

Advice on cookie banner compliance

For: CookieMagic
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Management summary

The cookie banner, shown in the image below is provided by CookieMagic. With these cookie banners, CookieMagic provides companies with a solution that makes it easy to comply with the current cookie legislation. If a company uses the CookieMagic cookie banners with the recommended settings, the company complies with the following key points for cookie compliance:

- Only cookies that are strictly necessary for the functionality of the website can be used before the website visitors' affirmative action.
- Analytics cookies, advertising cookies and social media cookies can only be used after the website visitors' has provided their valid consent.
- All websites using non-functional cookies must include a cookie banner and a cookie policy.
- Cookie banners must include a brief but meaningful description of the purposes for placing and using cookies.
- Cookie banners must provide a choice to accept or reject non-strictly necessary cookies.
- Websites must inform about the functionality of the browser to allow users to easily withdraw their consent.
- Assuming the website visitors' acceptance and relying on the use of a website as a form of consent is not compliant.
- The use of pre-ticked consent boxes is not compliant.
- The technical functionality employed to collect consent must allow to demonstrate that consent was given.

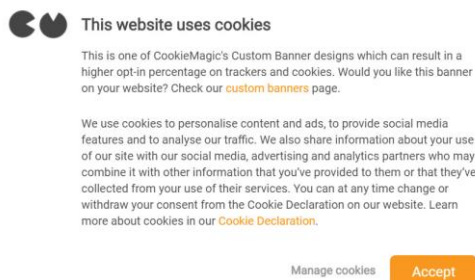


Figure 1 Cookie banner screen 1

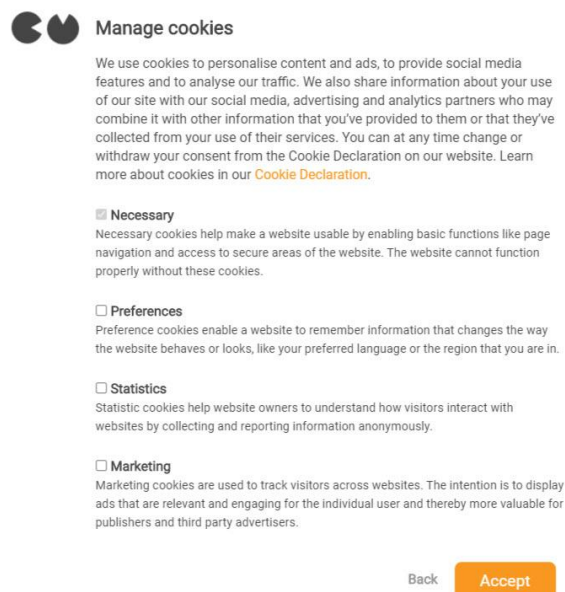


Figure 2 Cookie banner screen 2

Introduction

All organizations that use cookies are obliged to include at least a (privacy and) cookie statement on their website with a clear explanation of how they handle cookies and additionally, depending on the types of cookies used, a cookie banner. Considering these legal requirements, ICTRecht Privacy B.V. (hereinafter: ICTRecht) prepared a white paper for CookieMagic regarding the cookie banners that CookieMagic provide as a service for their clients. In this cookie scan it is assessed to what extent the custom cookie banners ¹ of CookieMagic comply with applicable laws and regulations.

Legal framework

Strict (privacy) rules apply to the use of cookies. The cookie legislation is laid down in the Dutch Telecommunications Act (hereinafter: "Tw")² and partly in the General Data Protection Regulation (hereinafter: "GDPR").³ Europe is working on new legislation: the e-Privacy Regulation (hereinafter: "ePR"). The ePR will replace the cookie legislation from the Tw in due course and will ensure that the same cookie legislation will apply throughout the European Economic Area (hereinafter: "EEA"). As it is not yet clear when the ePR will apply, its content is only included in this white paper as far as relevant.

Note: The scope of the cookie legislation goes beyond the placing of cookies: not only cookies fall within its scope, but also pixels, Javascripts, Flash cookies, HTML5 local storage, web beacons, device fingerprinting and all other techniques which store or collect personal data. The only situation in which article 11.7a Tw does not apply is when there is no possibility of data being stored or read on the user's peripheral equipment.

