

# Linklaters

## The Belgian DPA issues a checklist for the compliant use of cookies

October 2023



The Belgian Data Protection Authority (BDPA) has released a Cookie Checklist to help companies ensure their cookie practices comply with applicable regulations.

This practical and concise guide emphasizes that only strictly necessary cookies are exempt from consent requirements, and reminds companies of the correct categorization of cookies.

The BDPA also addresses new and controversial points, such as cookie walls, "accept/reject all cookies" buttons, deceptive design patterns, and separate consent for different purposes.

Additionally, the BDPA highlights specific accountability obligations, requiring controllers to maintain records of consent mechanisms and retain previous versions of cookie policies. Companies are advised to closely monitor cookie rules to avoid non-compliance consequences.

On 20 October 2023, the Belgian Data Protection Authority ("BDPA") published a checklist to help companies ensure that their cookie practices comply with applicable regulations (the "Cookie Checklist"), available in French [here](#) and in Dutch [here](#). The Cookie Checklist has been added to the BDPA's "toolbox".

When presenting its new budget in November last year, the BDPA already indicated that cookies would be one of its top priorities for 2023, together with data protection officers and smart cities. More generally, cookie compliance still remains a hot topic at European Union level, with a growing number of companies having been hit by (sometimes record) fines since 2020.

In this context, the BDPA has issued the Cookie Checklist guiding companies step-by-step through some of the do's and don'ts associated with cookies and other similar tracking mechanisms. In contrast with previous cookie guidance, the Cookie Checklist is presented in a practical, comprehensive, simple and concise format, which will certainly be welcomed by in-house lawyers willing to explain the consent requirements to their marketing and IT colleagues.

The Cookie Checklist certainly does not reinvent the wheel. It recalls previous guidance from the European Data Protection Board ("EDPB").

The guiding principle in the Cookie Checklist is that only strictly necessary cookies are exempt from consent requirements, and that all other categories of cookies may only be placed and read if the users have given their prior, free, specific, informed, unambiguous and active consent. Importantly, the BDPA now insists on the correct categorisation of cookies: consent is not required only for (i) essential technical cookies (e.g., cookies for load balancing) and (ii) strictly necessary functional cookies (e.g., cookies for temporary storage of language choice, cookie preferences or shopping basket content). This mirrors one of the main elements raised by NOYB in its complaints, i.e. non-strictly necessary cookies being inaccurately classified as strictly necessary cookies so that they can be placed without prior consent.

---

## What's new and/or has been confirmed by the BDPA?

- cookie walls are not allowed. This point is controversial and not in line with positions adopted by other authorities, such as the one adopted by the French data watchdog (i.e. the CNIL) which indicates that the use of cookie walls might be acceptable under specific circumstances (e.g. need to create an account to access the content, possibility to use a paywall to compensate for the loss of revenue from advertising, etc.);
- the BDPA made clear that if you add an “accept all cookies” button, it is necessary to add a “reject all cookies” button in the same layer. This is new for the BDPA but is not surprising as it merely follows the opinion of most other European Union data protection authorities according to the EDPB’s cookie banner taskforce (a few authorities considering that the e-Privacy directive 2002/58 does not explicitly require a “reject” option);
- as regards the use of the so-called “deceptive design patterns” (i.e. practices designed to influence the behaviour of the user), to which the BDPA dedicated a guidance following the adoption of the EDPB guidance [[Guidelines 03/2022 on deceptive design patterns in social media platform interfaces: how to recognise and avoid them | European Data Protection Board \(europa.eu\)](#)], the BDPA indicates that designs which give more prominence to the “accept” option are prohibited, and refers to the example of the use of a particular colour that may influence the choice of the user. For its own part, the EDPB cookie banner taskforce merely indicated that the only identified mis-practice is that “*an alternative action is offered (other than granting consent) in the form of a button where the contrast between the text and the button background is so minimal that the text is unreadable to virtually any user*”, noting that a case-by-case verification must be carried out when the contrast and colours are not obviously misleading;
- the BDPA also indicates the use of cookies for the controller’s advertising/profiling purposes and for third-party advertising/profiling must be considered as separate purposes, meaning that separate consent must be obtained. Also, the user must be given the option, if necessary at a lower “level” of the cookie banner, to accept (or not) the use of cookies by “partner” (joint controller), which goes beyond the GDPR requirement to obtain consent for each specific purpose;
- a single cookie should not be used to serve different purposes. While understandable, this requirement from the BDPA might prove technically difficult in practice;
- regarding the possibility to withdraw consent, the BDPA insists that the controller should offer an easy way to withdraw consent in one click (e.g. via a link or a button). According to the BDPA however, such withdrawal should go beyond not placing the cookie in the future. The controller should also ensure “the intended effect”. Further clarification from the BDPA as regards such effect would be welcome;
- cookie consent needs to be “refreshed” every six months according to the BDPA (i.e., controllers need to present the cookie banner again to the user within six months after they have given their consent to cookies);
- last but not least, the BDPA (in line with the French CNIL) introduces specific accountability obligations in respect of cookies: controllers must (i) keep information demonstrating how the consent mechanism (e.g. the cookie banner) has been adapted over time and (ii) retain previous versions of the cookie policy, which must be dated and include a version number.

