



Cookies and Consent: France Clarifies Responsibilities for Online Advertisers

In the online advertising sector, achieving a successful advertising campaign often involves implementing cookies (small files stored on computers or mobile devices that contain information on the user's browsing history), which will increase the efficiency of a campaign, typically by enabling the tracking of a user's online activity as well as retargeting and/or profiling actions.

As the use of cookies often involves not only the editor of a website but also third-party service providers, mapping the respective responsibilities of the parties is critical to complying with the regulatory framework.

Generally, online operators who determine the purposes and the means of the data processing are considered as data controllers, whereas the operators who only process personal data on behalf of a data controller will be considered as data processors. EU data protection regulations require that data controllers obtain the prior consent of data subjects for the implementation of cookies, except in a limited number of exceptions.

After conducting a survey of online advertising using cookies, CNIL, the French data protection authority, reached two conclusions:

- Website publishers that process personal data that they collect through their own cookies, or through third-party cookies managed on behalf the publishers, will be considered as data controllers. This includes website publishers that use analytic tools to monitor audiences and/or to monitor investments made into their advertising media. Here, third-party providers of cookies will be considered as data processors.
- Third-party providers of cookies that process, on their own behalf, personal data they collect through their own cookies will be considered as data controllers. This will typically involve: (i) an advertising department tracking users on several websites to determine their profiles; (ii) real-time bidding platforms; and (iii) any service provider that collects personal data in order to build its own database.

Businesses active in France must assess their compliance with respect to the use of cookies, especially when resorting to third-party service providers for the management of cookies. This is especially urgent now that France's level of potential fines recently has been increased (€3 million) and most likely will be raised even further (up to €20 million and 4 percent of a company's worldwide annual turnover) in 2018, when the draft e-Privacy regulation is finalized and becomes applicable.

For further information on the draft ePrivacy regulation, please view our related *Commentary*, "[ePrivacy—European Commission Tries to Catch Up with the Evolution of Modern Communication Technologies.](#)"

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