



@taginspector

Tag Inspector

Cookies & Consent: What Recent Guidance & Updates Mean for YOUR Organization

About Tag Inspector & Your Presenter



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Tag Inspector is a product of InfoTrust, LLC.
Web analytics, tag management, and product development
5,000+ sites analyzed and supported annually
30+ digital marketing and training programs a year
Offices: USA, UAE, and Spain

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This is Not Legal Counsel

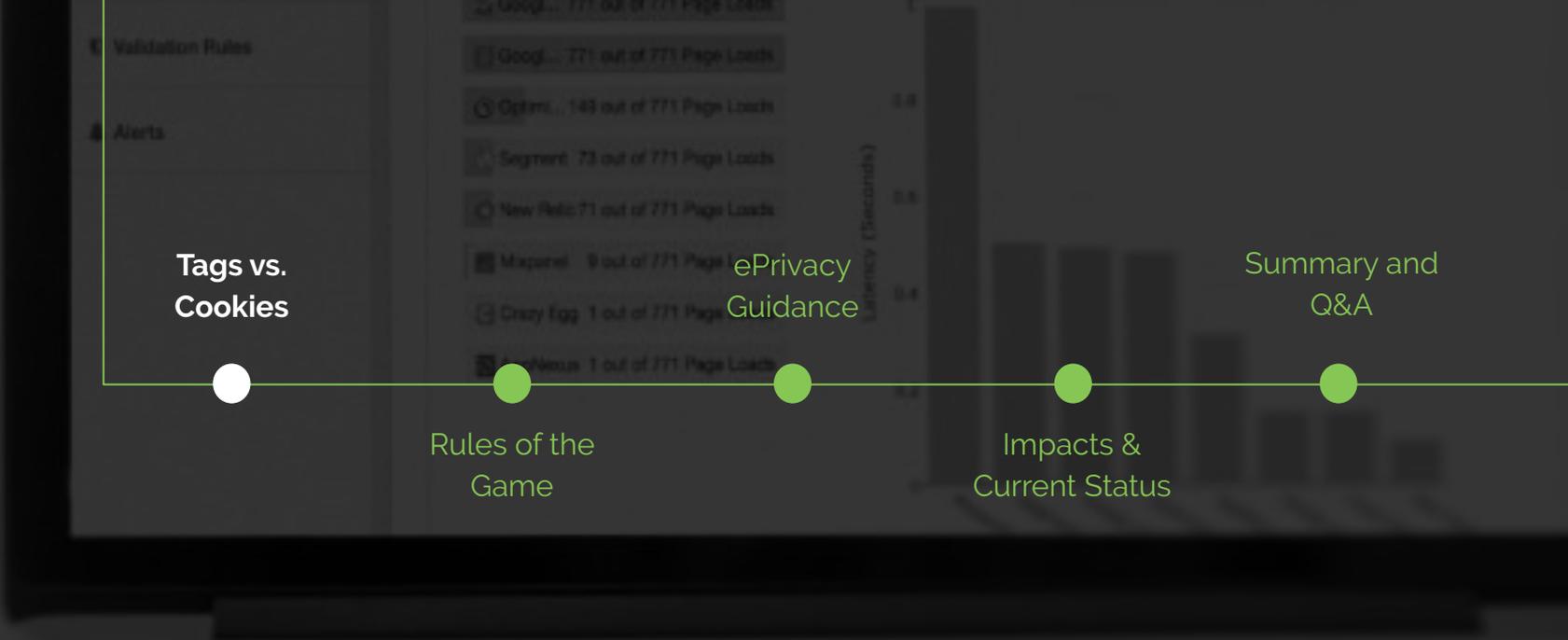
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Please obtain legal advice from legal counsel whenever taking action related to the law.