---

The BDPA further indicates that its thematic dossier on cookies (“**Thematic Dossier on Cookies**”, available [here](#) in French and [here](#) in Dutch) is soon to be updated. We will see whether this will consist of a mere update of the Thematic Dossier on Cookies to already known cookie requirements or if the BDPA also foresees revising some of its positions in respect of cookies.

In addition, the BDPA imposes certain particularly onerous obligations in respect of cookies, which are not necessarily considered as market practice by other regulators. For example, the BDPA considers that companies should give users the opportunity, as part of a second layer of information, to make a more granular choice, which - in certain cases - could lead to an individual choice per cookie. This obligation is not included in the Cookie Checklist, which is however non-exhaustive according to the BDPA. The above expected update could be an opportunity for the BDPA to revise its opinion on that point, or other points not fully line with the commonly accepted practices on cookies. In any event, companies will need to keep a close eye on cookie rules in the future to avoid adverse consequences for not complying with the updated cookie requirements.



## Key contacts



Tanguy Van Overstraeten

---

Partner, Brussels  
Global Head of Privacy and Data Protection  
Tel: +32 2 501 94 05  
[tanguy.van\\_overstraeten@linklaters.com](mailto:tanguy.van_overstraeten@linklaters.com)



Guillaume Couneson

---

Partner, Brussels  
Tel: +32 2 501 93 05  
[guillaume.couneson@linklaters.com](mailto:guillaume.couneson@linklaters.com)



Valérie Heremans

---

Managing Associate, Brussels  
Tel: +32 2 501 93 49  
[valerie.heremans@linklaters.com](mailto:valerie.heremans@linklaters.com)

[linklaters.com](https://linklaters.com)

Brussels  
13 rue Brederode  
1000 Brussels  
Tel: +32 2 501 94 11

This publication is intended merely to highlight issues and not to be comprehensive, nor to provide legal advice. Should you have any questions on issues reported here or on other areas of law, please contact one of your regular contacts, or contact the editors.

© Linklaters LLP. All Rights reserved 2022

[linklaters.com](https://linklaters.com)

Linklaters LLP is a limited liability partnership registered in England and Wales with registered number OC326345. It is a law firm authorised and regulated by the Solicitors Regulation Authority. The term partner in relation to Linklaters LLP is used to refer to a member of the Linklaters LLP or an independent consultant or, outside of Belgium, an employee of Linklaters LLP or any of its affiliated firms or entities with equivalent standing and qualifications. A list of the names of the members of Linklaters LLP and of the non-members who are designated as partners and their professional qualifications is open to inspection at its registered office, One Silk Street, London EC2Y 8HQ, England, or on [www.linklaters.com](https://www.linklaters.com). This document contains confidential and proprietary information. It is provided on condition that its contents are kept confidential and are not disclosed to any third party without the prior written consent of Linklaters. Please refer to [www.linklaters.com/regulation](https://www.linklaters.com/regulation) for important information on our regulatory position.

We process your data in line with our Global Privacy Notice. You can view this at [www.linklaters.com/en/legal-notices/privacy-notice](https://www.linklaters.com/en/legal-notices/privacy-notice).

To opt-out of receiving any marketing emails from us, or to manage your email preferences and the personal details we hold for you, please contact: [marketing.database@linklaters.com](mailto:marketing.database@linklaters.com).