Consent

Only when consent has been given (read: an "agree" button has been clicked) cookies may be placed on a user's device. In 2018, the GDPR introduced a strengthened concept of consent, which by effect of EU data protection law, is applicable to the consent required under the e-Privacy Directive. The GDPR stresses that consent should amount to an unambiguous indication of wishes expressed by active behaviour. To reiterate this point, the Court of Justice of the European Union ("CJEU") set out in its Planet49 decision of October 2019⁴ some key aspects applicable to the cookie consent obligation, namely:

- Consent must be active, rather than passive.
- Consent must be unambiguous. According to the CJEU, "only active behaviour on the part of the data subject with a view to giving his or her consent may fulfil that requirement".
- Simply giving users the chance to opt out by un-checking a pre-checked box does not constitute valid consent since "consent given in the form of a preselected tick in a checkbox does not imply active behaviour on the part of the website user".
- Consent must be specific. This means that "it must relate specifically to the processing of the data in question and cannot be inferred from an indication of the data subject's wishes for other purposes".

¹ <https://cookiemagic.eu/cookiebot-custom-banner-designs/>, custom banners.

² Article 11.7a Telecommunicatiewet.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation).

⁴ JUDGMENT OF THE COURT (Grand Chamber) 1 October 2019 (*) (Reference for a preliminary ruling — Directive 95/46/EC — Directive 2002/58/EC — Regulation (EU) 2016/679 — Processing of personal data and protection of privacy in the electronic communications sector — Cookies — Concept of consent of the data subject — Declaration of consent by means of a pre-ticked checkbox)
<http://curia.europa.eu/juris/document/document.jsf?sessionid=816D1D891FD75984177135CFBBD5F218?text=&docid=218462&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=2348720>

Obligation to inform

The GDPR contains a number of minimum requirements regarding the information obligation. There should at least be information about:⁵

- the purposes for placing cookies;
- the types of personal data collected and processed via cookies;
- the legal ground for placing cookies;
- the recipients of the data (legal entities);
- the appropriate guarantees for processing outside the EEA, and how these can be consulted;
- the retention periods;
- the rights of data subjects (and the way in which data subjects can exercise them).

Key points with regard to cookie consent

- Only cookies that are strictly necessary for the functionality of the website can be used before the website visitors' affirmative action.
- Analytics cookies, advertising cookies and social media cookies can only be used after the website visitors' has provided their valid consent.
- All websites using non-functional cookies must include a cookie banner and a cookie policy.
- Cookie banners must include a brief but meaningful description of the purposes for placing and using cookies.
- Cookie banners must provide a choice to accept or reject non-strictly necessary cookies.
- Websites must include functionality to allow users to easily withdraw their consent.
- Assuming the website visitors' acceptance and relying on the use of a website as a form of consent is not compliant.
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CookieMagic cookie banners

With the use of the CookieMagic cookie banners⁶, the company offers its website visitors the option of choosing their own settings. By clicking on the button for this option, the website visitors receive information about the cookie functionalities, and they are offered the possibility to refuse the placing of cookies. After clicking on this button, a selection menu appears, where all choices must be actively checked. This is in line with the recent "privacy by default" principle, which is laid down in the GDPR. On the basis of this principle, the standard settings must be privacy-friendly, which means that the tick box must be 'off' by default and the visitor must actively 'tick' them if they want to agree to the corresponding cookies. The purposes of the cookies are sufficiently described. The cookie banner in its current form provides for valid consent. Only the tick box providing consent for the placing of functional and/or technical cookies may be ticked in advance. The cookie consent banner text and working method comply with current cookie legislation.

Future cookies

Technology is evolving quickly. This means that companies have the ability and plans to further develop online marketing on their websites. Therefore, the developers that install cookies (or other tools) on their website need to be aware that a new processing of personal data is initiated. For each new processing of personal data, some steps need to be taken. The developer has to link the new cookie to the right setting of the cookie banner, check whether the consent does still cover the tool. CookieMagic provides a solution for this, because with their cookie banner solutions, the new cookies will be automatically added to the cookie statement. The new cookies are only used when the website visitor gives prior consent.

⁵ Article 13 GDPR.

⁶ <https://cookiemagic.eu/cookiebot-custom-banner-designs/>, custom banners.