Agenda



Tags vs. Cookies

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wfscr.async = true;
wfscr.src = url + '&#x2013; + Math.random();
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  removeEvent(evts[i], logHuman);
}
};
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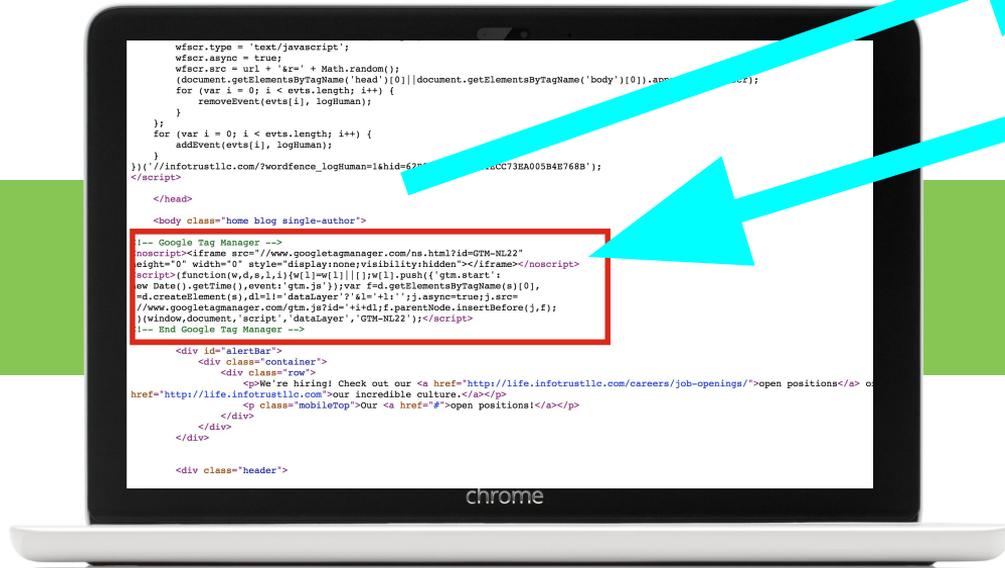
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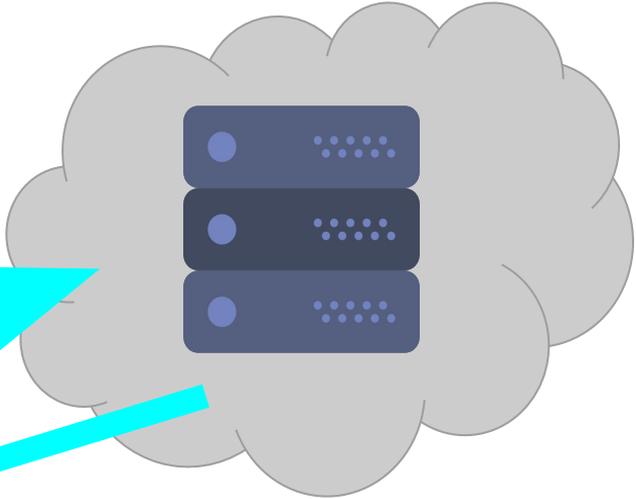
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    <div class="row">
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      href="http://life.infotrustllc.com">our incredible culture.</a></p>
      <p class="mobileTop">Our <a href="#">open positions!</a></p>
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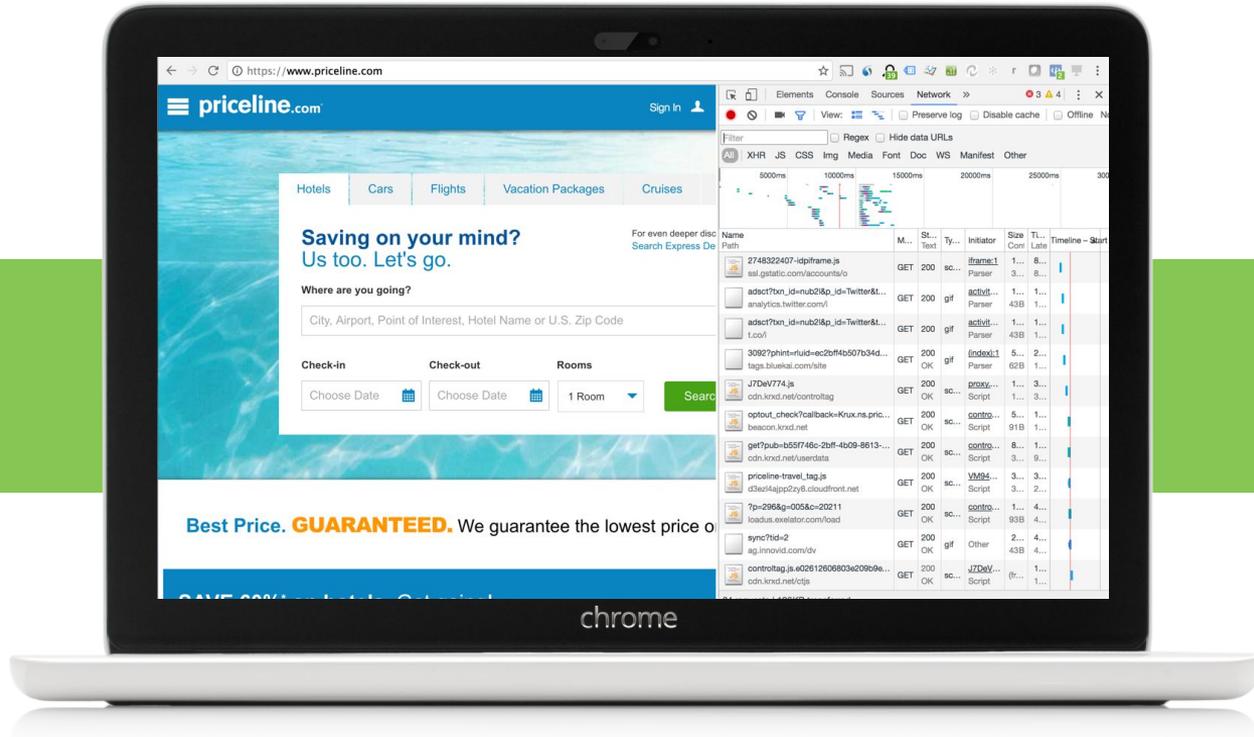
Tags vs. Cookies



