



Cookie Consent and Affiliate & Partner Marketing

March 2024

We all know how important it is to get consent to track users on your website.

This document, released by The Affiliate & Partner Marketing Association (The APMA), offers guidance and information for cookie consent requirements for brands running affiliate campaigns.

Whether you're a major blue-chip brand or a new start-up, the rules and principles are the same and apply equally.

Introduction

We're set to hear a lot more about the consent topic; Google has issued a deadline for the effective implementation of consent to continue using its services, and the UK's data regulator, the Information Commissioner's Office (ICO), is monitoring how consent is obtained on websites.

Cookies, one of the most obvious ways of storing information, can require consent under two overlapping, but distinct, pieces of legislation. The ePrivacy regulations require companies to obtain consent for all cookies, with a few specific exceptions.

Additionally, if cookies are unique or contribute to a user profile, the GDPR (General Data Protection Regulation) will also apply, as these cookies are considered personal data.

Please note that the Google requirements and ICO advice are unrelated. We include both of them in this document simply because they are happening concurrently. Please also remember that this document does not contain any actions you need to take. It is designed to aid your understanding of cookie consent related to your own business.

Any information contained in this document does not constitute legal advice.

What's happening with Google?

Let's deal with the Google initiative first.

Starting March 6th, 2024, Google has said companies using its services must provide valid user consent.

This is done via [Google Consent Mode](#), which means aligning the consent choices your website users have given you to track them, and the tags fired via the tag manager. In other words, Google wants to be sure you're compliant with data and tracking requirements.

Google stipulates that organisations failing to implement effective consent mechanisms (usually through consent management platforms - CMPs), won't be able to access some of Google's most popular and widely used services, such as Google AdSense and Ad Manager.

Google partners using their products will be required to use a Google-certified [CMP](#).

It's common for businesses to use third-party CMPs. These include consent banners allowing users to select whether they want to be tracked. Among the most common are OneTrust, Quantcast and TrustArc.

The Google Consent topic has no direct impact on affiliate tracking and does not obligate advertisers to make any changes to their affiliate consent settings.

What's happening with the ICO?

Separately from Google, the ICO which regulates and monitors data laws in the UK, has been in the news because it has written to some of the most widely trafficked websites in the UK, asking them to change how they collect user consent.

The ICO found that opting out of tracking on some websites was either more difficult than, or not as clear as, opting in.

They published a [detailed report with the Competition and Markets Authority](#) in 2023 that provides some examples. In a recent blog post, they stated: *"We expect all websites using advertising cookies or similar technologies to give people a fair choice over whether they consent to the use of such technologies"*.

The ICO has indicated they will be closely monitoring more and more websites over the coming months to ensure what they consider is fair implementation of cookie preferences.

Why does this matter for affiliate marketers?

Again, while not having a direct bearing on affiliate marketing, brands may be considering the overall topic of consent banners and what information is being collected. This might include assessing all tracked activity, such as via marketing campaigns or basic information that means a website functions properly.

Brands running affiliate campaigns will need to give some thought to how they categorise the cookies that affiliate marketing relies on to track sales.

As a reminder, there are different categories of cookies depending on what they do on the website.

Strictly necessary (or essential) cookies are required for you to deliver a service requested by the website visitor, such as storing your products in an online basket.

Preference or functional cookies remember your online choices.

A brand might use **statistics, measurement, or performance cookies** to understand what is happening on their website, such as via their analytics tool.

Marketing cookies, meanwhile, track marketing campaigns and may be shared by other companies.

According to the ICO:

“Activities likely to fall within the ‘strictly necessary’ exemption include those that relate to the specific functionality of your service – i.e., without them, the user would be unable to undertake certain activities. Cookies that don’t relate to what is strictly necessary would need consent”.

How you choose to classify affiliate tracking must be an individual company decision based on what your business does, what information you store and the types of affiliates you work with.

This last point is important because different affiliates have different business models that you may decide need different cookie categorisation. You might classify cookies used by some affiliates, for example, as strictly necessary.

