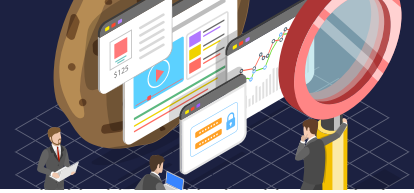




**HERZOG**  
HERZOG FOX & NEEMAN

# The EU Cookie Banner Taskforce Key Takeaways





In January 2023, the European Data Protection Board (**EDPB**) [adopted a report](#) on the work undertaken by the Cookie Banner Task Force.

The Task Force was established in accordance with the General Data Protection Regulation (**GDPR**), with the purpose of coordinating the response to multiple complaints concerning **cookie banners** which were filed with several EEA supervisory authorities.

The positions presented in the report reflect the **common denominator agreed by the supervisory authorities** in their interpretation of the applicable provisions of the ePrivacy Directive and the GDPR. While not constituting stand-alone recommendations or findings to obtain a greenlight from a competent authority, the Task Force's positions reflect a **minimum threshold** to assess the **placement and reading** of cookies and subsequent processing of the data collected.

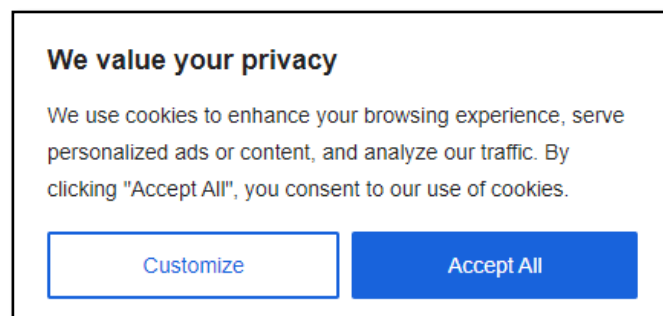
## PROBLEMATIC COOKIE CONSENT PRACTICES

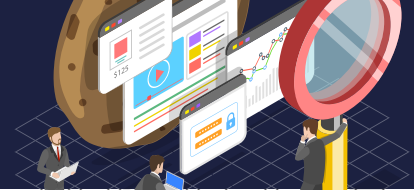
Following is a list of **five main cookie** consent practices that the Task Force found to be in violation of applicable law:

### **1. No reject button on the first layer**

The use of some cookies require consent, which must be expressed by a positive action on the part of the user.

Most supervisory authorities in the Task Force agreed that using a cookie banner that does not provide for a **refuse/reject/not consent** options on any layer of the banner is an infringement of the e-Privacy Directive. For example, a cookie banner that contains a button to accept the storage of cookies and a button that allows the data subject to access further options without containing a button to reject the cookies is considered in violation of the e-Privacy directive.

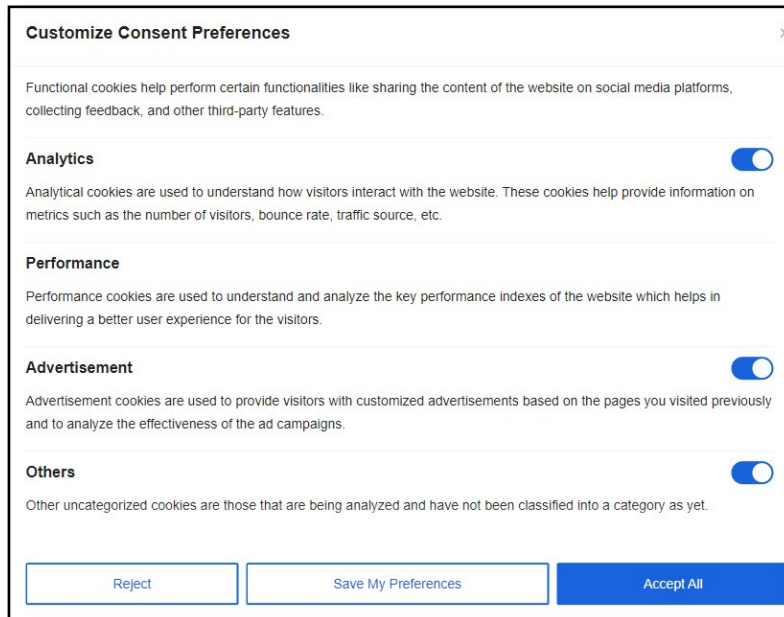




### 2. Pre-ticked boxes

Some websites provide users with several options (typically, representing each category of cookies the controller wishes to store) with pre-ticked boxes on the second layer of the cookie banner (after the user clicked on the “Settings/customize” button on the first layer).

