

Cookies, privacy and web sites: legislation and Italian Data Protection Authority requirements

With provision no. 229 of 8 May 2014, the Italian Data Protection Authority identified the “Simplified Arrangements to Provide Information and Obtain Consent Regarding Cookies”, as prescribed by Article 122, paragraph 1 of Legislative Decree 196/2003 (the so-called Personal Data Protection Code), as replaced by Legislative Decree 69/2012.

In drafting this document on cookies, the Data Protection Authority took into account the results of the relevant public consultation (**resolution No. 359 of 22 November 2012**) as well as the outcome of some meetings held with various parties (providers, consumer associations and the industry sectors involved, representatives from academia and research) and the guidance provided by the Article 29 Working Party (**Opinion 04/2012 on Cookie Consent Exemption** as adopted on 7 June 2012; **Working Document 2/2013 providing guidance on obtaining consent for cookies** as adopted on 2 October 2013).

The Data Protection Authority is general in nature,

- identifying the simplified arrangements to provide users with online information on the storage of cookies (and similar tools, such as web beacons, clear GIFs, etc.) on their terminal equipment by the websites they visit;
- Providing appropriate guidance on the mechanisms to obtain the users’ consent where this is required under the law.

The Data Protection Authority believes that the measures suggested in its document:

- will allow users to express truly informed choices on the installation of cookies through the expression of a specific consent (this being established by art. 23 of Legislative Decree 196/2003);
- will have the least possible impact in terms on unimpeded user browsing and the use, on their part, of telematic services.

What are cookies?

As mentioned by the Data Protection Authority in its document:

Cookies are small text strings sent from the web sites visited by the user to the user’s terminal (usually, the browser), where they are stored to be then sent back to the site of origin the next time the same user visits it.

When navigating a website, a user may happen to receive cookies from other websites or web servers, which are the so-called “third party” cookies. They are used for several purposes, as further detailed below.

Each browser can store a considerable number of cookies, including for long periods of time. This happens because their use is varied and, above all, in several cases, essential to ensure an acceptable browsing experience for the users. Cookies are used, for instance:

- for IT authentication purposes;
- to monitor browsing sessions;
- to store specific information on user preferences;
- to target ads.

Legal requirements of cookie regulations

A necessary premise: the regulatory framework on the subject of the protection of personal data is quite uniform in the European Union, since the laws issued by the various legislators “start from a common basis constituted, first of all, by Directive 95/46/EC (which, for example, our legislator has adapted with the famous, and by now abrogated, Law 675/96) and by the other Community texts (and not only) subsequently issued. The issue is complex, but it is appropriate to mention it here to avoid any doubt about a circumstance: this legislation is not only Italian, as can be easily ascertained by viewing websites hosted in other member states of the European Union!

Having said that, the Italian legislator established that the data controller must necessarily obtain the prior and informed consent to the installation of cookies used for purposes other than purely technical ones from the users.

Distinction between technical cookies and profiling cookies

The decision of the Data Protection Authority makes a fundamental distinction between:

- Technical cookies

Technical cookies are used to browse or provide a user-requested service (Section 122 par. of the Code: they are used exclusively with a view to “*carrying out the transmission of a communication 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.*”).

They are usually installed directly by the data controller or the website manager.

Technical cookies can be grouped into:

- browsing or session cookies (which allow users to navigate and use a website; e.g. to purchase items online or authenticate themselves to access certain sections);

- analytics cookies, which can be equated to technical cookies insofar as they are used directly by the website manager to collect aggregate information on the number of visitors and the pattern of visits to the website;
- functional cookies, which allow users to navigate as a function of certain pre-determined criteria (such as language or products to be purchased) so as to improve the quality of service.

Legal requirements:

- Information has to be provided on the privacy policy (in compliance with the requirements of art. 13 of Legislative decree 196/2003);
- **users' prior consent is not necessary.**

- Profiling cookies

As their name suggests, profiling cookies are aimed at "creating user profiles", that is to say, creating a user digital profile used to send ads messages in line with the preferences shown by the user during navigation.

