



GUIDELINES ON COOKIES AND WEB ANALYTICS IN PUBLIC ADMINISTRATION WEBSITES

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EXECUTIVE SUMMARY

The purpose of this document is to offer guidelines about the use of cookies and similar technologies in websites of Public Administrations, especially when it comes to the use of web analytics services.

It is addressed to data controllers in the Public Sector and their data protection officers.

The text analyzes the applicability of the Spanish e-Privacy Law (LSSI) and data protection regulations, as well as the obligations imposed on the controller, depending on the consideration of service of the information society and whether there is a processing of personal data.

There are also some cases of third-party services commonly used on government websites and their implications in relation to the regulations analyzed.

Finally, options for the use of web analytics services are highlighted that, configured with the appropriate guarantees, do not involve the processing of personal data, and therefore do not require consent on pages of Public Administrations that are not considered services of the information society.

Keywords: Public administrations, DPO, cookies, consent, information, web analytics, third parties, LSSI, GDPR, e-privacy, data protection, obligations, services, terminal equipment, users.

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I. OBJECTIVE AND RECIPIENTS

This document is addressed to controllers of Public Administrations and their data protection officers (DPO). It details the obligations of Public Administrations in relation to the use of cookies in their websites and, in general, techniques for using information from users' terminal equipment, in particular the use of web analytics tools.

This document does not intend to replicate or repeat what is established in the Guide on the use of [cookies of the AEPD](#), but simply to particularize the specific case of the use of these technologies in Internet services of Public Administrations.

II. INTRODUCTION

The Spanish Law 34/2002, of July 11, on services of the information society and electronic commerce (LSSI or Spanish e-Privacy Law) complements the guarantees of the General Data Protection Regulation (GDPR) in relation to information society services.

In accordance with article 95 of the GDPR, this regulation cannot impose additional obligations for processing in areas where there are specific obligations in the LSSI.

However, the LSSI is linked to the legal concepts of the GDPR that do not have a specific regulation in it, as it happens, for example, with informed consent.

The LSSI applies to information society service providers established in Spain. And it defines information society services as "*any service normally provided for consideration, at a distance, by electronic means and at the individual request of the recipient*" noting that it also includes services not remunerated by their recipients to the extent that they constitute an economic activity for the service provider.

Therefore, regarding the use of cookies by service providers of the information society, the LSSI is the special applicable law, regardless of whether cookies process personal data or not.

However, in the case of information society services where the use of information related to the use of cookies is used within the framework of processing of personal data, the provisions of the GDPR and the LOPDGDD (Spanish Data Protection Law) apply for everything not regulated in the LSSI, such as aspects related to the application of the principle of proactive responsibility, the hiring of data processors, international transfers, or others.

However, in the event that the owner of the website is not considered a provider of an information society service, if the information obtained through the use of cookies is used within the framework of processing personal data, the GDPR and the LOPDGDD will apply, even if the LSSI does not apply.

Finally, it should be noted that the use of cookies does not in all cases involve the processing of personal data.

A Public Administration, by the fact of having a website or providing services through the Internet, will not always be considered as a service provider of the information society and, consequently, as an obligated subject of the LSSI. This is the case of websites of Public Administrations in which services that imply an economic activity are not provided.

	Processes personal data	Does not process personal data
Information society service	LSSI GDPR and LOPDGDD in what is not regulated by the LSSI	LSSI
It is not an Information society Service	GDPR and LOPDGDD	X

Table 1: Regulations applicable to the use of cookies from the competences of the AEPD

In particular, web analytics is a common practice in almost all types of websites, including those of Public Administrations. Although there are also many different web analytics tools, with different functionalities and different regulatory impact.

III. APPLICABLE REGULATIONS

A Public Administration may have different channels on the Internet enabled through different domains on the Internet, channels on which specific services can be implemented. The applicability of the LSSI and the data protection regulations must be analyzed for each of these domains, channels and services separately. It could be the case that for a domain or a channel or a service a regulation applies, and for another domain or channel or service, due to the fact of not being considered an information society service provider and not processing personal data, it does not apply personal data protection regulations or LSSI.

A. APPLICABILITY OF THE LSSI¹

A Public Administration that offers services on the Internet, for example, through a website, by the fact of having it would not necessarily be considered as a service provider of the information society and, consequently, as an obligated subject of the LSSI.

Certain typical activities of Public Administrations, such as the electronic management of tax collection, information on the services of a third party (for example, the mere information on the website of a City Council about the existing rural houses in the municipality), or the collection of fees for a public service are considered public activities or of general interest and, therefore, different from the "*economic activity*" to which the LSSI refers.

In the resolution of the file (E/08710/2015), as a result of the complaint to a city council for using cookies on its website without a notice about them, it was established that the LSSI did not apply to it, since the website of the consistory did not appear any type of activity that could categorize it as a service provider of the information society.

Also serve as an example the Legal [Report 0083/2014](#) of the Legal Cabinet on the consultation raised by a Public University in which it is established that, in practice, public universities to the extent that they do not carry out economic activities through electronic communications – serving only websites for assistance in the provision of the public service of higher education – will not be service providers of the information society, so they would not be bound by article 22.2 of the LSSI.

