever on cookie-related compliance from data protection authorities.

This report covers key legal frameworks across the globe and answers some of the key questions that are important to consider when looking to make use of these technologies. These considerations apply equally whether these frameworks are specific to cookies or more broadly applicable to personal data but mapping across to the use of cookies and the data collected through such technologies.

As a final note, cookies and similar technologies are very commonly used as part of targeted advertising through the use of AdTech. Globally, AdTech as a sector is under increasing scrutiny from regulators and, as such, the provision and use of AdTech comes with additional considerations, whether relating to cookies or more broadly. We are also seeing seismic shifts in the industry on the horizon, driven by commercial changes throughout the ecosystem. As a result, we have specifically included notes on the use of these technologies in an AdTech context and we anticipate significant additional considerations to be addressed in future issues of this report. Recent high-profile decisions such as the APD ruling regarding IAB Europe's TCF standard continue to create uncertainty in the use of cookies in Europe, particularly in the AdTech space – the questions referred to the CJEU from the appeal of this decision could have a particularly significant impact on the sector.

Notably, the Global Cookie Review now includes key Latin American markets – a region where the use and regulation of cookies and similar technologies continues to grow.

APAC

When compared to Europe, you will find a greater degree of divergence between the rules in APAC territories given the absence of a regionwide GDPR-equivalent. However, some territories are feeling the indirect effect of GDPR, and we are seeing a general trend towards European levels of regulation.

China introduced its first data protection law ('PIPL') that came into force at the beginning of November 2021. Under the previous regime and in previous judgments, cookies and similar technologies were not deemed to be personal information. However, PIPL may usher in a new era of publicity and enforcement previously unseen for cookies and other AdTech-related practices. As such, it will be interesting to see how these new rules are adopted in practice across the market.

In Australia, Hong Kong and Singapore, there are currently no cookie-specific regulations. However, in Australia there are currently proposed reforms to the Privacy Act that were published in a discussion paper at the end of October 2021. These will provide for greater clarity on cookie and AdTech requirements following a government-led inquiry. The proposed reforms include a redrafting of what 'personal information' means, so that it will explicitly include online identifiers. This increased spotlight on the wider AdTech industry is reflected in the recent flurry of activity and enforcement taken by the regulators.

Latin America

Traditionally, regulations on personal data protection in Latin American countries have been largely inspired by those in Europe. This is mainly due to language and cultural similarities many Latin American countries share with Spain, resulting in widespread application of Spanish regulations (and thus reflecting GDPR).

With the exclusion of Brazil, there are no express references to cookies in the regulations or guides published by the DPAs of Latin America. On 19th October 2022, Brazil's DPA (the 'ANPD') issued specific guidance on cookies. It is yet to be seen as to whether this will have an influence outside Brazil; organisations are advised to keep a watchful eye. This guidance specifically identifies a lack of transparency as one of the potential problems to watch out for when using cookies. It is important to ensure that users can understand the type of information being obtained from their navigation and that consent is obtained where regulations require it for processing. As is the case in Europe, it is difficult to find exceptions for processing data without consent or reliance on other grounds for legitimization. Whilst in recent years Latin American DPAs have demonstrated an increased awareness and activeness to monitor compliance, there is still significantly less enforcement activity in comparison with the European regulators.



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EMEA

Summary

	Austria	Belgium	Czech Republic	Denmark	Finland	France	Germany	Hungary	Ireland	Italy	Luxembourg	Netherlands	Poland	Spain	Sweden	UK	South Africa	UAE
1 - Can you place cookies without consent?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
2 - Are cookie rules (whether specific or within general data protection laws) followed in practice?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
3 - Are there any exemptions if consent is required?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
4 - Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
5 - Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
6 - Can you set cookies without a cookie notice?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●

● = Higher risk/be alert ● = Lower risk ● = See detailed answer

	Austria	Belgium	Czech Republic	Denmark	Finland	France	Germany	Hungary	Ireland	Italy	Luxembourg	Netherlands	Poland	Spain	Sweden	UK	South Africa	UAE
7 - Can you set cookies without a cookie banner/ management tool?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
8 - Are you able to use cookie walls?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
9 - Is the local regulator currently enforcing decisions against breaches of cookie rules?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
10 - Are there any current consultations relating to ad tech/ cookies?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●
11 - Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●	●

● = Higher risk/be alert ● = Lower risk ● = See detailed answer

Asia Pacific

Summary

	Australia	China	Hong Kong	India	Singapore
1 - Can you place cookies without consent?	●	●	●	●	●
2 - Are cookie rules (whether specific or within general data protection laws) followed in practice?	●	●	●	●	●
3 - Are there any exemptions if consent is required?	●	●	●	●	●
4 - Can you place the following cookies automatically:					
i. Analytics cookies	●	●	●	●	●
ii. Advertising cookies	●	●	●	●	●
iii. Social media cookies	●	●	●	●	●
5 - Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	●	●	●	●	●
6 - Can you set cookies without a cookie notice?	●	●	●	●	●
7 - Can you set cookies without a cookie banner/ management tool?	●	●	●	●	●
8 - Are you able to use cookie walls?	●	●	●	●	●
9 - Is the local regulator currently enforcing decisions against breaches of cookie rules?	●	●	●	●	●
10 - Are there any current consultations relating to ad tech/ cookies?	●	●	●	●	●
11 - Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	●	●	●	●	●

● = Higher risk/be alert ● = Lower risk ● = See detailed answer

Latin America

Summary

	Argentina	Brazil	Colombia	Mexico
1 - Can you place cookies without consent?	●	●	●	●
2 - Are cookie rules (whether specific or within general data protection laws) followed in practice?	●	●	●	●
3 - Are there any exemptions if consent is required?	●	●	●	●
4 - Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	●	●	●	●
5 - Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	●	●	●	●
6 - Can you set cookies without a cookie notice?	●	●	●	●
7 - Can you set cookies without a cookie banner/ management tool?	●	●	●	●
8 - Are you able to use cookie walls?	●	●	●	●
9 - Is the local regulator currently enforcing decisions against breaches of cookie rules?	●	●	●	●
10 - Are there any current consultations relating to ad tech/cookies?	●	●	●	●
11 - Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	●	●	●	●

● = Higher risk/be alert ● = Lower risk ● = See detailed answer

EMEA Overview

Although the specific rules relating to cookies and other similar devices have been well established in Europe for many years (given that 2022 marks 20 years of the ePrivacy Directive and GDPR is now 5 years old), we have seen an increase in focus over recent years on the use of cookies. This has been driven by an increased use of targeted advertising across the EU and UK, with the ever-more sophisticated deployment of these technologies forming the backbone of innovative advertising solutions.

The increasing sophistication of behavioural profiling and increasing volumes of data being used for these purposes has resulted in these activities, and the underlying use of cookies and similar technologies, being a key target for privacy activists. With high-profile challenges from None of Your Business and campaigners such as Johnny Ryan, a number of DPAs have increased enforcement activity across all uses of cookies, not just those used for advertising, and some (such as the ICO in the UK) have launched full investigations into the use of AdTech more generally.

The biggest changes we are therefore seeing currently relate to the assessment of risk – where previously regulatory or enforcement action relating to cookies specifically may have been considered less likely absent a broader issue (such as a data breach investigation or broader compliance audit by a regulator), enforcement by DPAs in particular in Germany, Italy, Poland and Spain and/or individual claims should now be considered a real likelihood.

In addition, this latest update of the report now includes new jurisdictions to cover all key markets in the EU, plus UAE and South Africa. This expanded scope demonstrates the ever-increasing geographical scope of regulatory concern and focus on cookies and similar tracking technologies.



Austria

Can you place cookies without consent?	Only to the extent they are necessary for the sole purpose of transmitting a communication via a communications network or they are a basic precondition for enabling the provider of an information society service to provide a service explicitly requested by the user or subscriber (see Sec. 165 (3) Austrian Telecommunications Act 2021 ("TKG 2021"))
Are cookie rules (whether specific or within general data protection laws) followed in practice?	In general, yes
Are there any exemptions if consent is required?	<p>Yes</p> <p>Consent is not required if cookies are necessary for the sole purpose of transmitting a communication via a communications network or they are a basic precondition for enabling the provider of an information society service to provide a service explicitly requested by the user or subscriber (see Sec. 165 (3) TKG 2021).</p> <p>As regards the question of necessity, in cases of doubt the Austrian DPA ("DSB") recommends following the former Art. 29 WP's Opinion 04/2012 on Cookie Consent Exemption, WP 194, 00879/12/EN. Also, in light of the DSB's and the Austrian Federal Administrative Court's case law, the DSB underlines in its guidance (FAQ on cookies and data protection, as of 25 May 2022) that necessity must not be interpreted in the sense of an "economic necessity" (e.g. advertising cookies for showing personalised ads do not become "technically necessary" merely because they are necessary to finance the operation of the website).</p>
Can you place the following cookies automatically:	As long as none of the mentioned types of cookies are necessary pursuant to Sec. 165 (3) TKG 2021 they cannot be placed automatically without obtaining prior consent.
i. Analytics cookies	
ii. Advertising cookies	
iii. Social media cookies	
Are you able to gain consent without a user ticking 'accept', i.e., imply consent from a user continuing to browse the site?	No
Can you set cookies without a cookie notice?	No, unless the exemption for necessary cookies pursuant to Sec. 165 (3) TKG 2021 applies (please see answer to Q3 above). Please note, should personal data be processed as a result of using (any kind of) cookies, this has to be reflected in the privacy notice pursuant to Art. 13 and 14 GDPR.
Can you set cookies without a cookie banner/management tool?	No, unless the exemption for necessary cookies pursuant to Sec. 165 (3) TKG 2021 applies (please see answer to Q3 above).

Are you able to use cookie walls?	<p>Yes, according to the DSB's case law and guidance (FAQ on cookies and data protection as of 25 May 2022) the use of cookie walls may be permitted subject to the following considerations:</p> <ul style="list-style-type: none"> - full compliance with applicable data protection laws (in particular the GDPR) must be ensured regarding processing of personal data based on consent - no public authorities or other public bodies are involved - no exclusivity with regard to the content or services offered, i.e. companies with an explicitly public (supply) mandate or universal service providers cannot lawfully use cookie walls - companies using pay walls must not have a monopoly or quasi-monopoly position in the market - a reasonable and fair price for the pay alternative must be offered, i.e. the pay alternative must not be offered pro forma at a completely unrealistically high price - if a user accesses the website by means of the pay alternative, no personal data may be processed for the purpose of personalised advertising
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>As of today, there are no publicly accessible decisions available imposing fines due to violation of respective cookie rules. However, in light of increased activity of data protection activist groups and numerous pending complaint proceedings with the DSB an increase in enforcement in the future appears to be likely.</p> <p>Note: Violations of the information obligations pursuant to Sec. 165 TKG 2021 may be subject to fines up to EUR 50,000.- imposed by the competent Telecommunication Office (lokales Fernmeldebüro). However, the DSB may still have jurisdiction if personal data are processed as a result of the use of cookies. Hence, additional fines based on the GDPR may be imposed as well in such case.</p>
Are there any current consultations relating to ad tech/cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	So far none, but in light of increased activity of data protection activist groups and numerous pending complaint proceedings with the DSB an update in case law in the near future is likely.

Belgium

Can you place cookies without consent?	Only strictly necessary “functional” cookies can be placed without consent (e.g., to remember what has been placed in a shopping cart or to ensure the security of a financial transaction). This requirement of the ePrivacy Directive is implemented in Article 10/2 of the Belgian Data Protection Act.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	Due to increasing enforcement by the Belgian Data Protection Authority, compliance has been more common.
Are there any exemptions if consent is required?	There are no exemptions if consent is required for the placement of cookies.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	No, none of these three categories of cookies are considered strictly necessary by the Belgian Data Protection Authority, and their placement therefore requires consent.
Are you able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	Consent is deemed validly obtained when the user takes positive action to grant it (e.g., ticking a box, sliding a button, etc.), and given that this consent is free, informed and specific. On the other hand, mechanisms such as further browsing or deducing consent from the parameters of a browser are not valid ways to obtain consent from the user.
Can you set cookies without a cookie notice?	No, as any cookie set may process personal data, a cookie notice is required in any case to set out the information required under the GDPR. Additionally, where the placement of cookies requires consent, a cookie notice also fulfils the information requirement for user’s consent to be “informed”.
Can you set cookies without a cookie banner/management tool?	The law does not prescribe the means or manner to obtain and manage consent, so a cookie banner or management tool is not technically required. However, the management and obtention of consent should comply with all requirements under the GDPR (freely given, specific, informed, as easy to give as to withdraw, etc.), meaning the use of a cookie banner is <i>de facto</i> very much recommended to ensure such compliance.
Are you able to use cookie walls?	No, the Belgian Data Protection Authority follows the EDPB’s assessment in Guidelines 05/2020: “ <i>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</i> ”. Therefore, cookie walls are prohibited as they cannot result in users freely giving consent.

Is the local regulator currently enforcing decisions against breaches of cookie rules?

Yes, the Belgian Data Protection Authority has made 4 decisions enforcing cookies rules since 2019, 3 of which imposed fines on defendants.

Enforcement of cookie rules/ laws in Belgium are mainly complaint-driven. Where the Belgian Data Protection Authority (BDPA) decides to enforce and impose a sanction, that sanction is often an administrative fine.

The average fine imposed by the BDPA is, from an international perspective, typically rather low. In addition, the value of the fines imposed by the BDPA are not always proportionate to the size and turnover of the defendants (i.e., often lower fines for big organisations). Aforementioned decisions by the BDPA have imposed fines ranging from 1,500 to 15,000 EUR. However, a risk of outliers to this trend does exist.

Are there any current consultations relating to ad tech/cookies?

None that we are aware of.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

The decisions of the Belgian Data Protection Authority on cookies have been consistent and follow the rulings of the Court of Justice of the European Union and the Guidelines of the EDPB closely. In the same vein, the Belgian Data Protection Authority also tends to align with interpretations held by supervisory authorities in the EU. We therefore do not expect any significant changes in rules or attitudes in the market.

Czech Republic

Can you place cookies without consent?	<p>Article 5(3) of Directive 2002/58/EC (“ePrivacy Directive”), as amended in 2009, has been implemented into Czech law through Section 89 of the Czech Electronic Communications Act.</p> <p>Section 89 of the Electronic Communications Act establishes the “opt-in” principle. The end-user must grant its prior consent before information can be stored on their terminal equipment or before information already stored on the terminal equipment may be accessed. The consent must comply with the GDPR.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>The “opt-in” principle has been incorporated into Czech law as of 1 January 2022.</p> <p>Until then the ePrivacy Directive had been implemented incorrectly, and the Electronic Communications Act enabled the opt-out principle. Therefore, cookies could be placed without the prior end-user’s consent. The end-users must have only been provided with an opt-out option. As the Czech Electronic Communications Act was amended quite recently, it is likely that not all website operators have updated their cookie procedures yet, even though the Czech Data Protection Authority (DPA) advocated the opt-in principle even before the legislative change.</p>
Are there any exemptions if consent is required?	<p>Only technical cookies or cookies which are strictly necessary for enabling or facilitating communication by electronic means or for the provision of an online communication service can be placed automatically. The prior end-user’s consent is not necessary only in the case of technical cookies which enable storage of information or access to information that:</p> <ul style="list-style-type: none">(i) has the sole purpose of enabling or facilitating communication by electronic means; or(ii) is strictly necessary for the provision of an online communication service expressly requested by the end-user.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>No.</p>
Are you able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	<p>No. The Czech DPA stresses that the consent with cookies must comply with GDPR requirements and refers to the EDPB guidance. According to EDPB Guidelines 05/2020 on consent under Regulation 2016/679, merely continuing the ordinary use of a website is not conduct from which one can infer an indication of the end-user’s consent.</p>
Can you set cookies without a cookie notice?	<p>No. The consent must fulfil the GDPR requirements. According to Articles 4(11), 7, and 13 of the GDPR, the consent must be provided in an informed manner. The end-users have to be provided with relevant information before the consent is granted.</p>
Can you set cookies without a cookie banner/ management tool?	<p>The Czech law does not stipulate the manner as to how the cookie consent has to be obtained. However, some kind of cookie banner/ management tool is necessary as the end-users must have control over the cookies placed on their terminal equipment and manage their preferences.</p> <p>A cookie management tool might not be necessary provided that only technical cookies are used.</p>

Are you able to use cookie walls?	According to EDPB Guidelines 05/2020 on consent under Regulation 2016/679, if the end-users are forced to grant their consent with cookies to access to services in question by cookie walls, such consent would not be considered to be given freely. Therefore, the consent would not comply with GDPR requirements.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	Yes. Following the amended Czech Electronic Communications Act as of 1 January 2022, the Czech DPA published that it will focus on cookies practices in its supervisory activities in the year 2022.
Are there any current consultations relating to ad tech/cookies?	No, we are not aware of any.
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	None that we are aware of.