In the light of the highly invasive nature of these cookies vis-à-vis users' private sphere, Italian and European legislation requires

- **users to be informed appropriately on their use;**
- users' prior consent is required.

The policy can be made known also in a simplified manner, as detailed in Article 122 par.1 of legislative Decree 196/2003 (*"storing information, or accessing information that is already stored, in the terminal equipment of a contracting party or user shall only be permitted on condition that the contracting party or user has given his consent after being informed in accordance with the simplified arrangements mentioned in section 13(3)."*)

Entities involved: Publishers and "Third Parties"

As mentioned above, when a user visits a website, cookies may be installed both by the manager of the website visited ("publisher") and by other subjects ("third parties"); among these subjects, there are others who act as intermediaries for the provision of other services (in particular, advertising agents). It is considered necessary for the above distinction to be taken into due account also in order to appropriately outline the respective roles and responsibilities (such as, providing information to and obtaining consent from users online).

The DPA chose not to pass on third party obligations to the publisher, as will be highlighted below with reference to the privacy policy and consent profiles; nevertheless, the publisher itself is till subject to certain obligations, despite the fact that, as stated by the Authority itself, "publishers - a

category including natural persons and SMEs – are often the “weaker” party in this context. Conversely, third parties are usually large companies of substantial economic import that work as a rule with several publishers, so that one publisher may often have to do with a considerable number of third parties”.

Therefore, it should be noted that publishers are, on the one hand, data controllers in respect of the cookies installed directly by their websites;

on the other hand, they may be regarded more appropriately as a sort of technical intermediaries between third parties and users since they may hardly be considered to act as joint controllers with the said third parties in respect of the cookies the latter install by way of the publishers.

Providing Information on Cookies (Via Simplified Mechanisms) and Obtaining Consent Online

The data protection discipline is based on information and consent; however, web communications, in practice are not conducive to the reading of long texts, which users often just ignore. Additionally, the large dissemination of mobile devices (smartphones and tablets) creates additional problems in this respect.

The DPA, therefore, chose a balanced approach: on the one hand, it made the provision of information mandatory from the first access to a web site on, on the other hand it created a two-tiered approach. More specifically, the cookie policy must be communicated:

1. in a short form (*short cookie policy*), when the user first accesses a website (irrespective of the landing page), in an overlay banner creating a perceptible discontinuity in the user’s experience of the visited webpage, which must include a consent request to the use of cookies;
2. In extended form (*extended cookie policy*) accessed by means of a link included in the banner mentioned above.
3. a) *Short cookie policy and consent*

The short cookie policy must be displayed on accessing any landing page of a web site.

Size:

- suitably sized banner (the size of the banner must be such as to cause a perceptible discontinuity in the user’s experience of the visited web page).

Content:

- Information:
 - that the website uses profiling cookies to send advertising messages in line with the user’s online navigation preferences (where applicable);

- that the website allows sending third-party cookies as well (if this is actually the case);
- that on the extended cookie policy page the user may refuse to consent to the installation of whatever cookies;
- that if the user continues browsing by accessing any other section or selecting any item on the website, he or she signifies his or her consent to the use of cookies;
- a clickable link to the extended cookie policy.

Banner removal:

- the banner will only cease being displayed on screen if the user takes action (otherwise, it shall remain on screen).

Log:

- the publisher must in any case keep track of the user's consent. To that end, an ad-hoc technical cookie might be relied upon.

Finally, it should be mentioned that:

- publishers are obviously free to rely on other mechanisms in order to obtain users' consent to online cookies, providing such mechanisms can ensure compliance with the requirements of Section 23 par. 3 of Legislative Decree 196/2003 (*"The data subject's consent shall only be deemed to be effective if it is given freely and specifically with regard to a clearly identified processing operation, if it is documented in writing, and if the data subject has been provided with the information referred to in Section 13."*);
- This is without prejudice to the user's right to refuse consent and/or change the relevant cookie options at any time and in accordance with user-friendly mechanisms.