The Task Force confirmed that pre-ticked boxes to opt-in do not lead to valid consent according to the GDPR and the ePrivacy Directive.



**Customize Consent Preferences**

Functional cookies help perform certain functionalities like sharing the content of the website on social media platforms, collecting feedback, and other third-party features.

**Analytics**

Analytical cookies are used to understand how visitors interact with the website. These cookies help provide information on metrics such as the number of visitors, bounce rate, traffic source, etc.

**Performance**

Performance cookies are used to understand and analyze the key performance indexes of the website which helps in delivering a better user experience for the visitors.

**Advertisement**

Advertisement cookies are used to provide visitors with customized advertisements based on the pages you visited previously and to analyze the effectiveness of the ad campaigns.

**Others**

Other uncategorized cookies are those that are being analyzed and have not been classified into a category as yet.

[Reject](#) [Save My Preferences](#) [Accept All](#)

### 3. Deceptive “link design“

The Task Force examined cookie banners that contained a **link, and not a button**, as an option to reject the deposit of cookies (direct link to reject or link to a second layer where a user can reject the deposit of cookies).

According to the Task Force, such practice can **deprive users of their right to object to the use of cookies**, by giving them the impression that they have to give their consent to access the website content or by pushing them to give their consent by reducing the visibility of the option to reject to the use of cookies.

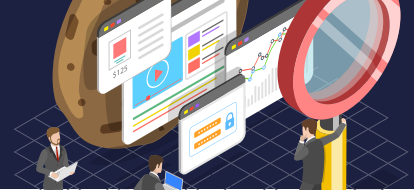
For example, a cookie banner in which **the only alternative action offered** (other than granting consent) consists of a link behind wording such as ‘refuse’ or ‘continue without accepting’ embedded in a paragraph of text in the cookie banner, or placed outside the cookie banner, in the absence of sufficient visual support to draw an average user’s attention to this alternative action.

refuse to reject the use of cookies.' At the bottom, there are two buttons: 'Customize' and 'Accept All'." data-bbox="269 788 718 956"/>

**We value your privacy**

We use cookies to enhance your browsing experience, serve personalized ads or content, and analyze our traffic. By clicking "Accept All", you consent to our use of cookies. Click [refuse](#) to reject the use of cookies.

[Customize](#) [Accept All](#)

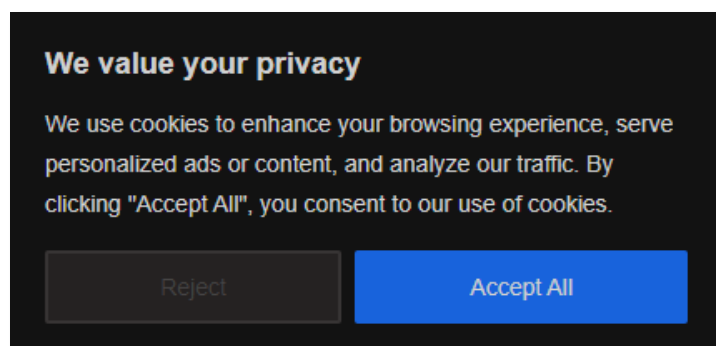


#### **4. Deceptive button colors and contrast**

The configuration of the cookie banner in terms of **colors and contrast** could lead to a clear highlight of the “accept all” button over the available options, thus resulting in an **unintending and invalid consent from users**.

The Task Force agreed that a general standard regarding colour or contrast cannot be imposed, and that **each specific cookie banner needs to be assessed on a case-by-case basis**.

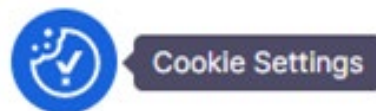
However, the Task Force did note that where an alternative action is offered (other than granting consent) in the form of a button where the contrast between the text and the button background is so minimal that the text is **unreadable to virtually any user**, consent can be considered valid.



#### **5. No withdraw consent icon**

In order for **consent to be valid** in accordance with the GDPR and the ePrivacy Directive, the user **must have a possibility to withdraw consent** at any time, in a process that must be as easy as to give consent.