Denmark

Can you place cookies without consent?	<p>No.</p> <p>Only cookies that are necessary for essential technical functions on the website do not require consent. All other cookies require consent.</p> <p>In Denmark the ePrivacy Directive has been implemented by the Executive Order on Information and Consent Required in Case of Storing and Accessing Information in End-User Terminal Equipment 1148/2011 ("Cookie Order").</p> <p>Where cookies or similar technologies are used to collect personal data the requirements of the GDPR must also be observed. In some instances, the GDPR requires consent.</p> <p>Consent must be granular, i.e. specific consent for each purpose.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>Yes. In general, there is a high level of focus by regulators but a gap in following the rules in practice.</p> <p>The Danish Business Authority oversees the cookie rules and enforces compliance with them. In May 2022, the Authority published its yearly report of 2021 of its oversight of cookies and similar technologies. In 2021, the Authority conducted 326 supervisions, where 219 cookie solutions were found not to comply with the cookie rules.</p> <p>GDPR is supervised and enforced by the Danish Data Protection Agency including when cookies are used to collect personal data.</p> <p>Non-compliance with the Cookie Order are however not subject to the same level of fines as provided for by the GDPR.</p>
Are there any exemptions if consent is required?	<p>The Cookie Order provides exemptions where storing or giving access to information:</p> <ul style="list-style-type: none">- is for the sole purpose of carrying out the transmission of communication over an electronic communications network; or- is necessary (technical precondition) to enable the provider of an information society service explicitly requested by the end-user to provide that service. <p>Necessary cookies can be login-functions on a website or the electronic shopping cart in a webshop, where the cookies ensure that the electronic shopping cart remembers the user's items while they are shopping or browsing the website.</p>
Can you place the following cookies automatically:	<p>No.</p> <p>None of these cookies fall within the scope of the exemptions specified in question 3.</p>
i. Analytics cookies	<p>Although it is still a legal requirement to obtain consent for the use of analytics cookies, the Business Authority has publicly stated that it is not a priority to enforce the consent requirements for simple analytics cookies (only first party cookies, simple counters, no profiling and no transfer to third parties). The full extent of this statement is unclear.</p> <p>In opposition, the Data Protection Agency has stated that it has not changed its enforcement priorities.</p>
ii. Advertising cookies	
iii. Social media cookies	

Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	<p>No.</p> <p>A consent must be an active indication. Pre-ticked checkboxes and click-through features, where it is stated that by continuing to use the website, the user accept the use of cookies, are not considered active consent. Consent must meet GDPR standards.</p> <p>To the extent that cookies are used for collecting personal data, consent is most often the appropriate legal basis.</p>
Can you set cookies without a cookie notice?	<p>No.</p> <p>Consent must be informed. The Cookie Order requires as a minimum that:</p> <ul style="list-style-type: none"> - The information is clear, precise and easily understood; - it contains details of the purposes of the storing or access; - it identifies any party storing or accessing information; - it contains readily accessible means by which the user can refuse or withdraw consent; and - it is given prior to the consent and subsequently available at all times <p>In addition, the information must inform of the lifespan of cookies.</p> <p>If cookies are used to collect personal data, the information requirements in GDPR Art 13 and 14 must be complied with.</p> <p>Some of the information must be placed in the banner while other information can be placed one-click-away and the remaining can be provided in a privacy notice.</p>
Can you set cookies without a cookie banner/ management tool?	<p>Generally, there is no requirement to have a consent management tool, but in practice it is difficult to obtain informed consent without.</p>
Are you able to use cookie walls?	<p>No. Consent must be freely given. If a cookie wall blocks access to a website unless cookie consent is given, consent will not be deemed freely given.</p> <p>It is assumed that a payment wall is acceptable, i.e. giving free access to a website if cookie consent is given or giving access against (reasonable) payment.</p> <p>The Danish Business Authority and the Danish Data Protection Authority have not covered this particular issue in its guidelines.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>Yes. The Danish Business Authority (who oversees the cookie rules) has issued orders to remedy non-compliance with the Cookie Order, to our knowledge no other sanctions have been applied.</p> <p>The Danish Data Protection Authority has published several cases concerning failure to comply with the data protection rules in relation to cookies. No fines have been issued for the processing of personal data by use of cookies.</p>
Are there any current consultations relating to ad tech/cookies?	<p>None that we are aware of.</p>

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

The Danish Data Protection Agency has looked into the tool Google Analytics, its settings, and the terms under which the tool is provided. On the basis of this review, the Danish Data Protection Agency concluded that the tool cannot, without additional protections, be used lawfully. Lawful use requires the implementation of supplementary measures in addition to the settings provided by Google.

In November 2021, the Danish Business Authority announced on their website, that it will not prioritise the monitoring of website's collection of simple statistical cookies in the future. However, the rules have not changed.

Recent case law from the Danish Data Protection Authority shows that the Authority is increasing its focus on how collection of personal data through cookies is being handled, especially with regards to granularity of the consent. However, no fines have yet been issued, but it is unclear whether this will change in the future.

Finland

Can you place cookies without consent?	No, but there is an exception for necessary cookies in line with ePrivacy Directive, see response 3 below.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>In September 2021, Finnish Transport and Communications Agency (“Traficom”) published new guidelines on cookies. The guidelines were prepared in coordination with the DPA. Because these changes are quite recent, we believe it is likely that not all actors have updated their cookie practices yet.</p> <p>In the past, there has been some conflicting guidance given by the Finnish DPA and Traficom. For a long time, Traficom argued that valid consent for cookie processing could be given through browser settings. This view was overturned by two judgments given by the Helsinki Administrative Court in April 2021.</p>
Are there any exemptions if consent is required?	Essential cookies can be used without consent, otherwise no exemptions.
Can you place the following cookies automatically:	Cookies can be placed automatically if they are deemed necessary. According to Traficom guidance, necessary cookies include cookies related, for example, to user feeds, data security, accessibility and communication (under certain circumstances).
i. Analytics cookies	Analytics, advertising and social media cookies require consent according to the interpretation of the authorities. In a social media context, the consent must be requested when the person signs up to the platform or if the person is not a user, before cookie data is collected.
ii. Advertising cookies	
iii. Social media cookies	
Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	No. The consent has to fulfil the requirements of the GDPR, which means it has to be explicit, informed etc.
Can you set cookies without a cookie notice?	No.
Can you set cookies without a cookie banner/management tool?	No. Both cookie notices (which require more information, for example on retention times) and cookie banners are required. Traficom recommends the latter as automatic (cookie) notices may be banned by the user in browser settings.
Are you able to use cookie walls?	No, based on guidance in Finland. Likely to follow EDPB’s Guidelines 05/2020.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	We are not aware of any current actions. The most recent action given by the DPA on cookies was on 14 May 2020, in which the DPA stated that consent given through browser settings was not valid.
Are there any current consultations relating to ad tech/cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	As mentioned above, new instructions were published in September 2021, which reflect two court cases published in April 2021. We anticipate these will change attitudes in the market as well as produce more cookie-related enforcement actions in the future.

France

Can you place cookies without consent?

No. Article 5(3) of [Directive 2002/58/EC](#), amended in 2009, establishes the principle of prior consent of the user before storing information on their terminal or accessing information already stored on it; except if these actions are strictly necessary for the provision of an online communication service expressly requested by the user or have the sole purpose of enabling or facilitating communication by electronic means.

Article 82 of the [French Data Protection Act](#) transposes these provisions into French law.

The French Data Protection Authority (the “CNIL”) underlines that the consent provided for by these provisions refers to the definition and conditions set forth in Articles 4(11) and 7 of the [GDPR](#). The consent must therefore be freely given, specific, informed and unambiguous, and the user must be able to withdraw it at any time. It must be as easy to withdraw as to give consent.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Yes. The CNIL carries out online investigations. Since the end of 2020, the CNIL has imposed several fines for violations of cookie rules. As the CNIL are very active in terms of enforcement, rules are followed in practice. The CNIL’s annual report for 2021 indicated that the CNIL’s formal notices and sanctions on the subject were widely followed and commented on within social networks and in the press.

Are there any exemptions if consent is required?

Yes. Some cookies are exempt from requiring consent to place them. These are cookies which are strictly necessary for the provision of an online communication service expressly requested by the user or cookies that exclusively aim to allow or facilitate the communication by electronic means. These cookies do not require the consent of the users, but the users must be informed of their use and you must remind users that browser settings can allow them to block cookies, but with potentially negative effects for the functioning of the website.

List of exempt cookies that do not require consent:

- Cookies recording the choice expressed by the users on the placement of cookies;
 - Cookies intended for authentication of a user that attempts to access a service, including those intended to ensure the security of the authentication mechanism, for example by limiting robotic or unexpected access attempts;
 - Cookies intended to keep track of the contents of a shopping cart on a merchant site or to invoice the user for the product(s) and/or service(s) purchased;
 - Cookies for personalizing the user interface (for example, for the choice of language or the presentation of a service), when such personalization constitutes an intrinsic and expected element of the service;
 - Cookies used for the purposes of load balancing traffic to a website;
 - Cookies allowing paying websites to limit free access to a sample of content requested by users (predefined quantity and/or over a limited period); and
 - Certain types of analytics cookies (“cookies de mesures d’audience”), under certain conditions. Notably they must be first party cookies and the personal data collected must not be cross-referenced with other processing operations or shared with third parties.
-

Can you place the following cookies automatically:

No. Only cookies strictly necessary for the provision of an online communication service expressly requested by the user or cookies that exclusively aim to allow or facilitate a communication by electronic means, as well as certain types of analytics, can be placed automatically. Please see our answer above.

i. Analytics cookies

ii. Advertising cookies

iii. Social media cookies

Are we able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?

No. According to the CNIL Guidelines of October 2020 and Article 29 Working Party Guidelines about consent of 10th April 2018, continuing to browse on a website can no longer be considered as a valid expression of the user’s consent to the deposit of cookies. In the absence of consent expressed by a clear positive act, the user must be considered to have refused it.

Can you set cookies without a cookie notice?

No. According to the CNIL’s Guidelines, Articles 4(11), 7 and 13 of the GDPR and Article 82 of the French Data Protection Act, the user must consent in an informed manner i.e. they must have access to clear and complete information on what they consent to.

The information must be drafted in simple terms that can be understood by all and that allows users to be duly informed of the different purposes of the cookie used. The information must be complete, visible and highlighted. For example, a reference to the General Conditions of Use is not sufficient.

The following information must be provided to users:

- Identity of data controllers (an exhaustive and regularly updated list of all data controller must be provided to the users);
 - Purposes;
 - Categories of cookies;
 - How to accept/ refuse cookies;
 - Consequences that result from the refusal of cookies; and
 - The right to withdraw consent, and how to withdraw it in practice.
-

Can you set cookies without a cookie banner/ management tool?

No. A cookie banner/ management tool must be made available to the user in order to collect and manage its preferences.

The CNIL recommends using a layered approach:

- 1st level of information provided through a cookie banner/ pop-up, at the time of consent collection; and
- 2nd level of information (via a drop-down menu, hyperlink or link to the cookie policy).

Further, the tool must be organised in a manner that the users can choose to accept all cookies, to refuse them all, or to personalize their choices. The CNIL highlights that the “buttons and fonts must be the same size, easy to read, and highlighted in the same way” in order to obtain a free and informed consent.

In addition to the first level of information provided via the cookie banner/ pop-up, a more detailed description of the purposes should be easily accessible on the Consent Management Platform (‘CMP’). The detailed description can be provided by a scroll down button that the user can activate which then display a detailed description of the purposes or via an hyperlink.

Interfaces should not incorporate deceptive design practices, such as faded buttons, slider bars that are difficult to understand, sliders activated by default, etc.

Are we able to use cookie walls?

The CNIL declared the practice of cookie walls illegal in its 2019 Guidelines.

However, the French Highest Administrative Court (Council of State, “Conseil d’Etat”), ruled that the CNIL could not impose a general and absolute ban of the cookie wall practice ([Decision from the French Council of State of 19th June 2020](#)).

Following this Decision, the CNIL reviewed its Guidelines in October 2020 and declared that it will determine on a case-by-case basis whether consent from individuals is free and whether a cookie wall is lawful or not. The CNIL indicated that it will pay close attention to the existence of real and satisfactory alternatives, in particular when provided by the same website editor, when the refusal of unnecessary cookies blocks access to the proposed service. The alternatives can include, for instance, a subscription, partial access to content or access to a limited amount of content.

Pending a legislation or a ruling Court of Justice of the European Union, the CNIL published in May 2022 remains the criteria for assessing the conformity of cookie walls.

Is the local regulator currently enforcing decisions against breaches of cookie rules?

Yes. See our answer to question 2 above.

Following the publication in October 2020 of the CNIL's latest [Guidelines](#) and [Recommendations](#) on cookies, the CNIL announced that cookie compliance was among its top 3 issues identified as priority theme areas of inspection for 2021.

More specifically, at the end of March 2021, the CNIL carried out three rounds of online investigations to assess the application of the rules on cookies, targeting 92 high-traffic websites.

CNIL also received more than 250 complaints concerning websites that did not seem to comply with cookie rules.

These controls led to formal notices (orders to comply) and sanction procedures. 2021 was a record year for the CNIL's enforcement action.

Among others, a record number of orders to comply were reached in 2021 with 135 decisions issued. 89 decisions included a breach relating to the use of cookies (84 of which were fully dedicated to this issue). There were four sanctions (with fines) issued in relation to breach of cookie rules.

The CNIL's annual report for 2021 indicates that the CNIL's formal notices and sanctions on the subject were widely followed and commented on social networks and in the press.

Although cookie compliance does not explicitly appear within CNIL's inspection priorities for 2022, it is expected that the CNIL will keep monitoring closely compliance with its Guidelines and Recommendations.

In January 2022, the CNIL issued a fine against a major platform because in practice it did not allow users to refuse cookies as easily as they could accept them.

In 2022, the French highest administrative court (Conseil d'Etat) also confirmed a decision on a sanction issued by the CNIL which fined a major e-commerce website for breach of cookie requirements.

Are there any current consultations relating to ad tech/ cookies?

CNIL is active in the field of AdTech. It has already opened investigations against AdTech players in France. The CNIL also regularly publishes articles on the AdTech field in its [Digital Innovation Laboratory](#) blog (Laboratoire d'Innovation Numérique, 'LINC'). For instance, the CNIL addressed issues relating to [Real Time Bidding in the online advertising industry](#). CNIL has also been consulted by the French Competition Authority in a competition case related to the deployment by Apple of the "App Tracking Transparency" (or "ATT"). The CNIL has also recently published on its website an article mentioning alternatives to the use of third-party cookies. As stated in the CNIL's annual report for 2021, the LINC will also continue to study "dark patterns" by analysing cookies banners as well as other types of services that influence users' choice.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

None that we are aware of.