Remember, the ICO notes that strictly necessary cookies are, *“restricted to what is essential to provide the service requested by the user”.*

There is a European precedent that helps show how regulators may classify some affiliate activity. In May 2022, the French data authority agreed that cookies that help deliver a reward or cashback *do not require consent.*

On the authority’s website they answer the question, *“Are trackers used for the purposes of cashback or reward services exempt from consent?”*,

“Yes. So-called “cashback” or “reward” practices consist of allowing Internet users, who have registered for this type of service on a partner site, to benefit from a partial reimbursement or an advantage (discount vouchers, preferential rates, etc.) when they make a purchase on a merchant site to which they are connected using a link on this partner site.”¹

While we cannot assume the ICO would take the same view in the UK, it is a useful point of reference if you’re considering your classification.

It is also worth noting that many affiliate cookies are used for measurement purposes, i.e. to record and then apportion credit for a sale. This information is then used by advertisers to decide who to pay. The data is not used for the intention of marketing to consumers by making inferences about their interests.

Cookies used for this purpose likely require consent under the ePrivacy regulations, unless those cookies are strictly necessary for the delivery of a service requested by the website user. However, the same cookies likely don’t require consent under GDPR, because as personal data, the impact on the consumer’s private life is relatively modest.

¹ (<https://www.cnil.fr/fr/cookies-et-autres-traceurs/regles/cookies/FAQ>)

We may, in the medium term, see a deregulation of the cookie consent for measurement-type cookies, as this is currently being discussed under prospective UK legislation (more on this below). However, for the time being, the position is clear that all cookies require consent unless exempt.

While we are yet to see fines in the UK for non-compliance with the cookie consent requirements of the ePrivacy regulations, the ICO is taking closer interest, with the power to issue fines of up to 4% of global group turnover for the most serious breaches.

Takeaways and actions

As a retailer, if you are considering implementing a change in your consent process or working with a CMP, how you treat affiliate cookies in this process can have a major impact on the performance of your affiliate channel. One cashback affiliate reported that when a brand they promote implemented a consent banner, their click-to-sale conversion rate dropped by 56%.

Here are some things to consider to ensure your affiliate activity isn't negatively impacted include:

- ➔ What are the business models used within your affiliate channel, and do any of these require cookies to provide the service requested by the user? Examples of this could include, but are not limited to, loyalty points, gift certificate rewards or cashback. If so, cookies used for this purpose could be classified as strictly necessary and therefore not require any consent.
- ➔ Would a consumer, directed to you from an affiliate site, be able to undertake their intended action without affiliate cookies in place? If the answer is 'no', consider whether consent is required.
- ➔ If your CMP implementation significantly impacts an affiliate's ability to earn commissions with you, you should consider how to compensate for loss of earnings. Some companies have strongly urged brands to ensure their affiliates, paid on conversions that may not track, be remunerated for these sales. If you think your implementation could have an impact on your affiliate sales, please speak to your network, platform or agency.
- ➔ It is worth ensuring that within your CMP design there is no favouring of either a rejection or an acceptance of consent, in line with ICO advice ([take a look at that ICO/CMA guidance](#)).
- ➔ How do you intend to integrate your affiliate platform within your CMP? Some platforms are integrated with the [IAB's Transparency Consent Framework \(TCF\)](#). The TCF is a set of guidelines and technical specifications designed to help publishers, advertisers, and technology companies comply with the EU's

GDPR and ePrivacy Directive. The TCF aims to provide a standardised framework for the collection and sharing of user consent for data processing.

- If you are looking to make changes to your CMP or how you classify affiliate cookies, don't forget to inform your network, platform or agency, as well as your affiliates. Being transparent will help avoid confusion and guarantee that everyone is aware of any impact on your programme.

All these factors are important to consider when making decisions about how to treat cookies within your consent management process.

Reach out to your affiliate tracking network, platform, or agency, to support you with the answers to these questions.

Finally, you may have read that in the UK's proposed new Data Protection and Digital Information (DPDI) Bill, the need for consent banners in the first place could change.

While this may make serving some cookies easier in future, for the time being we advise that cookies be handled in accordance with current legislation and ICO requirements.

This document was prepared by [The APMA](#) and its members.

Please [sign up for our newsletter](#) for further updates.