1. b) *Extended cookie policy*

The extended cookie policy must:

- include all the items mentioned in Section 13 of the Code (*"The data subject as well as any entity from whom or which personal data are collected shall be preliminarily informed, either orally or in writing, as to: a) the purposes and modalities of the processing for which the data are intended; b) the obligatory or voluntary nature of providing the requested data; c) the consequences if (s)he fails to reply; d) the entities or categories of entity to whom or which the data may be communicated, or who/which may get to know the data in their capacity as data processors or persons in charge of the processing, and the scope of dissemination of said data; e) the rights as per Section 7; f) the identification data concerning the data controller and, where designated, the data controller's representative in the State's territory pursuant to Section 5 and the data processor. If several data processors have been designated by the data controller, at least one among them shall be referred to and either the site on the communications network or the mechanisms for easily accessing the*

updated list of data processors shall be specified. If a data processor has been designated to provide responses to data subjects in case the rights as per Section 7 are exercised, such data processor shall be referred to”);

- describe the detailed features and purposes of the cookies installed by the website;
- allow users to select/deselect the individual cookies;
- refer to the possibility for users to signify their choices on the use of cookies by way of browser settings, describing the procedure to be followed to and possibly, if the technology underlying the website is compatible with the user’s browser version, making available a direct link with the settings configuration section in the browser.
- it must be linkable from the short version notice as well as from a hyperlink in the bottom section of each website page;
- contain an updated link to the information notices and consent forms of the third parties the publisher has agreed to let install cookies via his own website or of the intermediaries or brokers between him and those third parties (in the latter case, it is conceivable that these links with third-party websites can be collected in a single linkable website managed by an entity other than the publisher, for instance a licensee’s website).

Cookies, privacy, profiling and notification of processing

Persistent profiling cookies imply, for the data controller, the obligation to notify the DPA. Their use, indeed, is to be considered as processing of personal data subject to this obligation because it is aimed at “profiling the data subject and/or his/her personality, analysing consumption patterns and/or choices, or monitoring use of electronic communications services except for such processing operations as are technically indispensable to deliver said services to users” (art. 37, paragraph 1, letter d, Legisl. Decree 196/2003).

As mentioned in the last part of the above regulation, some profiling cookies are excluded from the above-mentioned obligation: they are those that have different purposes and that fall within the scope of technical cookies. Indeed, already in 2004 the Data protection Authority had expressly ruled out notification with regard to processing “that is related to the use of electronic markers or similar devices whether installed or temporarily stored, in a non-persistent manner, on an user’s terminal equipment, as consisting exclusively in the transmission of session IDs pursuant to the applicable regulations for the sole purpose of facilitating access to the contents of Internet sites” (decision No. 1 of 31 march 2004).

Consequences in Case of Non-Compliance with Cookie-Related Measures

Cookie related measures entail a series of obligations which each data controller must fulfil, within the scope of its competences. In the event of a violation, certain sanctioning provisions of the Personal Data Protection Code, which the Guarantor has already identified and highlighted in its measure of May 8, 2014, will apply. In particular, violations of the obligations under the cookie law, can be summarized as follows:

- failure to provide information or the provision of inadequate information (i.e. information that does not include the items specified in Section 13 of the Personal Data Protection Code as well as in this decision); this carries administrative sanctions consisting in payment of a fine ranging from 6,000 to 36,000 Euro (Section 161 of legislative decree 196/2003);
- installing cookies on users' terminal equipment without the users' prior consent; this carries an administrative sanction consisting in payment of a fine ranging from 10,000 to 120,000 Euro (Section 162, paragraph 2-bis of legislative decree 196/2003);
- failure to notify processing operations to the DPA or the provision of an incomplete notification to the DPA (when due to the presence of persistent profiling cookies, as further detailed in the relevant paragraph); this carries an administrative sanction consisting in payment of a fine ranging from 20,000 to 120,000 Euro (Section 37 par. 1, letter d) and Section 163 of legislative decree 196/2003).