Germany

Can you place cookies without consent?	No. Section 25 par. 1 of the Act Regulating Data Protection and Privacy in Telecommunications and Telemedia (<i>TTDSG</i>) in conformity with the Directive 2002/58/EC (e-Privacy Directive, also see Planet 49 case (no. I ZR 7/16) of the German Federal Court of Justice - “ <i>Bundesgerichtshof</i> ”): <ul style="list-style-type: none">- Storage of information in the end-user’s terminal equipment or access to information already stored in the terminal equipment shall only be permitted if the end-user has consented on the basis of clear and comprehensive information.- End-user information and consent shall be provided in accordance with Regulation (EU) 2016/679.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	Yes.
Are there any exemptions if consent is required?	Yes. Sec. 25 par. 2 TTDSG No consent required: <ul style="list-style-type: none">- if the sole purpose of storing information in the end-user's terminal equipment or the sole purpose of accessing information already stored in the end-user's terminal equipment is to carry out the transmission of a communication over a public telecommunications network; or- where the storage of information in the end-user's terminal equipment or the access to information already stored in the end-user's terminal equipment is strictly necessary to enable the provider of a telemedia service to provide a telemedia service explicitly requested by the user.
Can you place the following cookies automatically:	Necessary cookies, yes.
i. Analytics cookies	i. Analytics cookies: No
ii. Advertising cookies	ii. Advertising cookies: No
iii. Social media cookies	iii. Social media cookies: No
	iv. Performance cookies/functionality cookies: No
Are we able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	No.
Can you set cookies without a cookie notice?	No. Section 25 par. 1 sentence 2 TTDSG (since 1 December 2021).
Can you set cookies without a cookie banner/management tool?	No.

Are you able to use cookie walls?	Yes.
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Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>Yes.</p> <p>Cookie rules have not been heavily enforced recently. However, we are seeing and handling more and more enforcement and DPA actions, particularly on the use of cookies and similar technologies. Several German DPAs conducted a joint audit on the use of advertising/ tracking cookies in different sectors (with possible fines/ warnings which are not entirely public yet). Note that the majority of DPA enforcement actions/ investigations are not made public (i.e. we assume that many proceedings are ongoing).</p> <p>It should also be noted that, besides regulatory actions, more and more users (both B2B and B2C) are familiar with the cookie (consent) requirements. Thus, we are seeing and handling more and more cease and desist letters (“private enforcement”). Also the question of whether incompliant cookie set-ups may be subject to damage claims is controversial and a topic of discussion in Germany, but we have seen first proceedings in this respect.</p>
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Are there any current consultations relating to ad tech/cookies?	<p>This topic forms part of the above-mentioned audits in question 9.</p> <p>In addition, the Data Protection Conference (<i>DSK</i> - the joint body of the German DPA) published detailed guidance on cookies and data processing at the end of December 2021, which is still the subject of a consultation process.</p>
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Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	<p>On 1 December 2021, the TTDSG came into force (implementation of the cookie rules of the e-Privacy Regulation and consideration of the case law of the Federal Court of Justice (ref. I ZR 7/16) and the European Court of Justice - "CJEU" (ref. C 673/17) - <i>Planet49</i>). As a result, we see a clear focus of the German data protection authorities regarding the enforcement of the use of cookies. In addition, there are more and more private enforcement proceedings.</p>
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Hungary

Can you place cookies without consent?	<p>No.</p> <p>In Hungary, Article 5 of the ePrivacy Directive was transposed by the Act on Electronic Communications and Act on E-Commerce.</p> <p>Based on the above acts, the placement of cookies or the use of similar technologies on an end-device of a subscriber or user is only allowed if the subscriber or user concerned has given their consent and has been provided with clear and comprehensive information on the use of cookies and similar technologies, including information on the purpose of the data processing.</p> <p>General exemptions apply with regards to essential cookies; however, these exemptions are not codified into national law. The Hungarian Data Protection Authority applies these exemptions in its enforcement practice.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>The market approach is twofold.</p> <p>In recent years market practice evolved significantly and most website operators use a consent management platform (“CMP”) on their website. However, there are still a lot of examples of using these CMP’s in a non-compliant way e.g. not collecting consent for marketing related and analytics cookies, or using pre-checked checkboxes for certain cookies. We are not aware of significant enforcement actions to counter these practices from the Hungarian Data Protection Authority at this time.</p> <p>There are a shrinking number of webpages that rely on implied consent provided by user browser settings (such consent is obtained by further use of the site without changing default browser settings).</p>
Are there any exemptions if consent is required?	<p>In line with Hungarian Data Protection Authority’s guidance on the data processing of websites, the consent of the user for the cookie placement is required for non-essential cookies.</p> <p>The website operator may deploy cookies without consent in the case of essential cookies. The definition of essential cookies used by the Hungarian Data Protection Authority is in line with the practice of other European authorities; however, these have not yet been tested by a Hungarian court to our knowledge as enforcement is quite scarce.</p>
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>No.</p> <p>Only essential cookies can be placed without consent. The rest require consent. It is very likely that the Hungarian Data Protection Authority would qualify these cookies as non-essential.</p>
Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	<p>No.</p> <p>Consent must be clearly and actively given (i.e., the user must opt-in) in compliance with the GDPR. It is very likely that the Hungarian Data Protection Authority would find that a user just continuing to use the services does not constitute valid consent.</p>

Can you set cookies without a cookie notice?	<p>No.</p> <p>The placement of cookies or the use of similar technologies on an end-device of a subscriber or user is only allowed if clear and comprehensive information on the use of cookies and similar technologies, including information on the purpose of the data processing has been provided.</p> <p>Based on the Hungarian Data Protection Authority's guidance on web shops, the notice must indicate:</p> <ul style="list-style-type: none"> - the name of each relevant cookie, enabling identification of the website operator's and each third-party's cookies; - the data types for each relevant cookie and their expiry date; and - the explanation in plain language of each cookies' function.
Can you set cookies without a cookie banner/ management tool?	<p>No.</p> <p>Banners/ management tools are necessary to provide prior notice to the data subject about the data processing and to gather the consent from the data subject.</p>
Are you able to use cookie walls?	<p>No.</p> <p>Based on the guidance of the Hungarian Data Protection Authority on social media modules, in line with EDPB Guideline 05/2020, 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).</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>No.</p> <p>We are not aware of any enforcement decisions that would be publicly available, however, not all decisions of the Hungarian Data Protection Authority and the Hungarian National Media and Infocommunications Authority are uploaded to their websites.</p>
Are there any current consultations relating to ad tech/ cookies?	<p>None that we are aware of.</p>
Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	<p>The Hungarian Competition Authority ("GVH") recently conducted a market analysis on the data assets used by most Hungarian online marketplaces. Based on this market analysis, the GVH will contact the Hungarian Data Protection Authority to prepare a guidance on the sufficient information of consumers which will include information on the lawful use of cookies and similar technologies.</p>

Ireland

Can you place cookies without consent?

Generally speaking, no. Only cookies which satisfy either the “strictly necessary” exemption or the communications exemption (set out in further detail below) may be placed without consent.

In Ireland, the ePrivacy Regulations (S.I. 336/2011) transpose the European ePrivacy Directive. The standard of consent required under the ePrivacy Regulations is that set out in the GDPR.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Yes.

Cookie compliance is a “hot” regulatory topic for the Irish Data Protection Commission (the “DPC”) in recent years, with the DPC carrying out an audit on the use of cookies and producing separate guidance in 2020 so cookie rules should be followed carefully.

For the purposes of this outline of the cookie rules in Ireland below, we refer in particular to:

- the Irish ePrivacy Regulations (S.I. 336/2011);
- the DPC’s [Guidance note on cookies and other tracking technologies](#); and
- the [Report by the DPC on the use of cookies and other tracking technologies](#).

Are there any exemptions if consent is required?

Yes. There are two exemptions known as a) the communications exemption and b) the strictly necessary exemption. The DPC takes a very strict position on these two exemptions to the general rule requiring consent set out in S.I.336/2011.

The communications exemption applies to cookies whose sole purpose is for carrying out the transmission of a communication over a network, e.g., to identify the communication endpoints.

For the strictly necessary exemption a cookie must simultaneously pass two tests. It applies only to ‘information society services’ (ISS) – i.e., a service delivered over the internet, such as a website or an app. In addition to this, that service must have been explicitly requested by the user and the use of the cookie must be restricted to what is strictly necessary to provide that service. For more information on exemptions see the DPC’s Guidance [here](#). The strictly necessary exemption is very narrowly applied by the DPC and in the case of any complaint about a cookie, the DPC will interrogate whether the cookie is in fact strictly necessary to the delivery of the ISS. The DPC Cookie Report, available [here](#), and the DPC’s Guidance provide various examples of which cookies do and do not meet this threshold.

The DPC’s Guidance states that generally speaking, cookies which are strictly necessary/ exempt should expire at the end of each session.

Can you place the following cookies automatically:

Other than where the communications exemption (detailed above) applies, only strictly necessary cookies can be placed without consent, subject to those cookies which fulfil the requirements of the exemption, as set out above. All other non-exempt cookies require GDPR-grade consent, as set out below.

i. Analytics cookies**ii. Advertising cookies****iii. Social media cookies**

Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?

No.

Consent must be clearly and actively given (i.e., the user must opt-in). Silence, inaction or a user just continuing to use the app will not constitute valid consent (i.e., the standard of consent is that of the GDPR). Consent must not be set or deployed on a user’s device before that user’s consent is obtained.

Under applicable Irish rules, the user’s consent must also be specific to each purpose for which the cookie is deployed. This is because under the Irish rules, it is the purpose which is more important than the description given to the cookies and as such, each purpose should be identified in the applicable cookie policy so that this separate consent may be lawfully collected for each such purpose.

At the point of consent being collected, the organisation placing the cookie must also include a link or a means of accessing further information about its use of cookies (and the third parties to whom any data will be transferred) when the user is prompted to accept the use of cookies.

Separately, the DPC’s Guidance states in respect of the collection of consent from the user that the user should be asked to reaffirm their consent no longer than six months after the consent has been collected, otherwise the organisation placing the cookie must be able to objectively and, on a case-by-case basis, justify storage of the user’s consent for any period longer than this.

The user must also be able to withdraw consent as easily as they give it. Information should be provided clearly about how users can signify and later withdraw their consent, including by providing information on the action required for them to signal such a preference.

Can you set cookies without a cookie notice?

No.

You should provide more detailed information about cookies in a privacy or cookie policy accessed through a link within the consent mechanism (see next question) and at the top or bottom of your website.

While there is no requirement under Irish law relating to cookies that there be a set and separate cookie notice and neither does the DPC impose a strict requirement in its guidance, the DPC does nonetheless indicate that notwithstanding the possibility of a duplication of information between a more general privacy policy and a cookie policy, it is good practice to maintain both.

The Irish law on cookies requires that the user be provided with “clear and comprehensive information” about the use of cookies in accordance with data protection law. While “clear and comprehensive” is not defined, the standard required must be that set out in the data protection legislation, i.e., the GDPR and the Irish Data Protection Act 2018.

According to the DPC’s Guidance, the privacy policy and/ or cookie policy must also be visible and available to the user without them having to consent to cookies or dismiss a cookie banner; moreover, where a link to a cookie policy is presented in pop-up/ banner, the text of the policy must not be obscured by the banner/ pop-up and must be easily readable/ not disrupted by chatbots or other features on the page.

The DPC’s Guidance also requires that all information to which users are entitled to under Articles 12(1) of the GDPR in relation to transparency information about any other parties which are processing their personal data should be provided (to the extent that that processing, at the point after which cookies have been set, involves personal data).

Insofar as third-party cookies are placed, the DPC’s Guidance is that information must be provided in relation to third parties who will process information collected when those cookies are deployed. Wording should therefore be inserted to indicate this will happen and who the third-party who will receive the information is in the case of each third-party cookie.

N.B. if children are likely to access your site, you also need to ensure you comply with the DPC's Fundamentals for a Child-Oriented Approach to Data Processing when positioning and writing your notices, available [here](#). Note that the DPC requires that any user interface seeking consent for the use of cookies should, where the product or service is targeted at children, be easy to understand and it must also provide clear and comprehensible information written in a child-friendly way to explain what cookies do and how the information obtained through the use of cookies will be used, and by what other organisations. In any event, the use of cookies by organisations should comply with the principles concerning the profiling of children for advertising/ marketing purposes which are set out in the Fundamentals.

Can you set cookies without a cookie banner/ management tool?

No.

Note that the DPC does not indicate a preference between a cookie pop-up or a cookie banner. On the issue of the repetitive display of a cookie banner/ pop-up the DPC does not impose any particular requirements but in relation to the possibility of "consent fatigue" among users faced with having to choose their settings on each visit to a website, it has acknowledged in its Report that there is a balance to be struck between the provision of adequate information for users and a design that is minimally obtrusive to the user experience.

There is no requirement imposed in the DPC's Guidance that a "reject all" button be applied to a cookie banner/ pop-up alongside an accept button and it is permissible to either allow the user to reject non-necessary cookies or to manage cookies by bringing them to another layer of information in order to do this by cookie type and purpose. However, it is important to note that the DPC's position is that you must not use an interface that 'nudges' a user into accepting cookies over rejecting them. Silence or inaction by the user cannot constitute their consent to any processing of their data. You must include a link or a means of accessing further information about your use of cookies and the third parties to whom data will be transferred when the user is prompted to accept the use of cookies. Cookie banners must not obscure the text or your privacy policy or cookie policy. However, if you choose to manage user consent, your user interface must meet the requirement that information be clear and comprehensive.

Moreover, consent must not be "bundled" for multiple purposes. The DPC recommends that as a matter of good practice, you should outline in a first layer of communication on your site or mobile app that you are requesting consent for the use of cookies for specific purposes. A second layer of information may then be used to provide more detailed information about the types of cookies or other technologies in use, with options for the user to opt in or to accept these cookies. You are not permitted to use pre-checked boxes, sliders or other tools set to 'ON' by default to signal a user's consent to the setting or use of cookies.

In the Guidance, the DPC suggests as a practical solution the use of an easy tool such as a "radio button" could be implemented which allows users to control which cookies are set and to allow them to vary their consent at any time. In any event, a mechanism for easy withdrawal of consent to cookies (after initial provision of consent) should be built into the website. If consent can be given with just one click on a cookie mechanism (i.e., banner/ pop up) then essentially the mechanism to withdraw consent should also be just a click away e.g., accessible on each webpage (because withdrawal of consent should be as easy as giving it).

Are you able to use cookie walls?	<p>Generally, no, given the DPC’s approach as set out in its Report on cookies.</p> <p>Whilst the DPC’s Guidance does not specifically cover cookie walls, the accompanying Report suggests that it does not consider cookie walls permissible, noting “<i>we are of the view that users should not suffer any detriment where they reject cookies or other tracking technologies other than to the degree that certain functionality on the websites may be impacted by the rejection</i>”.</p> <p>The DPC’s Guidance emphasises that users must be provided with a genuine free choice in relation to their use of cookies. To exercise that choice freely, users must be able to consent to the use of cookies which, as noted above, must be GDPR-grade, i.e., amongst other things prior, affirmative and freely given. According to the DPC, neither should consent be bundled up as a condition of the service unless it is necessary for that service.</p> <p>Practically speaking, a cookie wall will generally be incompatible with this level of consent as arguably it will cause the user to suffer “detriment” (as referred to the DPC) should they reject cookies, as they will be prevented from using the website as they otherwise might have. In those circumstances, and while the DPC does not explicitly prohibit the use of cookie walls, it seems unlikely that the use of cookie walls could ever be compatible with the DPC’s application of the Irish cookie rules.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>Yes. There has been a general increase in the number of cookie-related complaints to the DPC in recent years, particularly given the “sweep” conducted by the DPC during late 2019, on foot of which the Report was published in April 2020. Following publication of the Report and Guidance, the DPC stated that it would allow a period of six months from the publication (April 2020) for organisations to bring their products, including websites and mobile apps, into compliance, after which enforcement would commence.</p> <p>The Report states that issues such as non-exempt cookies set by default to “on” (with the choice of the user to reject these cookies by means of unchecking the box not respected) will be a priority for enforcement. The DPC also indicated that failure to voluntarily make changes to user interfaces and/ or their processing will result in enforcement action to bring such organisations into compliance. By contrast, it notes that first-party analytics cookies are considered potentially low risk and as such are unlikely to be a priority for formal action by the DPC.</p>
Are there any current consultations relating to ad tech/cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	See above.