However, if a domain or channel belonging to a Public Administration provides some type of service that involves an economic activity, such as the sale of books, tickets, etc., the LSSI would apply to those domains, channels or specific services in which said economic activity

¹ [Technologies and Data Protection in the AA.PP.](#)

is carried out, regardless of whether personal data is processed or not. For example, in relation to the aforementioned report 0083/2014, when the activity of the website of a Public University does have an economic nature (for example, the sale of books or the offer of own titles with their corresponding prices) the LSSI will be applicable.

It is also necessary to take into account the case of a website of a Public Administration that allows the use of third-party cookies in exchange for the possibility of including third-party web services in said portal. In that case, this activity could constitute an economic activity provided that said tools or applications are executed embedded in the domain or channel of the Public Administration. This may occur with some web analytics services, captchas or human verification services, videos, maps and, in general, third-party services that include cookies or similar technologies that may carry out data processing for their own purposes and thus obtain a benefit². In these cases, the Public Administration will be a service provider of the information society and the LSSI will be applicable to the website where they are included.

In the report of the legal office of the Agency cited above, it is indicated that the incorporation of third-party services with buttons to share content on social networks, or web analytics that imply the use of persistent third-party cookies would imply the application of the LSSI.

An example is also the sanctioning procedure ([PS/00208/2021](#)) in which a regional public transport consortium is considered to create a Club of Friends of Public Transport in which information is offered on ideas, leisure plans, discounts and competitions of the different collaborators of the consortium, such as financial institutions, businesses and other entities that develop economic activities, as a service provider of the information society and therefore subject to the LSSI.

B. APPLICABILITY OF DATA PROTECTION REGULATIONS

In the event that the information obtained through the use of cookies is used in the processing of personal data, the provisions of the GDPR and the LOPDGDD will apply, such as those relating to the application of the principle of proactive responsibility, the processors, international transfers, rights of the interested parties and others.

In relation to the processing of personal data, web analytics services are particularly sensitive when they have implications for the processing of personal data, such as contributing to the monitoring of user navigation, profiling, supporting automated decisions, etc.

Likewise, when web analytics tools or other third-party services, which use cookies or similar technologies, involve connections and transfers of personal data to servers outside the European Economic Area, they will be making international data transfers and, in this case, all the precepts and guarantees provided in Chapter V of the GDPR for international transfers are applicable.

In the event that, in addition, the Public Administration is a service provider of the information society, and therefore the LSSI is applicable to it as a special law, according to article 95 of the GDPR, no additional obligations will be imposed by the data protection regulations. That is, the provisions of the LSSI relating to the legitimacy of the processing, consent³ and information to the interested parties will apply.

² This circumstance is common in services that are promoted as free.

³ The consent that must be given must include the requirements of the GDPR since the LSSI does not contain a legal concept of consent.

IV. OBLIGATIONS IMPOSED BY THE REGULATIONS

A. WEBSITE OF A PUBLIC ADMINISTRATION THAT IS NOT CONSIDERED A SERVICE OF THE INFORMATION SOCIETY OR DOESN'T PROCESS PERSONAL DATA THROUGH COOKIES

A Public Administration that is not considered a service provider of the information society is not applicable to the LSSI.

If, in addition, the Public Administration choose to use cookies **without processing personal data or directly not to use any technology classified as cookies**, this activity will not fall within the material scope of the GDPR or the LSSI (as far as it is the responsibility of the AEPD).

Therefore, it will not be mandatory to obtain consent for the use of cookies, nor to inform the interested parties through cookie or privacy policies, nor to comply with any other obligation. Incorporating unnecessary information policies can confuse and lead to user information fatigue.

B. WEBSITE OF A PUBLIC ADMINISTRATION THAT IS NOT CONSIDERED A SERVICE OF THE INFORMATION SOCIETY AND DOES PROCESS PERSONAL DATA THROUGH THE USE OF COOKIES

A Public Administration that is not considered a service provider of the information society is not applicable to the LSSI.

If the Public Administration use information obtained through cookies to process personal data (for example, cookies with unique identifiers), such processings will be subject to the GDPR and the LOPDGDD. This implies the observance of all the obligations of the data protection regulations, among others, having a legal basis to carry out the processing, informing the interested parties in the privacy policy (not in a cookie policy), offering and enabling the exercise of rights to the interested parties and establishing the necessary guarantees in case of international data transfers, without prejudice to the rest of mandatory requirements that were applicable to such processing.

C. WEBSITE OF A PUBLIC ADMINISTRATION THAT DOES HAVE CONSIDERATION OF SERVICE OF THE INFORMATION SOCIETY

In the case of a website of a Public Administration that is considered an information society⁴ service and that uses cookies, there is no particularity with respect to any other service of the information society for the mere fact of being a Public Administration.

Therefore, in this case it is necessary to refer to all of what is indicated in the [Guide on the use of cookies of the AEPD](#).