Conclusions and observations on the "cookie law" and on the Data Protection Authority decision

As can be seen, the EU legislation and, by virtue thereof, the Italian legislator and the Data protection Authority have intervened in an incisive way on a subject which is not only extremely technical but also conducive to material consequences under IT-law: the use of cookies. Indeed, it is common knowledge that cookies are constantly used and, as rightly noted by the DPA, this is done for different purposes. Cookies are practically necessary to allow a good web site browsing experience, so much so that the Authority has rightly adopted a very cautious approach towards technical cookies; they are also extremely useful in the management of online advertising campaigns, which are a source of livelihood for many sites, which are made available for browsing and use of any services apparently free of charge. The price to be paid, in fact, often consists of the acquisition of personal data and the possibility, even implicit, of creating one or more digital profiles of users. Many users, however, do not care, and many others, even after being informed, continue to do so.

As is often the case, it is extremely difficult to strike a good balance between conflicting interests. Consider, first of all, that the boundaries established by the various legislators (as well as the opinions of the Article 29 Working Group) have obviously limited the scope of action of the DPA, which therefore had to and must deal with regulations that, under a certain point of view, are already old and increasingly more prone to bureaucratisation than to effective protection, and which, in the opinion of this writer, are not sufficiently representative of the peculiarities of the various subjects operating online. The sanctions, which are particularly serious for small subjects (such as individuals, professionals and small/medium companies), are not so serious for large ones. Moreover, the problem of the effectiveness of sanctions is still unsolved, since, on the one hand, there is an enormous number of websites that quickly and metaphorically are born, grow and disappear, while, on the other hand, the control over them, and therefore on compliance with the regulations, is actually exercised by the Data Protection Authority rather than by the judges (for a multiplicity of reasons (cost, technological complexity, difficulty in proving the damage, even when it is not economic, etc.), very few proceedings will conceivably be brought before the competent judicial authority).

The distinction between “publishers” and “third parties” is certainly positive, because it distinguishes between different subjects; however, there are issues resulting from the lack of distinction between large or very large concerns and all the others, including with regard to the sanctions (even though the gap between minimum and maximum sanctions applicable for this purpose is quite large). Moreover, the reference to the possibility to select/deselect individual cookies directly from the extended cookie policy, and not only from one’s own browser controls or available services, should be understood in a highly restrictive sense; although this derives from the need to guarantee the possibility of revoking consent, it seems a technically too onerous and too invasive an obligation for a website manager. Since the publisher is in any case required to inform the user and explain how to disable cookies from their browser, it would be more appropriate to consider this sufficient for compliance with the law: the final word on this issue shall be spoken by the Data Protection Authority and the Judiciary.

Privacy policy under art. 13 of Legislative Decree 196/2003.

Specific cookie policy

- Only technical and session cookies are used.
- Cookies for statistical purposes are also used (analytics). The service is provided by Google Inc.: <https://www.google.com/analytics/learn/privacy.html?hl=it> (link to the third party service provider web site). The IP masking function is used.
- Only with regard to social networking site sharing functions cookies are not installed by the relevant providers through this site (thanks to the choice of technology adopted). These services are provided by third parties; please refer to the website of each third party for the relevant privacy policies:
 - Facebook: <https://www.facebook.com/help/cookies/> (link to the third party service provider web site).
 - Twitter: <https://support.twitter.com/articles/20170519-uso-dei-cookie-e-di-altre-tecnologie-simili-da-parte-di-twitter#> (link to the third party service provider web site).
 - LinkedIn: https://www.linkedin.com/legal/cookie_policy (link to the third party service provider web site).
 - GooglePlus: https://www.google.com/intl/it_ALL/policies/privacy/ (link to the third party service provider web site).
- No profiling cookies are used.
- It is possible *to deny consent to the processing of personal data* by means of the aforementioned “analytics” cookies in various ways (as indicated by the DPA):