Italy

Can you place cookies without consent?

No.

The Italian DPA distinguishes cookies into three major groups:

- a) **Technical cookies:** which are those used exclusively for “*carrying out the transmission on an electronic communications network, or insofar as this is strictly necessary to the provider of an information society service that has been explicitly requested by the contracting party or user to provide the said service*” (Article 122(1) of the Privacy Code).

These cookies could be further grouped into:

- i. Browsing or session cookies – which allow users to navigate and use a website;
 - ii. Analytics cookies – which can be equated to technical cookies insofar as they are used directly by the website’ owner (the “Publisher”) to collect aggregate information on the number of visitors and the pattern of visits to the website;
 - iii. Functional cookies – which allow users to navigate as a function of certain pre-determined criteria such as language so as to improve the quality of service;
- b) **Profiling cookies:** these cookies are aimed at creating user profiles and are used to send ads messages in line with the preferences shown by the user during the web browsing;
 - c) **Third-party cookies:** which are installed on the user’s devices by the owner of another websites through the Publisher’ website – e.g., cookies installed by social networks.

These cookies could be further grouped into:

- i. Third-party analytics cookies – which can be equated to technical cookies as long as technical means to reduce the identifying power of cookies (such as the IP masking allowed by Google Analytics) are adopted and the third-party does not cross- reference the collected information to other information already available to it; and
- ii. Third-party profiling cookies – which are aimed at creating user profiles and are used to send ads messages in line with the preferences shown by the user during the web browsing.

Consent is necessary for profiling cookies and for third-party analytics cookies. As long as technical means to reduce the identifying power of cookies (such as IP masking allowed by Google Analytics) are not adopted and as such the third-party cross-references the collected information to other information already available to it.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Yes, mostly followed. However please note that to the date the Italian Data Protection Authority has never adopted sanctioning measures in relation to cookie and similar technologies on a device, rather only a few decisions warning and preventing controllers from using Google Analytics due to the connected transfer of personal data to the USA.

Are there any exemptions if consent is required?

Yes.

It is not necessary for the above cookie categories a) and c.i).

Can you place the following cookies automatically:	Please see Q1 above.
i. Analytics cookies	
ii. Advertising cookies	
iii. Social media cookies	
Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	No. Scrolling down is not permitted. The consent can only be legitimately collected through the implementation by design of an unequivocal and informed choice of the user, which is at the same time recordable and documentable.
Can you set cookies without a cookie notice?	No. Required for every cookie category.
Can you set cookies without a cookie banner/management tool?	No. It is necessary for: 1) Third-party analytics cookies, if there are no adopted technical means to reduce the identifying power of cookies and the third-party does not cross-reference the collected information to other information already available to it; and 2) Profiling cookies
Are you able to use cookie walls?	No. However, the Garante has been looking into a very recent practice implemented by some Italian online editors which have purportedly implemented a barrier that could be considered similar to a cookie wall. A formal decision of the Garante on this is expected in the near future.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	No. However, please see Q2 above: a change in the enforcement by the Garante is expected in the next future.
Are there any current consultations relating to ad tech/cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	The Italian Data Protection Authority has approved new Guidelines on cookies dated June 10, 2021, with the aim of strengthening the decision-making power of users over the use of their personal data when they surf online. The measure was adopted taking into account the results of the public consultation publicised at the end of last year. https://www.garanteprivacy.it/web/guest/home/docweb/-/docweb-display/docweb/9677876

Luxembourg

Can you place cookies without consent?

No.

In Luxembourg, Article 5(3) of the ePrivacy Directive 2002/58/EC, amended in 2009, was transposed by Article 4 of the amended law of 30 May 2005 on the protection of privacy in the electronic communications sector (“Law of 30 May 2005”).

Under Article 4 of the Law of 30 May 2005, consent is required to store cookies and similar technologies on a device. Nonetheless, some cookies are exempt from consent. For more information, see our answer to question 3 below.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Yes.

Are there any exemptions if consent is required?

Yes. Some cookies are exempt from requiring consent to place them. These are considered as “essential cookies”: (i) cookies which are strictly necessary for the provider, for the provision of an online communication service expressly requested by the subscriber or by the user; or (ii) cookies that exclusively aim to allow the transmission of communication by electronic means. These cookies do not require the consent of the users.

The data protection authority, the Commission Nationale pour la Protection des Données (“**CNPD**”), gives some examples in its guidelines published in October 2021 of cookies that do not require consent. There are cookies that are used for:

- Registering a user’s choice regarding cookies;
- User authentication where the cookie is only used for this purpose. The CNPD notes that this will not be the case for most cookies provided by social networks to simplify authentication;
- Saving the contents of a shopping cart;
- Recording responses to a contact form;
- Content streaming, provided that the user has clearly indicated their wish to access the content concerned;
- Service customisation. For example, to register a display format or language setting. The CNPD notes that personalisation of advertising does not fall into this category and consent must be obtained before a cookie can be placed or read for this purpose;
- Security, if the cookie is only used for this purpose (e.g. fraud prevention, detection of multiple authentication attempts) and only on behalf of the website or application publisher; and
- Certain types of analytics cookies (see below).

While consent is not required for these cookies, the CNPD recommends informing users of their use (via a cookie banner for instance, please see below).

Furthermore, where some cookies are considered strictly necessary but only necessary for certain functionalities of a site or application, the CNPD recommends placing such cookies only when the user indicates their wish to use the specific functionality (for instance a music player).

<p>Can you place the following cookies automatically:</p> <p>i. Analytics cookies</p> <p>ii. Advertising cookies</p> <p>iii. Social media cookies</p>	<p>Yes, certain analytics cookies may be considered essential and placed automatically. However, cookies used for tracking, profiling, ad targeting, and geolocation purposes require consent. Social plugins also require consent where the plugins are linked to the use of cookies.</p> <p>The CNPD states that analytical cookies may be considered essential – and exempted from consent – if the site operator can demonstrate that the use of these analytical cookies are necessary for the provision of the service (for example, because they are needed to assess necessary server capacity or to detect navigation problems).</p> <p>In this case, the CNPD considers that the exception will only apply if the data collected via these cookies:</p> <ul style="list-style-type: none"> - are not passed on to third parties or cross-checked with other processing; - do not allow for global tracking of a person’s browsing using different applications or browsing on several websites; and - are collected exclusively on behalf of the site editor and are used to produce anonymous statistics only.
<p>Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?</p>	<p>No.</p> <p>Consent must be unambiguous: it must be clearly and actively given (i.e. the user must opt-in) and the person must have been informed beforehand of the consequences of his or her choice. Ticking a box or turning on a slider button are examples of valid consent. The following cases do not constitute valid consent:</p> <ul style="list-style-type: none"> - continuing to browse the website or use an application; - the fact that the terminal’s configuration accepts cookies; - not unchecking a pre-checked box; - not having made a choice at the time of the request for consent. <p>Besides, the CNPD strongly recommends providing the same options for giving consent as for refusing it and that if an “accept all” button is included on the first layer, a similar “refuse all” button should also be included. The different choices available to the user should be presented in an identical manner (i.e. avoid using nudging techniques such as different forms, fonts, colours, sizes or contrasts).</p>
<p>Can you set cookies without a cookie notice?</p>	<p>No.</p> <p>According to the CNPD’s Guidelines, the user must consent in an informed manner (i.e. complete, clear information and drafted in simple terms that can be understood by all and that must allow the user to be duly informed of the different purposes of the cookie used). This information must be provided prior to obtaining his or her consent.</p> <p>This information must comply with Articles 12 and 13 of the GDPR. Specifically, the CNPD recommends that the information be provided in two levels. The first level is mentioned below (For more information, see question 7).</p> <p>The second level of information must be accessible from the first level (e.g. via a hyperlink or a drop-down menu). It generally corresponds to what is known as the “cookie policy”. It may also be a section dedicated to cookies in the privacy policy.</p> <p>Even if only strictly necessary cookies are used, in such cases, the CNPD recommends explaining to the user - at a minimum - what a cookie is and what the purposes of the cookies used are.</p>
<p>Can you set cookies without a cookie banner/management tool?</p>	<p>No.</p>
<p>Are you able to use cookie walls?</p>	<p>This is decided on a case-by-case basis, but most likely will not be possible unless it is low risk and unobtrusive.</p> <p>However, where the user or subscriber has no genuine choice but to ‘agree’ or ‘accept’ the setting of cookies before they can access an online service’s content, or has to sign up to a service, the CNPD takes the view that this cookie wall does not allow for the collection of valid consent.</p>

Is the local regulator currently enforcing decisions against breaches of cookie rules?

CNPD has carried out audits, especially following complaints it has received over the past few years. The CNPD's 2021 Annual Report highlights the Guidelines and Recommendations for Cookies and other Trackers.

However, we are not aware of any decision/ fine given by the CNPD in relation to cookie rules. The abovementioned report indicates that cookies represented 1% of the total of complaints that the CNPD received in 2021.

Are there any current consultations relating to ad tech/cookies?

None that we are aware of.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

None that we are aware of.

The Netherlands

Can you place cookies without consent?	No. As the main rule, article 11.7a Dutch Telecommunications Act (Telecommunicatiewet, Tw) provides that consent is required to store cookies and similar technologies on a device.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	Yes.
Are there any exemptions if consent is required	Yes. Some cookies are exempt from requiring consent to place them. Namely, cookies: <ul style="list-style-type: none">- which are strictly necessary for the provision of an online communication service expressly requested by the user;- that aim to allow or facilitate the transmission of communication by electronic means;- which are used to obtain statistics about the quality and efficiency of an online service (such as a website) insofar they have little or no impact on the privacy of an individual.
Can you place the following cookies automatically:	Some analytics cookies may be placed automatically. Advertising and Social media cookies may, however, only be placed after prior consent.
i. Analytics cookies	Analytics cookies fall under exemption 3, mentioned above, insofar they have little or no impact on the privacy of an individual.
ii. Advertising cookies	More specifically, for analytics cookies to be exempted, the following measures should be taken into consideration, following guidance from the AP:
iii. Social media cookies	<ul style="list-style-type: none">- Conclude a data processing agreement with the third-party provider (not relevant if this is an in-house analytic solution);- Don't process users' full IP addresses;- Don't share the data with the provider of the solution for other purposes than the provision of the services (not relevant if this is an in-house analytic solution);- Don't share/ use the collected data for advertising purposes;- Don't enable cross device identification;- Inform users about the analytic activities via the cookie/ privacy notice(s);- Provide users with an opt out solution;- The above measures are not cumulative conditions and if alternative measures can be offered to protect the privacy of affected users, they could be considered. <p>The AP has provided guidance on how to apply these requirements for use with Google Analytics to be able to rely on this analytics exemption.</p> <p>Please note that the AP has recently concluded its investigation on whether, in light of the Schrems II decision, the use of Google Analytics is still permitted, given that the use of Google Analytics entails the transfer of data to the United States. A decision is expected to be published in Q3 or Q4 of 2022. It is likely that the AP will</p>

follow the decisions of fellow DPAs in Europe, and rule against the use of Google Analytics on the basis of aforementioned data transfer considerations.

Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?

No.

GDPR grade consent is required, i.e. consent must be specific, freely given, unambiguous and provided before cookies are placed. Any buttons/ boxes must be unticked by default. A clear positive action is necessary to express consent.

Please note that you must be able to prove that visitors have actually given consent for cookies to be placed.

Can you set cookies without a cookie notice?

No.

The user must consent in an informed manner i.e. they must have access to clear and complete information on what they consent to. At least the following information must be provided to users:

- Categories of cookies and their purpose;
- Duration of the cookie lifespan;
- Categories of personal data processed;
- Categories of companies to which data is provided; and
- Any other further information as necessary in order to give visitors a fair overview of the data processing.

For the sake of completeness, we note that a separate cookie notice is not required; the information can for example also be included in the privacy notice, or the second layer of a cookie banner. Also note that, even if all cookies are exempted, the AP still advises to observe transparency and provide notice of the use of cookies.

Can you set cookies without a cookie banner/ management tool?

No.

The cookie banner must provide at least:

- the option to ACCEPT/ DECLINE cookies,
- the option to change certain cookie settings in a granular manner,
- the option to consult a list of third-parties who will place cookies on the devices of users or have access to their devices; and
- the information that the user can withdraw given consent at any time.

The cookie banner normally also describes the information included in the cookie notice in a concise manner, including specific hyperlinks to the relevant documents/ pages where more detailed information is set out.

Are you able to use cookie walls?

No.

The DPA has stated in its guidance that valid consent cannot be obtained if a cookie wall is used.

Is the local regulator currently enforcing decisions against breaches of cookie rules?

Yes. In the Netherlands, the ACM and the AP supervise compliance with the cookie rules. The main regulator is the Authority Consumer and Market (Autoriteit Consument en Markt, ACM).

Insofar the cookies are used to process personal data, the Dutch Data Protection Authority (Autoriteit Persoonsgegevens, AP) is also competent.

There has been active enforcement of the cookie rules by ACM and the AP in the past, notably between 2013-2015, where ACM sent numerous warning letters to organisations that were non-compliant. In a handful of cases this resulted in actual formal proceedings.

Between 2017 and 2019 there was little active enforcement, but the AP has recently become increasingly active in the cookie space. In 2019, the AP initiated investigations relating to tracking cookies and cookie walls and announced intensified monitoring of these spaces in the future. To date and to our knowledge, the ACM has not been too involved in this.

Are there any current consultations relating to ad tech/cookies?

None that we are aware of.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

Recent enforcement activities of data protection authorities reflect a shift in attitudes towards cookies.

Most notably, the Belgian DPA rendered a decision entailing that the [Transparency and Consent Framework](#) (TCF) is not GDPR compliant and an increasing number of European DPAs [consider](#) that the use of Google Analytics is not compatible with the GDPR as a result of (unlawful) data transfers to the United States.

Following the Belgian DPA's ruling, the AP advised companies to stop using the TCF immediately. The AP has refrained from commenting on whether it will initiate enforcement against websites that continue to use the TCF. The Dutch DPA's decision on the legality of the use of Google Analytics is expected in the coming months (Q4 2022).