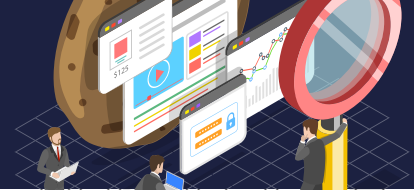
The Task Force members agreed that websites should put in place **easily accessible solutions** allowing users to withdraw their consent at any time, such as a small hovering and permanently visible icon or a link placed on a visible and standardized place.



## **SUBSEQUENT PROCESSING BASED ON UNLAWFUL GAINING OF ACCESS**

The Task Force emphasized, that where the access to information through cookies was not done in compliance with applicable law, all subsequent processing of such information also constitutes violation of the GDPR.

For example, if information was gathered from a user that provided an invalid consent for the use of cookies (e.g. if the cookie banner did not include an option to refuse at the first level), any further processing of that information will also be in violation of the GDPR.



## PRACTICAL CONCLUSION

Although the instructions of the Task Force are not legally binding, they seem to express the anticipated regulatory interpretation of the EU law with respect to the collection of personal data through cookies, and it is therefore recommended to follow them.

Companies that use cookies to collect personal data should make sure that they do not use one or more of the deceptive practices described above, and that users are provided with a simple option to withdraw their consent at any time.

**Feel free to contact us if you have any questions regarding these regulatory requirements and their potential effect on your operation.**

## HERZOG TECHNOLOGY & REGULATION DEPARTMENT

Herzog's **Technology & eCommerce Regulation Department** is a recognized market leader in its field. The team is led by domain experts who possess a unique set of vital, **interdisciplinary** and **global** regulatory advisory skills, and are uniquely positioned to advise a range of clients, including leading multinational technology companies as well as start-ups and disruptive technology vendors, on applicable regulatory and compliance considerations in numerous technological areas.

We understand that the **regulatory exposure** and scope of required **attention** of almost any company operating in the **digital and technological sphere** are much wider than one specific jurisdiction or legal discipline. As our clients are often on the forefront of this ever-evolving landscape, we further understand the impact of industry trends and compliance demands on our clients' businesses. Therefore, our team possesses in-depth knowledge of the increasing volume of regulations, enforcement actions, legislative and industry trends in a **myriad of jurisdictions**, digital platforms and leading **self-regulatory** guidelines. This enables our team to offer **practical, holistic** and **comprehensive** solutions for complex situations often presented by innovative technologies and disruptive business solutions, providing "hands-on" support to our clients on the strategic, corporate and operational aspects of their business, with the aim of mitigating our clients' legal and business risks.

Regulation of **personal data** has been dramatically expanding on a global basis. Companies processing data of hundreds of millions of data subjects as well as small start-ups—all are required to spend significant resources on understanding and implementing the constantly evolving legal challenges. Our [Privacy & Data Protection](#) team guides our clients on all matters relating to their data usage and assist them in navigating the numerous data protection regimes, in all the jurisdictions in which they operate.



**Ariel Yosefi** | Partner

Head of Technology & eCommerce Regulation  
yosefia@herzoglaw.co.il



**On Dvori** | Associate

Technology & eCommerce Regulation  
dvorio@herzoglaw.co.il



**Ido Manor** | Partner

Technology & eCommerce Regulation  
manori@herzoglaw.co.il



**Kevin David Gampel** | Associate

Technology & eCommerce Regulation  
gampelk@herzoglaw.co.il



**Ruly Ber** | Partner

Technology & eCommerce Regulation  
berr@herzoglaw.co.il



**Or Noy** | Associate

Technology & eCommerce Regulation  
noyo@herzoglaw.co.il



**Dan Shalev** | Partner

Technology & eCommerce Regulation  
shalevd@herzoglaw.co.il



**Oded Kramer** | Associate

Technology & eCommerce Regulation  
kramero@herzoglaw.co.il



**Eden Lang** | Associate

Technology & eCommerce Regulation  
lange@herzoglaw.co.il



**Liron Adar** | Intern

Technology & eCommerce Regulation  
adarl@herzoglaw.co.il



**Dima Zalyalyeyev** | Associate

Technology & eCommerce Regulation  
zalyalyeyevd@herzoglaw.co.il



**Kobi Plotkin** | Intern

Technology & eCommerce Regulation  
plotkiny@herzoglaw.co.il



**Mai Arlowski** | Intern

Technology & eCommerce Regulation  
arlowskim@herzoglaw.co.il