- **How to block third-party cookies:** i third-party *cookie* sare not generally essential for browsing purposes, so they can be refused by *default*, using the relevant *browser functions*.
 - **Activating the *Do Not Track option*:** the *Do Not Track* option is available in the majority of latest generation browsers. Web sites designed to comply with this option, when activated, should automatically cease collecting navigation data. However, not all web sites are set so as to comply with this (discretionary) option.
 - **Activating the “anonymous browsing” mode** with this function you can browse without a trace in the navigation data browser. Sites will not remember the user, the pages visited will not be stored in the history and the new cookies will be deleted. The anonymous browsing mode does not guarantee anonymity on the Internet, however, because it only serves to delete browsing data in the browser, while they will continue to be available to website managers and connectivity providers.
 - **Deleting cookies immediately:** all browsers have a specific function for this. At every connection, new cookies are downloaded, so this deleting operation should be repeated at regular intervals. Some browsers even offer automated systems for regular cookie erasure.
- A useful tool to check which cookies are installed in your computer (and block them, by revoking consent), can be found at the following address: <http://www.youronlinechoices.com/it/le-tue-scelte>.
 - Purposes of processing: addressing contact requests made by the data subject.
 - Modalities of processing: data shall be processed with computerised and/or paper means, according to need.
 - Nature of the data provision: discretionary
 - The entities or categories of entity to whom or which the data may be communicated, or who/which may get to know the data in their capacity as data processors or persons in charge of the processing, and the scope of dissemination of said data: data shall not be disclosed or communicated to third parties, save when required by law. The data may be known only by the data controller and his agents (where applicable).
 - The data subject has the following rights: to obtain from the controller confirmation as to whether or not personal data concerning him or her are being processed, and for these data to be provided to him or her in an intelligible and easily accessible form; obtain information on: a) the source of the personal data; b) the purposes and modalities of processing; c) the logic involved in processing activities performed with the aid of electronic instruments; d) the identification details of the data controller, the data processors and the designated data protection officer under article 5 par. 2; e) the subjects or categories of subjects to whom his or her personal data may be communicated or who/which may get to know the data in their capacity as designated data protection officer within the National territory, as data

processors or persons in charge of the processing; he or she has the right to obtain: a) the updating, rectification or, when interested, integration of data; b) the erasure, anonymisation or blocking of data processed unlawfully, including data whose storage is unnecessary for the purposes for which the data were collected or subsequently processed; c) certification to the effect that the operations as per letters a) and b) have been notified, including with regard to their contents, to the entities to whom or which the data were communicated or disseminated, unless this requirement proves impossible or involves a manifestly disproportionate effort compared with the right that is to be protected; to object, in whole or in part: a) for legitimate reasons, to the processing of personal data concerning him/her, even if relevant to the purpose of the collection; b) to the processing of personal data concerning him/her for the purpose of sending advertising materials or direct selling or for the performance of market or commercial communication surveys.

The SERRMAC INTERNATIONAL S.R.L. Website **DOES NOT use profiling cookies**, only, when the computer systems the infrastructure is based on use them,

- **browsing or session cookies** which allow users to navigate and use a website; e.g. to purchase items online or authenticate themselves to access certain sections);

- **analytics cookies**: these can be equated to technical cookies insofar as they are used directly by the website manager to collect aggregate information on the number of visitors and the pattern of visits to the website (currently they are not installed and, should they be used in future, they will be widely communicated);

- **function cookies**: they allow users to navigate as a function of certain pre-determined criteria (such as language or products to be purchased) so as to improve the quality of service (currently they are not installed and, should they be used in future, they will be widely communicated).

With regard to the processing of personal data that are, however, collected and processed as a consequence of users sending e-mail through the site, please refer to the Privacy Policy (<https://www.serrmac.it/wp-content/uploads/2019/03/SERRMAC-INTERNARIONAL-S.R.L.-Informativa-sito-web.pdf>) of the same.

SERRMAC INTERNATIONAL S.R.L. Thanks you for reading this notice and wishes you a pleasant visit to its web site.