Poland

Can you place cookies without consent?	No. Polish regulations on the use of cookies are incorporated in the Telecommunications Law (Arts. 173 and 174) (“Telecoms Law”). According to the Telecoms Law, cookie consent may be expressed by adjusting the settings of the software installed in the telecommunications terminal equipment used by the subscriber or end user, or by adjusting service configuration settings (e.g., browser settings). Since 2019, the Telecoms Law has required that cookie consent be compliant with GDPR consent requirements.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>Yes, although the market approach is twofold.</p> <p>It is still common to rely on implied consent provided by user browser settings (such consent is obtained by further use of the site without changing default browser settings). The Polish Personal Data Protection Office (the “Polish DPA”) decided at the end of 2021 that such consent is not valid, however the decision was repealed (see regulatory enforcement section below).</p> <p>For some time now, the market practice has been evolving in the direction of active consent collection, i.e., consent obtained by means of consent management tools.</p>
Are there any exemptions if consent is required?	<p>Yes. The Telecoms Law allows for the use of “<i>strictly necessary cookies</i>” without consent, provided that such use is necessary for the purposes of:</p> <ul style="list-style-type: none">- performing message transmission via the public telecommunications network; or- providing a telecommunications service or a service provided via electronic means (information society service), as requested by the subscriber or end user.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>No, only strictly necessary cookies can be placed automatically without consent.</p> <p>Neither the Telecoms Law nor regulatory guidance provide for any additional exemptions, which means that use of other types of cookies requires consent.</p>
Are you able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	<p>The Telecoms Law does not make this clear. On one hand, cookie consent should meet the GDPR standard for consent; so implied consent is unlikely to be deemed sufficient. However, due to a provision allowing for the collection of cookie consent by way of adjusting service configuration settings (e.g., by browser settings), some have argued that implied consent via browser settings is also possible.</p> <p>According to the Polish DPA’s decision (issued at the end of 2021) (the “Decision”), the consent provided via browser settings without user’s active action is invalid, as it does not meet the requirements of art. 4 (11) of the GDPR. Subsequently, the Polish DPA ordered the deletion of the IP address and Cookie ID. The Decision was a result of a data subject’s complaint. No administrative fine was imposed. The Decision has been contested by the controller and the court repealed it (for reasons other than related to consent).</p> <p>Nevertheless, it remains market practice (as described above) that a user who does not change the user’s browser settings and continues to use the website, consents to the use of cookies.</p>

Can you set cookies without a cookie notice?	<p>No, the Telecoms Law requires that the user is informed expressly and in advance, in an unambiguous, simple, and comprehensible manner, about:</p> <ul style="list-style-type: none"> - the purpose of the storing and accessing of such information, - the possibility of 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 (e.g., by way of browser settings). <p>The Decision confirmed that the user needs to obtain a privacy notice before the user may consent to the use of cookies. Some entities (usually those who implement a consent management tool) add information about retention periods and the specific cookie being used.</p>
Can you set cookies without a cookie banner/ management tool?	<p>No, cookie banners/ management tools are necessary. Cookie banners are commonly used regardless of whether consent is obtained via browser settings or a management tool.</p>
Are you able to use cookie walls?	<p>There are no guidelines or enforcement decisions on this. Cookie walls were used by the biggest publishers on the Polish market once the GDPR entered into force, this was not challenged by regulators. However, most large publishers operating in the market have since implemented the IAB Europe Transparency and Consent Framework v 2.0 and thus no longer use cookie walls.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>Not proactively.</p> <p>There are two regulators responsible for the enforcement of cookie rules: (i) the Polish DPA in charge of data processing, and (ii) the President of the Electronic Communication Office in charge of cookie rules.</p> <p>Neither are active in enforcement against breaches of cookie rules or related data processing. However, the Polish DPA acts based on complaints, for example:</p> <ul style="list-style-type: none"> - (i) In 2020, following complaints from NOYB against a number of Polish companies, the Polish DPA undertook proceedings relating to the use of cookies and related data transfers; and - (ii) In response to two complaints from Panoptykon Foundation, it acted against two major Polish publishers regarding the right of access to a user's behavioural profile created using cookies. In one case, the publisher was ordered to provide the information to the user. It is rumoured that several cookie cases are pending before the Polish DPA.
Are there any current consultations relating to ad tech/cookies?	<p>No.</p>
Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	<p>Yes, however:</p> <ul style="list-style-type: none"> - The anticipated changes in the rules are likely to be similar to the current rules; and - The case law (the Decision) that posed to change market attitudes has been repealed. <p>The Telecoms Law will be replaced by a new act – The Electronic Communications Law (the draft of which has not been enacted yet). Currently, the wording regarding use of the cookies/ collecting consent in the draft law is similar to that in the Telecoms Law.</p> <p>Whilst the currently repealed Decision has not substantially influenced market practice, there has been a slow evolution towards active consent for some time now.</p>

South Africa

Can you place cookies without consent?	<p>Yes. The use of cookies and/ or processing personal information by means of cookies is not currently regulated in terms of South Africa's data protection legislation, the Protection of Personal Information Act 4 of 2013 (POPIA), or otherwise.</p> <p>As such, the general principles for lawfully processing personal information under POPIA will apply where the use of any cookies on a particular website contains personal information/ data which can be used to identify the end-user. This includes, amongst other things, the need to process personal information using cookies on a lawful basis (i.e. consent, contract, legal obligation, or legitimate interest).</p> <p>Consent is only one of the lawful bases on which data controllers can process personal information in the context of cookies, but it is not the gold standard or silver bullet and it is possible to rely on any of the other lawful bases outlined above.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>Yes. Although there are no specific rules, laws or regulations regarding the use of cookies in South Africa, the general principles for processing personal information lawfully in South Africa are generally adhered to in practice. This is because (i) POPIA is a new piece of legislation which recently became enforceable (on 1 July 2021); and (ii) there has been a fair degree of misunderstanding and fear around compliance rules and possible consequences under POPIA.</p>
Are there any exemptions if consent is required?	<p>N/A</p>
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>Yes, provided that a data controller takes reasonably practicable steps to ensure that data subjects are made aware of the automatic enablement of these categories of cookies; the information that may be stored/ otherwise processed using these cookies; and the purpose for which these cookies are used. This is typically done in the form of a privacy notice/ privacy policy, but also in the form of website pop-up notifications.</p> <p>That said, to the extent that a data controller relies on consent as the lawful basis on which to process personal information using cookies, it must be possible for a data subject to refuse to give his or her consent in this regard without any negative consequences arising from such refusal (e.g. the data subject should not be barred from using the website/ services if he or she refuses his or her consent). An example of the ability to refuse certain categories of cookies is where a website pop-up notification allows a user to select only strictly necessary cookies and opt-out of any other types of cookies.</p>
Are we able to gain consent without a user ticking 'accept', i.e., imply consent from a user continuing to browse the site?	<p>No. Under POPIA, consent is required to be a voluntary, specific and informed expression of will given by the data subject. Although the South African data protection regulator, the Information Regulator, has not published any guidance on consent, the guidance applicable in the EU is useful given that (i) the GDPR is international best practice; and (ii) POPIA is very similar to the old EU Data Protection Directive 95/46/EC which was repealed and replaced by the GDPR. In other words, consent (i) must be express, not implied; (ii) must be voluntary, (iii) is a real choice by the data subject, and (iv) is not the gold standard or "silver bullet" to be relied on when processing personal information and data controllers must respect if a data subject refuses his or her consent.</p>
Can you set cookies without a cookie notice?	<p>Yes. There is no requirement under POPIA, or otherwise, which requires a data controller to have a cookies notice in place (particularly given that cookies are not expressly regulated under POPIA). It will be sufficient if a data controller's data processing activities in respect of cookies is covered in its general privacy notice/ policy. That said, it is good practice to have a standalone cookie notice.</p>
Can you set cookies without a cookie banner/ management tool?	<p>Yes. Given that cookies are not expressly regulated under POPIA or otherwise, there are no restrictions in this regard, although it is good practice to set cookies using a cookie banner/ management tool for the reasons set out previously.</p>

Are you able to use cookie walls? No. Although cookies are not expressly regulated under POPIA, based on the general principles under POPIA, cookie walls would not be true consent because it does not give the user a real choice i.e. the ability to consent to certain types of cookies or refuse to consent to certain types of cookies.

Is the local regulator currently enforcing decisions against breaches of cookie rules? No. Given that POPIA does not expressly regulate cookies, the Information Regulator has not taken any enforcement action in the context of cookies specifically.

Are there any current consultations relating to ad tech/cookies? None that we are aware of.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)? None that we are aware of.

Spain

Can you place cookies without consent?	No. Article 22(2) of the Information Society Services and e-Commerce Act requires it.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>Yes, although with some deviations.</p> <p>In practice, several companies breach their duty to gather users' informed consent prior to the use of cookies. Two of the most frequent and serious deviations are:</p> <p>(1) there are still websites that gather the users' consent through "continue browsing" solutions, which is no longer valid; and</p> <p>(2) Some websites automatically download cookies on the user's terminal, without action on their part as soon as they access the website.</p>
Are there any exemptions if consent is required?	Yes. Consent is not needed for placing and using so-called technical and/ or strictly necessary cookies.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>No. Consent must be granted by means of a clear affirmative action. Only technical (i.e. needed to ensure the transmission of a communication over an electronic communications network) and necessary cookies (i.e. needed to provide an information society service expressly requested by the user) can be placed automatically. The AEPD refers to Article 29 Working Party's Opinion 04/2012 on Cookie Consent Exemption in its guidance on cookies.</p> <p>According to the AEPD's guidance, below are some examples of technical and strictly necessary cookies:</p> <ul style="list-style-type: none">- Technical cookies: cookies used for remembering the items added to a cart or cookies that enable the proper functioning of the payment process.- Strictly necessary cookies: cookies that provide a function to remember the preferred language of a user or the number of search results to be displayed, or cookies that enable remembering the browser used by the user to ensure an optimal browsing experience. <p>It is important to note that if those same cookies are also used for other purposes which are not exempt (for example, for behavioural advertising purposes), they shall be subject to the same information and consent obligations as the other types of cookies.</p>
Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	No. Consent must be granted by means of a clear affirmative action.
Can you set cookies without a cookie notice?	No, unless only technical and/ or strictly necessary cookies are used.

Can you set cookies without a cookie banner/management tool?

Information does not necessarily have to be provided by means of a cookie banner (other ways of providing the information could serve as well. For example, a notice prior to accessing an information society service) but a management tool is needed.

If a cookie banner is used, the following needs to be included in it:

- a “Consent” or “Accept” button. “Continue browsing...” solutions are no longer valid;
- a management tool (or a link to it) enabling users to give granular consent to (at least) each category of cookies, taking into consideration that users must be able to withdraw consent easily (at least in a way that is as easy as the way of giving consent);
- a “Reject all” button, unless offered in the management tool;
- information on: the identity of the website owner, a brief description of the purposes for which cookies will be used, information on whether cookies used are first and/ or third-party, information on profiling (where appropriate), way of accepting/ managing/ rejecting cookies;
- a link to the full cookie policy that includes detailed information on the use of cookies through the website.

The AEPD highly recommends somehow highlighting the buttons and links included in the banner.

Although the use of cookie banner (including a link to a full cookie notice) is the most common way of providing information on cookies in practice, the AEPD has confirmed other alternatives are valid as well. For example, the full information can be presented to the user when accessing the website (instead of using a two-layer system). Information on cookies may also be provided together with the privacy policy or some terms and conditions, as long as the user is able to directly access the cookie section of the privacy policy/ terms and conditions directly through a link.

Are you able to use cookie walls?

Cookie walls may only be used if a cookie-free equivalent information society service is also offered and the user is informed about this option.

Is the local regulator currently enforcing decisions against breaches of cookie rules?

Yes, it is.

Please find in the following table some of the most recent relevant AEPD's decisions that involve cookies:

Decision	Controller	Conduct	Fine
PS/00032/2020	IBERIA LÍNEAS AÉREAS DE ESPAÑA, S.A.	The first layer banner had unconcise, not transparent, and incomprehensible information. If the "accept" button or the "cookie settings" button was not clicked, no further browsing was allowed, thus not giving the user the option to reject the cookies deposit.	€30.000
PS/00475/2021	MYHERITAGE, LTD	Use of own and third-party non-necessary cookies without the user's express consent. Lack of information on typology of used cookies.	€20.000 For infringement recognition 16.000€
PS/00032/2022	VUELING AIRLINES, S.A.	The use of third-party cookies that are not technical or necessary; the groups of cookies pre-marked in the "accepted" option in the control panel and the impossibility of rejecting third-party cookies that are not technical or necessary.	€30.000 For infringement recognition 18.000

Are there any current consultations relating to ad tech/ cookies?

None that we are aware of.

Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

None that we are aware of.

Sweden

Can you place cookies without consent?	No. According to the Swedish Electronic Communications Act (2022:482) Chapter 9 Section 28, consent is required for placing cookies and similar technologies that are not necessary for the provision of the service expressly requested by the user.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	Yes, the rule on consent is generally followed in practice.
Are there any exemptions if consent is required?	Yes. Consent is not required for cookies or similar technologies that are necessary for the provision of the service. Functional cookies, such as cookies that allow for the consumer to place products in an online store shopping basket, are generally seen as necessary.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	Necessary cookies may be placed automatically (without consent), all other cookies require the users' consent. Please note that the transparency obligations, as specified below, apply also when placing necessary cookies.
Are you able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	No. The consent required for non-necessary cookies uses the same definition for consent found in the GDPR, i.e., the consent must be freely given, specific, informed, and unambiguous, and either a statement or a clear affirmative action. Generally, implied consent does not fulfil this requirement.
Can you set cookies without a cookie notice?	No. Cookies may only be placed when the user is informed about the cookies, and if the use of cookies involves processing of users' personal data, the transparency obligations set out in the GDPR apply as well.
Can you set cookies without a cookie banner/ management tool?	Consent must be obtained from the user before cookies, other than necessary cookies, are placed on the user's device. In accordance with the CJEU ruling in case C-673/17 "Planet49", such consent must comply with the requirements stipulated in the GDPR, i.e., the consent must be freely given, specific, informed, and unambiguous and may not be obtained through pre-ticked boxes. Moreover, the user must be able to withdraw his/ her consent at any time, as easily as it was given. It is our understanding that information does not necessarily have to be provided through the means of a cookie banner, however, a management tool will be necessary to comply with the requirement on prior consent. Please note that this is not specifically regulated in Swedish law and the Swedish Post and Telecom Authority ("PTS"), the supervisory authority in respect of cookie legislation, has not issued any guidance on cookie banners/ management tools. Nevertheless, from our experience almost all website providers in Sweden use management tools for the collection/ rejection of consent.
Are you able to use cookie walls?	No. Cookie walls (that block the access to a website) cannot be used to obtain consent for cookies from the users. Consent must be given freely, and thus if a cookie wall prevents the use of a website unless consent is given, consent is not given freely.

Is the local regulator currently enforcing decisions against breaches of cookie rules?

The PTS has not enforced any decisions against breaches of cookie rules yet. However, in October 2022, the PTS announced that they have initiated investigations against four selected website providers -Swedbank, Folkhälsomyndigheten (the Public Health Agency of Sweden), Konsumentverket (the Swedish Consumer Agency) and Tele2. In addition, the PTS stressed that it plans to launch investigations on other website providers as well.

If the use of cookies will result in processing of personal data, the Swedish Authority for Privacy Protection (“IMY”) also has supervisory responsibilities.

Are there any current consultations relating to ad tech/cookies?

None that we are aware of.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

As far as we are aware, there are no anticipated changes to the rules on cookies. However, it can be argued that there have been changes to the attitudes in the market, at least by the PTS. As aforementioned, the PTS have initiated investigations against several website providers recently and intends to conduct further investigations.

Can you place cookies without consent?

Unlike Europe, the UAE does not have separate legislation regulating the use of cookies so general principles of data protection law apply. Therefore, obtaining prior explicit consent will be required.

The federal data protection law in the UAE prohibits the processing of personal data without the consent of the individual and if the cookies process personal data, express consent should be sought prior to the processing as the exemptions to consent are unlikely to apply. Note the conditions for consent:

- Controller must be able to prove the consent;
- The consent must be given in clear, simple, unambiguous and easily accessible manner, whether in writing or electronic form;
- The consent must indicate the right to withdraw and such withdrawal must be easily made; and
- The individual may withdraw consent at any time and such withdrawal will not affect the legality and lawfulness of the processing made based on the consent given prior to the withdrawal.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

As mentioned above in Q1, there are no specific cookie rules in the UAE and therefore the federal data protection law principles should be applied to the use of cookies which include the processing of personal data.

Are there any exemptions if consent is required?

It is prohibited to process personal data without consent. However, the following cases are excluded from such prohibition:

- necessary to protect the public interest;
- if the personal data that has become available and known to the public by an act of the data subject;
- necessary to initiate or defend against any actions to claim rights or legal proceedings, or related to judicial or security procedures;
- necessary for the purposes of occupational or preventive medicine, for assessment of the working capacity of an employee, medical diagnosis, provision of health or social care, treatment or health insurance services, or management of health or social care systems and services;
- necessary to protect public health, including the protection from communicable diseases and epidemics, or for the purposes of ensuring the safety and quality of health care, medicines, drugs and medical devices;
- necessary for archival purposes or for scientific, historical and statistical studies;
- necessary to protect the interests of the data subject;
- necessary for the controller or data subject to fulfil obligations and exercise legally established rights in the field of employment, social security or laws on social protection;
- necessary to perform a contract to which the data subject is a party or to take, at the request of the data subject, procedures for concluding, amending or terminating a contract;
- necessary to fulfil obligations imposed by other laws of the UAE on controllers; and

- any other cases set by the Executive Regulations (pending publication).