In addition, if the information obtained through these cookies is used for the processing of personal data, the controller will have to comply with the provisions of the data protection regulations in everything in which there are no specific guarantees regulated in the LSSI, among other obligations, and without exhaustiveness, compliance with the principle of proactive responsibility and of limitation of the processing, offer guarantees in case of international transfers of data and the obligation of contract between controller and processor that, where appropriate, includes guarantees for the intervention of sub-processors.

⁴ Either because on the website the Administration carries out an economic activity, or because it includes on the web embedded third-party services, free or paid, which may involve processing of personal data on behalf of those third parties and therefore an economic activity of those third parties.

V. MODEL CASES

A. THIRD PARTY SERVICES ON THE WEBSITES

On the websites of the Public Administrations, it is possible that you consider using third-party services, such as captchas, videos, or maps.

When these services, or similar, involve the use of cookies and / or the processing of personal data in the terms indicated above, the controller must analyze the obligations that may arise from the LSSI and / or data protection regulations.

If, instead of including these third-party services embedded in its website, they are included as links that redirect to third-party services, the Public Administration will not be considered a subject bound by either of the two regulations. That is, it will not have, among others, an obligation to inform or to have a legal basis for data processing.

The responsible Public Administration should warn the user, in advance, that he will access a service outside the website of said Public Administration with its own processings and data protection policies, so that the user can decide if he wants to access such links or not.

This information could be included in an informative banner (not consent), prominently and visibly so that the risks of the link can be appreciated, at the time the user is going to access those third-party links and in the privacy policy.

It should be borne in mind that the foregoing applies as long as access to such third-party services is not imperative to provide the services of the Public Administration itself to citizens, in which case the regulatory obligations and responsibilities that, in each case, were required would apply.

The controller must be diligent regarding the use and contracting of third-party services, selecting those that meet the requirements to comply with the obligations imposed on them by the regulations.

B. OPTIONS FOR WEB ANALYTICS WITHOUT PROCESSING PERSONAL DATA

Web analytics allows you to extract information about the use of a website. There are many different web analytics tools with various functionalities, configurations and ways to use them. For example, not all web analytics tools need cookies to function and not all web analytics tools process personal data.

In most cases, having a tool that provides basic anonymized analytical information is more than enough to meet the needs of the organization. The use of tools that include additional functionalities may involve processing of personal data, incur in the assumptions of application of the LSSI and introduce risks for the privacy of users. If the use of tools with other functionalities is considered, we recommend evaluate the necessity and proportionality in relation to the purpose of web analytics that is pursued.

There are technical solutions that allow to have a complete web analytics service without involving processing of personal data or incur in assumptions that suppose that the Administration is considered a service provider of the information society.

For example, there are tools⁵ on the market that include the following features:

- The implementation is carried out on servers in Europe⁶ and under the responsibility of the data controller, which avoids possible international data transfers and the possible monitoring of users' navigation on the Public Administration website and other websites by third parties.
- They allow the anonymization of the IP (truncated minimum of 2 bytes) and any data that allows to identify or track the navigation of the users.
- Visitor profile and similar options may be disabled, or such functionality is not present.
- They allow analytical information to be collected with techniques other than the cookies. For example, but not exclusively, analytics based on the [import of server logs](#)⁷ or CDNs.
- Features such as UserID, Tag Manager, Heatmaps/Session recordings, and DeviceID can be disabled.
- They can provide full functionality without making use of techniques such as pixel tracking, fingerprinting, third-party tracking web beacons, or similar technologies.

VI. REFERENCES

[Spanish Law 34/2002, of 11 July, on services of the information society and electronic commerce \(LSSI\).](#)

[Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data and repealing Directive 95/46/EC](#) (GDPR).

[Organic Law 3/2018, of December 5, Protection of Personal Data and guarantee of digital rights \(LOPDGDD\).](#)

[Guide on the use of AEPD cookies.](#)

[Technologies and Data Protection in the AA.PP.](#)

[Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector \(Directive on privacy and electronic communications\)](#)

[Guidelines 5/2020 on consent within the meaning of Regulation \(EU\) 2016/679](#)

⁵ There are several solutions on the market that could meet the indicated requirements: [Fathom Analytics](#), [Matomo Analytics](#), [Open Web Analytics](#), [Plausible Analytics](#) or [Umami](#), among others. This list of tools does not constitute a validation, recommendation, nor does it indicate preference by the Spanish Agency for Data Protection. It is up to the controller to evaluate those tools and select processors that can comply with the requirements of the GDPR. Some of the tools listed may involve processing of personal data depending on the installation/configuration options that the controller uses.

⁶ Installation Self-hosted on servers owned or managed by the Public Administration in Europe, or on servers of a processor in Europe (could be the third party provider of the analytical service) under the responsibility of the Public Administration and according to a contract for the processing in accordance with art. 28 of the GDPR that does not allow own purposes to the processor (except those that are legal obligation of the processor or for the security of the processing).

⁷ Although the server logs / CDN contain the IP addresses of users who visit the web, this processing would be legitimized by the security of the information system and to make communication possible. This is traffic data. IP addresses must be anonymized in the process of importing into the web analytics tool since they are not necessary for the purpose pursued. (Truncation of IPs).