Can you place the following cookies automatically:	The federal data protection law in the UAE does not distinguish between types of cookies. If cookies process personal data, consent is required prior to processing meaning they should not be placed automatically unless they fall within an exemption. For example, the processing is necessary:
i. Analytics cookies	
ii. Advertising cookies	<ul style="list-style-type: none"> - to protect public interest;
iii. Social media cookies	<ul style="list-style-type: none"> - if the personal data is publicly available; - to initiate or defend against any actions or legal proceedings; - for the purposes of occupational or preventive medicine; - to protect public health; - for archival purposes or scientific, historical, and statistical studies; - to protect the interests of the data subject; - exercise rights in the field of employment or social security; - to perform a contract; and - to fulfil obligations imposed by other laws in the UAE.
Are we able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	No, implicit consent would not be sufficient. The consent must be a specific, informed and unambiguous indication of the individual’s agreement to the processing of personal data by a statement or by a clear affirmative action. This means implying consent from a user continuing to browse a site would not be considered valid consent.
Can you set cookies without a cookie notice?	As the UAE does not have separate legislation regulating the use of cookies, we rely on general principles of data protection law instead. For this reason, it is important to provide a notice to the individuals (in addition to obtaining prior explicit consent), which explains the purpose of the processing, the targeted sectors or establishments with which the personal data is to be shared whether inside or outside the UAE and the protection measures for cross border processing. The notice can be in the form of a privacy notice or a separate cookie notice.
Can you set cookies without a cookie banner/ management tool?	There are no explicit laws on this. However, we recommend implementing a cookie banner with a consent functionality to provide individuals with information about the data processing carried out via cookies and/ or other tracking technologies.
Are you able to use cookie walls?	If the cookie wall constitutes a hybrid approach that obtains general user consent but leaves out any choice for the user to granulate their consent to certain types of cookies, then this would not be permitted as personal data must be collected for a specific and clear purpose and may not be processed at any subsequent time in a manner incompatible with that purpose; meaning bulk consent is not compliant. However, personal data may be processed if the purpose of processing is similar or close to the purpose for which such data is collected.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	The UAE Data Office has not yet been set up. We do not have any information on the timeframe for its establishment as at the date of this publication.
Are there any current consultations relating to ad tech/ cookies?	None that we are aware of.

Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

The executive regulations are expected to provide more guidance and information on the basic data protection principles established in the federal data protection law in the UAE. In terms of timing, the executive regulations were expected to be published within 6 months of the date of promulgation of the data protection law which was in March 2022. However, they were delayed, and no timeframe has been provided for its release as yet.

UK

Can you place cookies without consent?	No. In the UK, the ePrivacy Directive was transposed as the Privacy and Electronic Communications Regulations ('UK PECR'). Further, in the UK, the 'UK GDPR' and the Data Protection Act 2018 also apply to the level of consent required to store cookies and online identifiers. Under regulation 6 of UK PECR, consent is required to store cookies and similar technologies on a device.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	Yes. However, there are some companies that take a risk/ reward approach and place cookies automatically before or without obtaining consent. This is also because fines for breach of cookie rules (that don't relate to personal data) are still covered by UK PECR, and as such are substantially lower than UK GDPR fines. This is becoming an increasingly risky approach given the consumer awareness of cookie rules. Further, a well-known privacy activist group called 'None of Your Business' or 'NOYB' filed a large number of complaints across Europe with the regulators about website cookie compliance.
Are there any exemptions if consent is required?	Yes. There is the 'communication' exemption and an exemption for cookies that are deemed 'strictly necessary' (i.e. it must be essential to provide the service requested by the user, e.g. remembering the contents of a user's shopping basket).
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	No. Only strictly necessary cookies can be placed without consent. Any other type of cookie requires consent. Please see horizon scanning below.
Are we able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	No. Consent must be clearly and actively given (i.e. the user must opt-in). A user just continuing to use the app will not constitute valid consent (i.e. the standard of consent is that of the UK GDPR).
Can you set cookies without a cookie notice?	No. You should provide more detailed information about cookies in a privacy or cookie policy accessed through a link within the consent mechanism (see next question) and at the top or bottom of your website. The placement of this link depends on the volume of content of the page. The denser the page the more likely it would be more appropriate to include the policy link at the top. The ICO's guidance on cookies sets out the formatting, position and wording are all key to ensuring its prominence and that users can find it easily. NB if children are likely to access your site, you also need to ensure you comply with the ICO's Age Appropriate Design Code when positioning and writing your notices.

Can you set cookies without a cookie banner/management tool?	<p>No.</p> <p>Any consent mechanism you put in place should allow users to have control over all the cookies your website sets, i.e., this must include third-party cookies. Practical points to consider:</p> <ul style="list-style-type: none"> - when you are deciding whether to use a third-party cookie, you should first check whether your consent management tool enables users to control these cookies; - when you design and implement a consent mechanism, if a user must visit different websites and take different actions to disable cookies placed on your website this is not a compliant approach to PECR. The user needs to be provided with control over these cookies via the consent management tool; - when deciding on which type of tool to use, consider how this affects user experience on desktop versus mobile devices; and - electronic consent requests must not be unnecessarily disruptive. As such, you need to consider how to provide clear and comprehensive information without disrupting user experience (and without invalidating consent).
Are you able to use cookie walls?	<p>This is decided on a case-by-case basis, but most likely will not be possible unless it is low risk and unobtrusive.</p> <p>Examples of where this ‘take it or leave it’ approach will be inappropriate:</p> <ul style="list-style-type: none"> - where the user or subscriber has no genuine choice but to ‘agree’ or ‘accept’ the setting of cookies before they can access an online service’s content, or has to sign up to a service. This is because the UK GDPR says that consent must be freely given; - where ‘general access’ is subject to conditions requiring users to accept non-essential cookies. You can only limit certain content if the user does not consent; and - if a cookie wall is intended to require, or influence, users to agree to their personal data being used by you or any third parties as a condition of accessing a service, then it is unlikely that user consent will be considered valid. <p>The ICO set out in their cookie guidance that the key point is that users are 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.</p> <p>It could be appropriate if the cookie walls refer to facilitating the provision of the service the user explicitly requests. NB that this does not include third-party services such as analytics services or online advertising.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>Yes. There has been a general increase in the number of cookie-related complaints to the ICO in recent years (see here for the exact numbers). ICO cookie-related regulatory priorities are stated as unlikely to cover uses of cookies where there is a low level of intrusiveness and low risk of harm to individuals. For example, first party cookies used for analytics purposes where these have a low privacy risk, or those that merely support the accessibility of sites and services. When reviewing complaints, the ICO will also consider whether users were informed about the cookies in question and provided with clear details of how to make choices.</p>
Are there any current consultations relating to ad tech/cookies?	<p>No, although the ICO’s adtech investigation first launched in 2019 continues.</p>

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

Yes.

The UK's new Data Protection and Digital Information Bill was introduced to Parliament on 18 July 2022, following the Department for Digital, Culture, Media and Sport's (DCMS) response to its consultation on reforming the UK GDPR framework. It aims to reduce the regulatory burden on data controllers, proposing to make cookie consent requirements less strict under defined circumstances. The Secretary of State would also have the power to implement browser level consent to cookies across all websites visited by a user. Whilst the future of the bill itself is uncertain, the DCMS Minister has set intentions for 'business and consumer friendly' reform.

On 1 November 2022, it was announced that the new bill is facing delays and a new public consultation will launch in the coming weeks.

Asia Pacific Overview

When compared to Europe, you will find a greater degree of divergence between the rules in APAC territories given the absence of a regionwide GDPR-equivalent. However, some territories are feeling the indirect effect of GDPR, and we are seeing a general trend towards European levels of regulation.

China introduced its first data protection law ('PIPL') that came into force at the beginning of November 2021. Under the previous regime and in previous judgments, cookies and similar technologies were not deemed to be personal information. However, PIPL may usher in a new era of publicity and enforcement previously unseen for cookies and other AdTech-related practices. As such, it will be interesting to see what our next update has in store for Chinese enforcement and how the new rules have been adopted in practice across the market.

In Australia, Hong Kong and Singapore, there are currently no cookie-specific regulations. However, in Australia there are currently proposed reforms to the Privacy Act that were published in a discussion paper at the end of October 2021. These will provide for greater clarity on cookie and AdTech requirements following a government-led inquiry. The proposed reforms include a redrafting of what 'personal information' means, so that it will explicitly include online identifiers. This increased spotlight on the wider AdTech industry is reflected in the recent flurry of activity and enforcement taken by the regulators. As such, our next update should provide an interesting update on the progress of these proposals.

As somewhat of an outlier, Hong Kong similarly has no specific cookie regulation but does not look to be changing this. The data protection law came into force in the 90s but has since been updated in 2012 and more recently this year is subject to changes to introduce stronger sanctions for 'doxing' offences (disclosing someone's sensitive information online maliciously).

Australia

Can you place cookies without consent?

There are no specific cookie-related laws in force in Australia. However, entities subject to the Australian Privacy Act must handle personal information in accordance with the Australian Privacy Principles (APPs). “Personal information” is defined under the Australian Privacy Act as information or an opinion about an identified individual or an individual who is reasonably identifiable. If an entity handling data collected via cookies and similar technologies has reasonable access to other information which would enable that data to be associated with an individual, that individual is “identifiable”, regardless of whether the entity makes that link. To be considered personal information, the data collected via cookies and similar technologies must also be considered information “about” a person, meaning that the individual is the subject matter of the information.

In its report in relation to the *Digital Platforms Inquiry*, the Australian Competition and Consumer Commission (ACCC) stated that there is “considerable legal uncertainty on the issue of whether technical data collected in relation to individuals is within the scope of the definition of personal information”. The ACCC has proposed that the definition of personal information in the Australian Privacy Act be updated to clarify that it captures “technical data such as IP addresses, device identifiers, location data, and any other online identifiers that may be used to identify an individual”.

Is consent required for placing cookies or similar technologies?

In some circumstances. Under the APPs consent is required:

- for the collection of sensitive information.
- if an APP entity wishes to use or disclose personal information for a secondary purpose (does not apply to the use or disclosure of personal information by private sector organisations for the purpose of direct marketing)
- for an organisation to use or disclose personal information for the purpose of direct marketing, where:
 - the information is collected from the individual, but they would not reasonably expect the use or disclosure;
 - the information is collected from someone other than the individual; or
 - the information is sensitive information about an individual.

To the extent that data collected via cookies and similar technologies constitutes personal information, consent is required in the circumstances set out above unless an exception applies.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

There are a couple of different approaches taken:

- due to the unclear position on whether an online identifier is personal information, some publishers take the view that consent is not required in the case of anonymous website users. Instead, they only obtain consent when users create an account; or
- publishers obtain consent from all users, e.g., via a cookie banner. The obligation to obtain consent is frequently managed by imposing an obligation on the publisher by way of contract.

Are there any exemptions if consent is required?

The consent requirements referred to above are subject to limited and narrow exemptions (for example, conducting Defence Forces activities or, in the case of direct marketing, in relation to a specific Commonwealth contract).

<p>Can you place the following cookies automatically:</p> <p>i. Analytics cookies</p> <p>ii. Advertising cookies</p> <p>iii. Social media cookies</p>	<p>Not without regard to the APPs. To the extent that the data collected by each of these types of cookies constitutes personal information, the handling of the data will be subject to the same rules as are set out above and below.</p>
<p>Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?</p>	<p>The APP Guidelines state that use of an opt-out mechanism to infer consent will only be appropriate in limited circumstances, as the individual’s intention in failing to opt out may be ambiguous. One relevant circumstance where an opt out mechanism is permissible for private sector organisations, pursuant to the APPs, is where:</p> <ul style="list-style-type: none"> - the organisation collects the information from the individual; - the individual would reasonably expect the organisation to use or disclose the information collected for the purpose of direct marketing; - the organisation provides a simple means by which the individual may opt out; and - the individual has not made such a request. <p>The APP Guidelines also include additional, narrower circumstances where an opt-out mechanism is permissible.</p>
<p>Can you set cookies without a cookie notice?</p>	<p>The APP Guidelines require entities collecting personal information to take reasonable steps to notify individuals of certain matters, or otherwise ensure that they are made aware of them. To the extent that the data collected via cookies or similar technologies constitutes personal information, entities must take reasonable steps to notify individuals of these matters, or otherwise ensure that they are aware of them. This is not always done in practice, and some publishers only provide notice once a user creates an account.</p>
<p>Can you set cookies without a cookie banner/management tool?</p>	<p>This is done in some circumstances. See question 2 above.</p>
<p>Are you able to use cookie walls?</p>	<p>There is no specific guidance from the Office of the Australian Information Commissioner (OAIC) in relation to cookie walls. Their guidance in relation to consent more generally is that there are four key elements:</p> <ul style="list-style-type: none"> - the individual is adequately informed before giving consent; - the individual gives consent voluntarily; - the consent is current and specific; and - the individual has the capacity to understand and communicate their consent. <p>Considering the above, the use of cookie walls would likely be an effective means of obtaining consent.</p>

<p>Is the local regulator currently enforcing decisions against breaches of cookie rules?</p>	<p>While enforcement action in relation to cookies and similar technologies has previously been uncommon in Australia, significant enforcement actions have recently been brought against Facebook and Google by both the ACCC and OAIC. In October 2019, the ACCC brought proceedings against Google in the Federal Court. In April 2021, the Federal Court ruled in favour of the ACCC in that case, finding that when Android device users created a new Google Account during the initial setup process, Google had stated that the “Location History” setting was the only setting that influenced whether Google collected, stored, or used personally identifiable location data. In August 2022, the Federal Court ordered Google to pay \$60 million in penalties in relation to this conduct. The ACCC also has two other enforcement actions which are currently in the Federal Court against Google and Facebook respectively, namely:</p> <ul style="list-style-type: none"> - Proceedings brought against Google in July 2020 in which it has alleged that Google obtained user consent to expand the scope of personal information that it could collect and combine about their internet activity, for use by Google for other purposes including targeted advertising. - Proceedings brought against Facebook (now Meta) in December 2020 in which it has alleged that Facebook and its subsidiaries told consumers that the Onavo Protect app would not be used for any purpose other than to provide Onavo Protect services, which has now been challenged. <p>In March 2020, the OAIC also brought proceedings against Facebook in the Federal Court in relation to Cambridge Analytica. In February 2022, the Federal Court dismissed Facebook’s initial claim that it is not liable under the Privacy Act as it does not carry on business or collect personal information <i>in</i> Australia. The Federal Court found the OAIC had established a prima facie case that Facebook carried on business and collected personal information in Australia within the meaning of the Privacy Act through, amongst other things, its installation of cookies on Australian devices.</p>
<p>Are there any current consultations relating to ad tech/cookies?</p>	<p>None that we are aware of.</p>
<p>Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?</p>	<p>Yes.</p> <p>In response to the Digital Platforms Inquiry, the Australian Government committed to undertake a review of the Privacy Act in order to empower Australian consumers, protect their data and best serve the Australian economy. That review is currently underway, and a discussion paper was released in October 2021, seeking feedback on preliminary outcomes including possible options for reform, with a final report expected by the end of 2022.</p> <p>Proposed reforms to the Privacy Act relevantly include:</p> <ul style="list-style-type: none"> - Broadening to the definition of personal information, for example to include technical information and inferred information; - Amendment of the matters required to be included as part of the organisation’s privacy policy (in respect of direct marketing); - Amendment of the matters required to be notified as part of a collection notice; - Additional requirements for information handling, notices and consent in respect of the personal information of children; - An additional requirement in respect of collection, use and disclosure of personal information, namely that it be fair and reasonable in the circumstances; - An additional requirement that risk-mitigation steps be taken in respect of particular privacy risks in respect of direct marketing;

- New requirements for pro-privacy default settings on websites, for example requiring opt-in as opposed to opt-out;
- Changed rules for cross-border flows of data;
- Replacement of the ‘de-identification’ requirements with the higher standard of anonymisation;
- Increased individual rights, such as a right of erasure, a direct right of action, and a tort of privacy.

Other proposed reforms include expanding the extra-territorial application of the Privacy Act by requiring foreign organisations who carry on business in Australia to meet the obligations under the Privacy Act, even if they do not collect or hold personal information in Australia.

In October 2022, a bill was also introduced that would increase maximum penalties for serious or repeated privacy breaches from the current \$2.22 million penalty to whichever is the greatest of:

- a) \$50 million;
- b) Three times the value of any benefit obtained through the misuse of information; or
- c) 30% of a company’s adjusted turnover, during the breach turnover period, if the court cannot determine the value of the benefit.

In response to the *Digital Platforms Inquiry*, the Australian Government also directed the ACCC to conduct an inquiry into markets for the supply of digital advertising technology services and digital advertising agency services.

There was a consultation process, following which a final report was published on 28 September 2021 (the **Final Ad Tech Report**). The ACCC made the following recommendations in the Final Ad Tech Report:

- “The ACCC should be given powers to develop sector specific rules to address conflicts of interest and competition issues in the ad tech supply chain.”
- “The power to introduce sector specific rules should allow the ACCC to address competition issues caused by an ad tech provider’s data advantage.”
- “Industry should establish standards to require ad tech providers to publish average fees and take rates for ad tech services, and to enable full, independent verification of demand side platform services.”
- “The ACCC should be given powers to develop and enforce rules to improve transparency of the price and performance of ad tech services.”

The Final Ad Tech Report also relevantly refers to stakeholder concerns regarding potential consumer harms arising from the use of data for ad targeting purposes. In that context, the ACCC notes that the Australian Government has confirmed it will be introducing legislation to enable the OAIC to develop a binding privacy code to apply to social media platforms and other online platforms that use personal information. A draft of that legislation was also released for public consultation in October 2021.

China

Can you place cookies without consent?	<p>No, cookie information is considered personal information, and personal information must be processed on a recognised legal ground.</p> <p>Consent is usually required for placing a cookie to collect information.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>The rules are not universally followed, and implementation is patchy so far. The reason is that the Personal Information Protection Law (PIPL), the first mandatory data protection law in China, took effect on 1 November 2021 after being published mid-2021 and there has been little active enforcement so far. We expect that the rules will be more widely followed and enforced now the PIPL has come into force.</p>
Are there any exemptions if consent is required?	<p>Yes, but only if the party processing personal information via cookies can rely on another legal ground. For example, it is necessary for concluding or performing a contract to which the individual is a party or for performing statutory obligations or duties.</p>
Can you place the following cookies automatically: <ul style="list-style-type: none">i. Analytics cookiesii. Advertising cookiesiii. Social media cookies	<p>Consent is required for placing a cookie unless the data processing party can rely on a different legal ground. Therefore, the cookies cannot be placed automatically.</p> <p>Further, if the cookies collect sensitive personal information, a separate consent is required.</p>
Are you able to gain consent without a user ticking ‘accept’, i.e. imply consent from a user continuing to browse the site?	<p>Under PIPL, consent needs to be, among other things, unambiguous. Although the law does not further elaborate on the requirement of unambiguity, an implied consent may not satisfy the requirement.</p>
Can you set cookies without a cookie notice?	<p>A standalone cookie policy is not necessary, although it is considered good practice. However, if an individual refuses to give consent, you cannot refuse to provide the services or product on that basis unless cookie information is strictly necessary for such services or products.</p>
Can you set cookies without a cookie banner/management tool?	<p>It is not mandatory, although this will be considered good practice.</p>
Are you able to use cookie walls?	<p>No. A cookie wall will not give individuals the right to reject data processing and the consent may be invalidated as it may be considered not “freely given”.</p> <p>Besides, the PIPL expressly prohibits entities from refusing to provide products or services if the individuals refuse to give or withdraw their consent, unless it is necessary to provide the service. Therefore, you are not able to use cookie walls.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>We have seen very few cases on cookie rules after the PIPL took effect but expect to see more enforcement and court cases in the future.</p>
Are there any current consultations relating to ad tech/cookies?	<p>None that we are aware of.</p>

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

Early court decisions tend to exclude cookie information from personal information or privacy rules. However, under the Civil Code and PIPL, the current consensus is that cookie information will be considered personal information.

The cookie rules remain to be tested in enforcement and judicial cases.

Hong Kong

Can you place cookies without consent?

Yes. Consent would not be required for placing cookies and similar technologies on a device, subject to the below.

There is no specific cookie-related regulation in Hong Kong and therefore, the answer to this question will mainly be considered from data protection perspective. If a data user in Hong Kong places cookies/ other similar technologies on a device which will collect personal data of individuals, the Personal Data (Privacy) Ordinance (“PDPO”), the main data protection law in Hong Kong, will apply. The PDPO does not have extraterritorial effect and applies to data user that controls the collection, holding, processing or use of personal data in Hong Kong. “Personal data” is defined under the PDPO to refer to data in which the identity of an individual can be directly or indirectly ascertained.

Even if personal data will be collected by the cookies/ similar technologies, consent is not required except in three specific scenarios, i.e., personal data collected by cookies will be used: (i) for direct marketing; (ii) in relation to a matching procedure; and (iii) for a purpose that is different from, or not directly related to, the original purpose(s) of collection.

“Direct marketing” is defined to mean, among others, the offering, or advertising of the availability, of goods, facilities, or services through sending information or goods, addressed to specific persons by name, by mail, fax, electronic mail or other means of communication. In general, advertising cookies are unlikely to be regarded as “direct marketing” as they are unlikely to satisfy the requirement of “address to specific persons by name”. However, if the data user knows the identity of the web user, for example, due to other information it holds, it would be prudent to obtain consent from the web user as best practice.

“Matching procedure” is defined to mean any procedure whereby personal data collected for 1 or more purposes in respect of 10 or more data subjects is compared (except by manual means) with personal data collected for any other purpose in respect of those data subjects where the comparison may be used for the purpose of taking adverse action against any of those data subjects.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Yes. While there are no specific cookie rules currently available in HK, PDPO requirements are followed and enforced in practice.

Are there any exemptions if consent is required?

As stated under question 1 above, consent is generally not required except for a few specific scenarios.

Can you place the following cookies automatically:

- i. Analytics cookies**
- ii. Advertising cookies**
- iii. Social media cookies**

Yes, except the limited circumstances where consent would be required (see response to question 1 above), e.g., to the extent the advertising cookies constitute direct marketing as defined under PDPO, informed consent is required.

Consent for purposes of direct marketing is defined under PDPO as “an indication of no objection to the use or provision”. According to the guidance issued by the Privacy Commissioner for Personal Data (“PCPD”), not checking the tick box indicating objection to receive direct marketing materials would be acceptable provided that the individual also signed the agreement to indicate that he/she has clearly read and understood the data user’s notification regarding collection, use and provision of personal data. The guidance further pointed out that consideration on whether consent is valid would also be subject to the way the information is presented (whether the tick box is conspicuous, etc.) The guidance issued by PCPO is not itself legally binding but serves as a reference point for compliance.

Are you able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	Please refer to question 4 for requirements of valid consent.
Can you set cookies without a cookie notice?	Yes. There is no requirement for a separate cookie notice. If cookies collect personal data, data users will usually describe the function of cookies in the “purposes of processing of personal information” section in the privacy policy or include a separate paragraph on cookies in privacy policy.
Can you set cookies without a cookie banner/management tool?	Yes.
Are you able to use cookie walls?	Yes.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	N/A. As stated above, there are no cookie-specific regulations. We are not aware of any enforcement actions taken against breaches of the PDPO in respect of the use of cookies.
Are there any current consultations relating to ad tech/cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	No, we are not aware of any at the moment. While there have been proposed changes to the PDPO, it is unlikely that any proposed changes will have any direct impact on cookies practice.

India

Can you place cookies without consent?	<p>There are no specific Indian laws regulating cookies.</p> <p>Under the Information Technology (Reasonable Security Practices and Procedures and Sensitive Personal Data or Information) Rules, 2011 (“SPDI Rules”), which set out general data protection obligations, consent of the information provider is the only ground for the collection of sensitive personal data or information or “SPDI” – a subcategory of personal data that includes passwords, financial information, physical, physiological and mental health conditions, sexual orientation, medical records and history, and biometric information.</p> <p>While the use of cookies does not require consent, to the extent cookies are used to collect SPDI, consent must be obtained prior to the deployment of such cookies. Separately, market practice has also evolved in a manner where organisations generally seek consent for the use of cookies, regardless of whether any SPDI is collected through such use.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>Yes. The SPDI Rules are generally complied with.</p>
Are there any exemptions if consent is required?	<p>None.</p>
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>There are no specific Indian laws regulating cookies. To the extent these categories of cookies collect SPDI, consent is required prior to the deployment of such cookies.</p>
Are you able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	<p>The SPDI Rules require consent to be obtained in writing or through electronic modes. Implied consent is not acceptable in respect of collection of SPDI through the use of cookies.</p>
Can you set cookies without a cookie notice?	<p>There are no specific Indian laws requiring cookie notices. However, under the SDPI Rules, organisations are required to provide a policy detailing their practices relating to the handling of or dealing with personal data. This policy must include a clear and easily accessible statement of a regulated entity’s practices and policies.</p> <p>Given the open-ended nature of this requirement, it is advisable to provide for a cookie notice, or detail cookie practices in the privacy policy.</p>
Can you set cookies without a cookie banner/management tool?	<p>Yes. However, market practice has evolved to include the use of cookie banners as best practice.</p>
Are you able to use cookie walls?	<p>There are no specific Indian laws prohibiting the use of cookie walls.</p>

Is the local regulator currently enforcing decisions against breaches of cookie rules?	No, not presently.
Are there any current consultations relating to ad tech/cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	Yes. Indian data protection laws are in a state of flux. The existing draft Indian data protection bill has been withdrawn, and a new bill is expected to be tabled before the Indian parliament in 2023.

Singapore

Can you place cookies without consent?	<p>There are no specific cookie-related laws in force in Singapore. To the extent that personal data is collected using cookies or similar technologies, such activity will be regulated under the Personal Data Protection Act 2012 (“PDPA”).</p> <p>Unless an exception applies, consent will be required where a cookie or similar technology collects personal data. Where cookies do not collect personal data, consent is not required.</p>
Are cookie rules (whether specific or within general data protection laws) followed in practice?	<p>Yes. The above data protection rules are followed in practice.</p>
Are there any exemptions if consent is required?	<p>Yes.</p> <p>The data controller may be able to rely on the legitimate interest’s exception under the PDPA, provided that the data controller complies with the relevant requirements.</p> <p>In addition to the legitimate interest’s exception, the PDPA provides several other exceptions to the requirement for consent. However, these generally apply only in specific contexts and/ or are subject to specific conditions. It is unlikely that a data controller will be able to rely on these exceptions for cookies which are placed by a publicly accessible website.</p>
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<p>Cookies may be placed automatically where they do not collect personal data, or if they do collect personal data, where consent may be deemed or implied.</p> <p>As Singapore does not have a specific cookie-related law, the classification of cookies provided here may not neatly map to the requirements under the PDPA.</p> <p>In general, where cookies are strictly necessary for the functioning of a website, it is likely that consent may be implied or deemed. On the other hand, where the collection of personal data might be more extensive, such as for Social Media cookies, it may be more difficult to rely on implied or deemed consent for automatic placement of such cookies. The extent to which Analytics or Advertising cookies require consent will depend on whether the data which such cookies collect is considered personal data.</p>

Are you able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	<p>Yes. Depending on the circumstances, a user may be deemed or implied to have consented to the collection of data by cookies.</p> <p>A user may be deemed or implied to have consented to the placement of cookies by continuing to browse a website. In general, deemed consent applies where it would be reasonable for a user to have voluntarily provided the data collected by the cookies, and implied consent operates where a user has notice of the purposes for which the cookies collect data and by continuing to browse the site provides such implied consent.</p> <p>The Personal Data Protection Commission (“PDPC”) has provided guidance in its Advisory Guidelines on the PDPA for Selected Topics of situations where consent may be deemed or implied. Consent may be implied where cookies provide a functionality which the user has requested, the user is aware of the purposes for the collection, use and disclosure of his/ her personal data, and the user provides the data voluntarily.</p> <p>Consent may be deemed where an activity cannot take place without cookies that collect, use, and disclose personal data, the user voluntarily provides his/ her data for the purposes of the activity, and it is objectively reasonable for the user to do so.</p> <p>For example, where a cookie is required for the operation of a web form to facilitate an online purchase, there is no requirement for separate consent to be obtained specifically for the functioning of that cookie as the collection of data through the cookie may be implied and/ or deemed.</p> <p>Consent may also be implied from the way a user configures his/ her browser to accept certain cookies but reject others. The reliance on such settings alone may not however provide valid consent in all circumstances. The PDPC cautions that the mere failure of an individual to actively manage his/ her browser settings does not imply that the individual has consented to collection, use and disclosure of his/ her personal data by all websites.</p>
Can you set cookies without a cookie notice?	<p>Yes. There is no mandatory requirement to have a cookie notice. However, if the cookies used on a website collect personal data, information on the purposes for which the personal data is collected, used, and disclosed should be included in a privacy notice if no cookie notice is published.</p>
Can you set cookies without a cookie banner/ management tool?	<p>Yes. There is no mandatory requirement for the use of a cookie banner or management tool.</p>
Are you able to use cookie walls?	<p>There are no specific rules which prohibit the use of cookie walls. However, there may be issues with the validity of consent where cookie walls are used to deny access to users. Under section 14(2)(a) of the PDPA, data controllers may not as a condition of providing a product or service, require a data subject to consent to the collection, use or disclosure of personal data about the data subject beyond what is reasonable to provide the product or service to that data subject. Where such a condition is imposed, the consent received will be invalid. Thus, where a data controller requires that large amounts of personal data be collected through cookies beyond what is reasonable for providing a product or service, the use of cookie walls may be inappropriate for obtaining valid consent.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>There have been no reported cases where the PDPC has taken enforcement action against an entity for breaches specifically in relation to cookies.</p>
Are there any current consultations relating to ad tech/cookies?	<p>No, we are not aware of any.</p>

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

There are no anticipated changes to the rules and there have been no changes to attitudes in the market relating to cookies and similar technologies. As the PDPA was only recently amended in November 2020, there are currently no plans to further update the law.

Latin America Overview

Data Protection & Europe

Traditionally, regulations on personal data protection in Latin American countries have been largely inspired by those in Europe. This is mainly due to language and cultural similarities many Latin American countries share with Spain, resulting in widespread application of Spanish regulations. In recent years this has become ever more apparent due to the introduction of the EU's GDPR in 2018, bringing together the international consensus to produce a global standard. Examples of this include the recent regulations issued in countries such as Argentina and Brazil.

Cookies

With the exclusion of Brazil, there are no express references to cookies in the regulations or guides published by the DPAs of Latin America. On 19th October 2022, Brazil's DPA (the 'ANPD') issued specific guidance on cookies. It is yet to be seen as to whether this will have an influence outside Brazil; organisations are advised to keep a watchful eye. More broadly, any interpretation of the law should be based on offering users sufficient transparency and clarity on the use of their data. The ANPD's cookie guidance iterates this, citing a lack of transparency as one of the potential problems to watch out for when using cookies. It is important to ensure that users can understand the type of information being obtained from their navigation and that consent is obtained where regulations require it for processing. As is the case in Europe, it is difficult to find exceptions for processing data without consent or reliance on other grounds for legitimization. In contrast with Europe, there is less enforcement activity by Latin American DPAs; whilst in recent years Latin American DPAs have demonstrated an increased awareness and activeness to monitor compliance, there is still significantly less enforcement activity in comparison with the European regulators.

What does the future look like?

The average user in Latin America is becoming increasingly concerned about the protection of their privacy and personal data. The right approach for those handling data in Latin America continues to be one that demonstrates to users that their data is being processed diligently and under the highest standards of compliance. Long term, this approach ensures that you are conveying an image of seriousness and professionalism, thereby protecting your reputation and relationships with your users.

Argentina

Can you place cookies without consent?	Yes, cookies can be placed without consent if they do not collect/ use personal data and do not identify the data subject. If the cookies collect personal data, the dispositions of the Personal Data Protection Act N° 25,326 ("PDPA") will be applicable and consent would be needed. Please note that consent is the only valid legal basis for processing personal data, and therefore for using cookies which collect personal data.
Are cookie rules (whether specific or within general data protection laws) followed in practice?	The PDPA does not specifically regulate cookies. However, if cookies process personal data, then data protection regulations will apply to the use of cookies.
Are there any exemptions if consent is required?	PDPA does provide exemptions for consent, but they shall not be applicable to cookies if personal data is collected. However, if the data subject is not identifiable, consent will not be required.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	<ol style="list-style-type: none">i. Analytics cookies can only be placed automatically for statistical purposes if data subjects cannot be identified or with the data subject's consent.ii. Advertising cookies can be placed to establish profiles. However, please note that according to the PDPA, collected information cannot exceed the purposes of collection. In this sense, please bear in mind that the collection should be limited to the minimum possible amount. However, if the data subject is identifiable, consent must be provided before processing. This would mean that automatic placement of cookies would be illegal.iii. Social media cookies cannot be automatically placed. Social media cookies tend to identify a user and can also reflect several aspects of sensitive data, such as ethnicity, political preferences. Therefore, social media cookies should not be automatically placed.
Are we able to gain consent without a user ticking 'accept', i.e. imply consent from a user continuing to browse the site?	If the placement of cookies results in the identification of an individual, consent cannot be gained without ticking "I accept" as a positive action. In this sense, consent cannot be implied, as according to Argentine regulations, consent must be express and informed in order to be valid.
Can you set cookies without a cookie notice?	The PDPA does not require a specific Cookie notice, however, if cookies process personal data, the Company must inform the data subject on how this information is being collected and for what purposes by means of a privacy notice or privacy policy.
Can you set cookies without a cookie banner/ management tool?	Provided that the data subject has been informed on how cookies are placed, and has expressly consented to such terms, a cookie banner should not be mandatory. However, Argentine regulation states that processing of personal data should be kept to a minimum. In this sense, if data subjects can provide less data and still enjoy a website, they should be given the chance.
Are you able to use cookie walls?	A cookie wall could be set when the data subject has been correctly informed of the consequences of not providing the required personal data, and provided that the denied personal data are essential for the use of the platform. Otherwise, when the withheld data are not essential, the service may not be denied.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	There are no specific cookie regulations in Argentina. However, the dispositions of the PDPA are applicable and the local DPA might put into place enforcement measures when unlawfully processing personal data collected by means of cookies.

Are there any current consultations relating to ad tech/cookies?

No, we are not aware of any.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

As in Europe, there is a regional tendency to protect data subject's personal information. Thus, we expect heavier regulation in the future.

Brazil

Can you place cookies without consent?

There are no specific cookie-related laws or regulations in force in Brazil. However, companies that are subject to the Brazilian General Data Protection Law (LGPD) must comply with the requirements set forth under the law for processing personal data. Moreover, the Brazilian DPA (ANPD) has recently published an Orienting Guidance on Cookies (“Cookies Guidance”).

“Personal data” is defined under the LGPD as information related to an identified or identifiable natural person. Therefore, in some situations, cookies could be deemed as personal data, especially where they assign a unique identifier to each user and may contain data such as the e-mail address, personal preferences, location, IP address, among others.

Under the LGPD, there are several legal bases that permit the processing of personal data. Specifically for cookies, both consent and the data controllers’ or a third-party’s legitimate interest are viable legal bases, which has been acknowledged by the Cookies Guidance. Specifically for strictly necessary cookies, the Guidance sets forth that legitimate interest would usually be an appropriate lawful basis for such processing.

In order to use legitimate interest as a legal basis for the processing the data controller or the third-party must be able to demonstrate that: (i) the purpose of the processing is legitimate; (ii) the processing is considered based on an actual situation; (iii) only personal data strictly necessary for the intended purpose is processed; (iv) the legitimate expectations of the data subjects were considered prior to the processing; and (v) the legitimate interest is not overridden by the interests or fundamental rights and freedoms of the data subject.

In these cases, the controller or the third-party should consider carrying out a Legitimate Interest Assessment prior to placing cookies. Although this is not a strictly mandatory requirement under the LGPD, it would be helpful to demonstrate that the controller or the third-party thoughtfully assessed whether it had a legitimate interest or not and recorded the outcome of such evaluation. Performing a Legitimate Interest Assessment would also be useful to demonstrate compliance with the accountability principle set forth by the LGPD.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Besides the recent Cookies Guidance, which is not binding and has an educative purpose, there are no other specific laws related to cookies. Organisations have been taking different approaches so far, although we expect this to change. The tendency is that organisations will follow the Cookies Guidance.

Some organisations have started to use cookie banners/ management tools on their websites to collect users’ prior consent to place cookies and other similar technologies. For consent to be valid, it must be freely given, informed and unambiguous.

Other organisations are placing cookies based on their legitimate interest and informing data subjects of such use as soon as a website is loaded through a cookie banner. However, the Cookies Guidance does not recommend the use of cookie banners with pre-selected authorisation options or the adoption of tacit consent mechanisms.

Are there any exemptions if consent is required?

Consent is not required for placing cookies.

In the Cookies Guidance, any other lawful bases provided by the LGPD may be used for placing cookies depending on the facts, including legitimate interest.

Can you place the following cookies automatically:	Although the Cookies Guidance gives examples of cookie categories, it does not impose explicit restrictions on placing any type of cookies.
i. Analytics cookies	As mentioned above, cookies may be placed automatically under the legitimate interest of the data controller or a third-party, provided that the requirements stated in answer 1 are complied with.
ii. Advertising cookies	Moreover, data controllers must provide clear, precise, and easily accessible information about the use of cookies on their website (such as including information on the use of cookies in their privacy notice or cookies notice). On the other hand, if the data controller decides to place cookies based on consent, cookies cannot be placed automatically prior to consent being granted by the data subject.
iii. Social media cookies	
Are we able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	No. Under the LGPD, consent must be freely given, informed and unambiguous, which means that the user must express its consent by a clear affirmative action. The Cookies Guidance echoes this, requiring a “clear and positive manifestation of will” from the data subject. Furthermore, the use of cookie banners with pre-selected authorisation options or the adoption of tacit consent mechanisms must be avoided. Therefore, to reinforce the previous example, continuing to browse on a website cannot be considered as a valid consent considering it fails to fulfill all the legal requirements.
Can you set cookies without a cookie notice?	No. Transparency and free access are one of the key principles of the LGPD. Data subjects must receive clear, precise and easily accessible information on any personal data processing activities. Although, there is no mandatory requirement for a separate cookie notice under the law, data controllers must be able to present information on the use of cookies. This could be done through a cookie banner or a privacy notice, provided that all information required by law is made available to the data subjects. Also, the Cookies Guidance reinforces that data subjects must be able to easily withdraw their consent, in addition to ensuring the exercise of their rights, as set forth by the LGPD.
Can you set cookies without a cookie banner/ management tool?	There is no legal requirement in Brazil to implement a cookie banner/ management tool, although it may be considered as a good practice. The Cookies Guidance, although not binding, strongly recommends the adoption of such procedures or mechanisms. If the personal data processing via cookies is carried out based on consent, the data controller must be able to demonstrate that consent was duly obtained in compliance with the provisions of the LGPD. In this case, a cookie banner/ management tool could be useful to collect evidence on the lawfulness of obtaining the data subjects’ consent. In the Cookies Guidance, the ANPD states that banners can serve as a tool to bring transparency and adherence to data protection principles. It outlines how to design cookie banners in a manner compatible with provisions of the LGPD. In particular, it outlines what should be avoided when designing cookie banners, as mentioned in item 8 bellow.
Are you able to use cookie walls?	There are no specific rules or regulation by ANPD prohibiting the use of cookie walls. However, the Cookies Guidance provides clear recommendation on the matter emphasising that the use of cookie banners with pre-selected authorisation options or the adoption of tacit consent mechanisms must be avoided. By the same token, cookie walls would more likely than not be deemed as an invalid way of obtaining consent considering it would be hard to defend that consent was freely given, one of the requirements for consent to be valid under the LGPD.

Is the local regulator currently enforcing decisions against breaches of cookie rules?	<p>Currently there are no public investigations or enforcement actions carried out by the ANPD regarding cookies. As the ANPD began functioning in 2021, the Authority is largely focusing its efforts on issuing regulations and guidelines.</p> <p>It should be noted, though, that the LGPD may also be enforced by consumer protection agencies and other regulatory bodies. Recently, a State Consumer Protection Agency announced it was investigating the use of cookies on the Brazilian Post and Telegraph Company website, on the ground that the Post Company had violated the principle of transparency and that it failed to collect users' consent according to the law.</p> <p>In the Cookies Guidance, the ANPD noted that one of the potential problems related to the use of cookies is the lack of transparency. The Cookies Guidance highlights that privacy risks may be magnified where the lack of transparency is coupled with practices of collecting massive amounts of personal information for purposes of identifying, tracking and profiling behaviour. The Cookies Guidance seeks to bring illustrative examples to enable the identification of positive and negative practices in cookie use. It states that it is the responsibility of organisations to take the necessary steps to safeguard the rights of data subjects.</p>
Are there any current consultations relating to ad tech/ cookies?	<p>No, we are not aware of any.</p>
Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	<p>None that we are aware of.</p>

Colombia

Can you place cookies without consent?	Cookies cannot be placed without consent if they are installed in devices of individuals located in Colombia, and they collect personal data. In such cases, consent is needed according to the dispositions of the Colombian Data Protection Act N° 1581 ("CDPA").
Are cookie rules (whether specific or within general data protection laws) followed in practice?	There is no specific regulation regarding cookies in Colombia. However, the Superintendence of Industry and Commerce issued administrative decisions where it stated that cookies installed in devices of individuals located in Colombia are means to collect personal data, and therefore local law applies for such data. They are generally followed in practice.
Are there any exemptions if consent is required?	CDPA does provide exemptions for consent, but they shall not be applicable to cookies in cases where the data collected is considered as personal data. In this sense, if personal data is not processed, consent will not be required.
Can you place the following cookies automatically: i. Analytics cookies ii. Advertising cookies iii. Social media cookies	According to Colombian regulations, if the data subject is identifiable, consent must be provided before processing. This would mean that automatic placement of cookies would be illegal in all cases.
Are we able to gain consent without a user ticking 'accept', i.e., imply consent from a user continuing to browse the site?	No, consent without ticking accept is not permitted in Colombia. Express consent for the use of cookies is required when the data collected is personal data. Also, before a user accepts, the Company must provide the data subject clear, truthful, sufficient, timely, verifiable, understandable, accurate and suitable information. Therefore, an "I accept" button is needed to provide valid consent.
Can you set cookies without a cookie notice?	The CDPA does not require companies to have a separate Cookie Policy, however, there still should be express and informed consent from the data subject, and the general Privacy Policy should comply with the requirements set forth by local law.
Can you set cookies without a cookie banner/management tool?	Provided that the data subject has been informed and consented to the use of cookies which collect personal data, a cookie banner is not strictly necessary. Terms on the use of cookies may be placed in the Privacy Policy and/ or Consent Mechanism, with a link directing the data subject to the relevant sections.
Are you able to use cookie walls?	<p>A cookie wall can be used when a data subject does not provide consent for use of their personal data and the use of cookies, but only when:</p> <ul style="list-style-type: none">- the data subject has been correctly informed of the consequences of such decision; and- the personal data they have refused to provide is essential for the use of the platform. <p>Otherwise, where the withheld data is not essential to the service, the cookie wall cannot be implemented.</p>
Is the local regulator currently enforcing decisions against breaches of cookie rules?	The CDPA does not have a particular regulation that covers cookies. However, the Superintendence of Industry and Commerce issued administrative decisions where it stated that cookies installed in devices of individuals located in Colombia are means to collect personal data, and therefore, local law applies to the processing of such data, including any breach of the law when using cookies.

Are there any current consultations relating to ad tech/cookies?

No, we are not aware of any.

Are there any anticipated changes to the rules and/or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?

As in Europe, there is a regional tendency to protect data subject's personal information. Therefore, we expect heavier regulation on these matters in the future.

Mexico

Can you place cookies without consent?

No, but there is an exception for necessary cookies. The requirement to inform a data subject of how such technologies can be disabled will not be applicable if such a technology or cookie is required for technical purposes. In that sense, the controller must include the use of cookies and other tracking devices (features and purposes) in the relevant privacy notice. Tacit consent (opt-out) is the general rule: when the controller intends to collect the personal data directly or personally from the data subject, they must make the privacy notice available to them prior to such collection. The data subject must be able express their refusal to the processing of their personal data for purposes that are different from those that are necessary and that underline the legal relationship between the controller and the data subject.

Valid consent must be:

- freely given without error, bad faith, violence, or fraud, which may affect the data subject's expression of will;
- specific: referring to one or more specific purposes that justify the processing; and
- informed: the data subject must be aware of the privacy notice prior to the processing to which their personal data will be subject and the consequences of giving their consent.

For cookies and similar technologies, the principle of consent applies in a singular way, as personal data is being collected when the consumer relationship begins. In addition to consent requirements, there is a requirement to provide consumers with the ability to opt-out. However, regulations usually require that consumers or online users must be informed about how these files are being used and processed.

Are cookie rules (whether specific or within general data protection laws) followed in practice?

Although in Mexico there are no specific guidelines on cookies and similar technologies, provisions on these can nevertheless be found in the Privacy Notice Guidelines (only available in Spanish [here](#)) ('the Privacy Guidelines') issued by the [National Institute for Access to Information and Data Protection](#).

Under Mexican data protection regulations, cookies do not fall within the definition of 'personal data'. However, through the use of cookies, personal data such as, inter alia, internet protocol ('IP') addresses, personal preferences, and content personalisation, may be collected.

When the controller uses mechanisms in remote or local means of electronic, optical, or other communication technology, which allow for the collection of personal data automatically and simultaneously while the data subject makes contact with them, the controller must immediately inform the data subject. The data must be informed through a communication or warning placed in a visible place as to the use of these technologies and the fact that personal data is obtained from them, as well as how they can be disabled.

In this sense, Mexican data protection law obliges controllers, in a broad sense, to notify of any use of cookies or other tracking devices in the relevant privacy notice, and to provide a means of disabling them.

In addition, the E-Commerce Regulation considers it good practice to provide mechanisms that guarantee the protection and confidentiality of personal data, by allowing users and consumers to actively mark or select privacy settings when this is possible and does not affect the proper functioning of the website.

Are there any exemptions if consent is required?

Yes, for necessary technical purposes.

Can you place the following cookies automatically:	Yes, however data subjects must be provided with information as described in question 1 and an opt out mechanism.
i. Analytics cookies	
ii. Advertising cookies	
iii. Social media cookies	
Are we able to gain consent without a user ticking ‘accept’, i.e., imply consent from a user continuing to browse the site?	Yes, to the extent no sensitive or financial data will be processed by cookies.
Can you set cookies without a cookie notice?	No.
Can you set cookies without a cookie banner/ management tool?	No. According to the Data Protection Law, it is necessary to place a cookie banner or 'pop-up' on the website or app where cookies and similar technologies are used.
Are you able to use cookie walls?	There are no specific requirements or guidance regarding cookie walls. However, considering the provisions on cookies established in the law, it is reasonable to interpret cookie walls not to be lawful under the Mexican data protection law.
Is the local regulator currently enforcing decisions against breaches of cookie rules?	Yes.
Are there any current consultations relating to ad tech/ cookies?	None that we are aware of.
Are there any anticipated changes to the rules and/ or have there been changes to the attitudes in the market (for example, case law or industry body decisions)?	Yes. There is a bill that relates to marketing consent (opt-in instead of opt-out). This initiative has been approved in the Senate; however, it has not yet been discussed in the Chamber of Deputies, and it is still uncertain when this discussion will take place .

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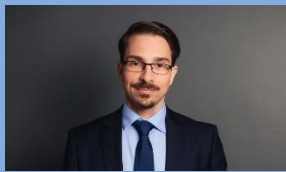
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Thank you

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