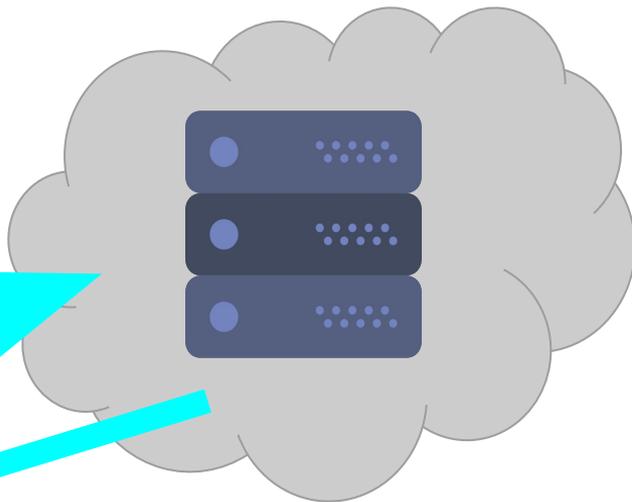
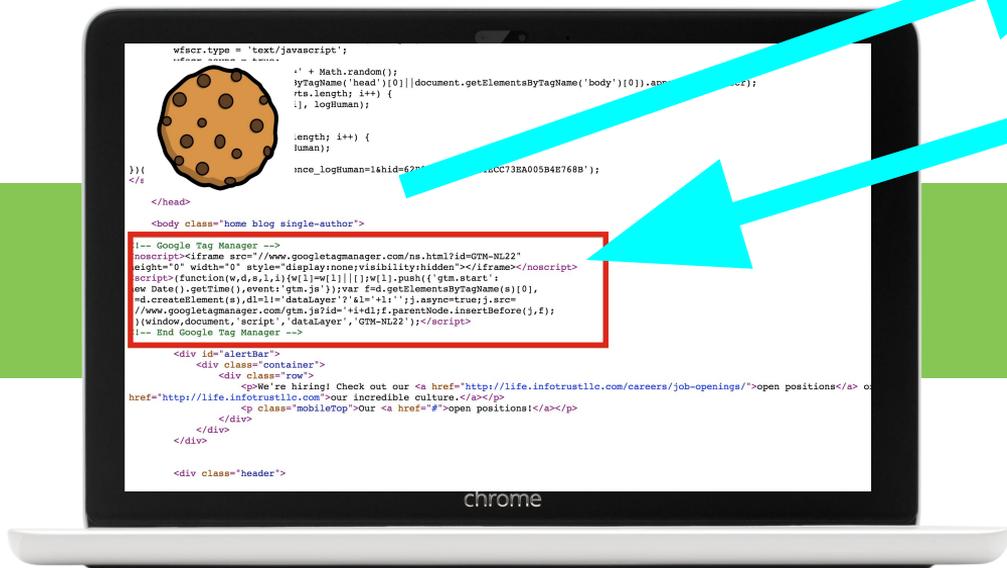
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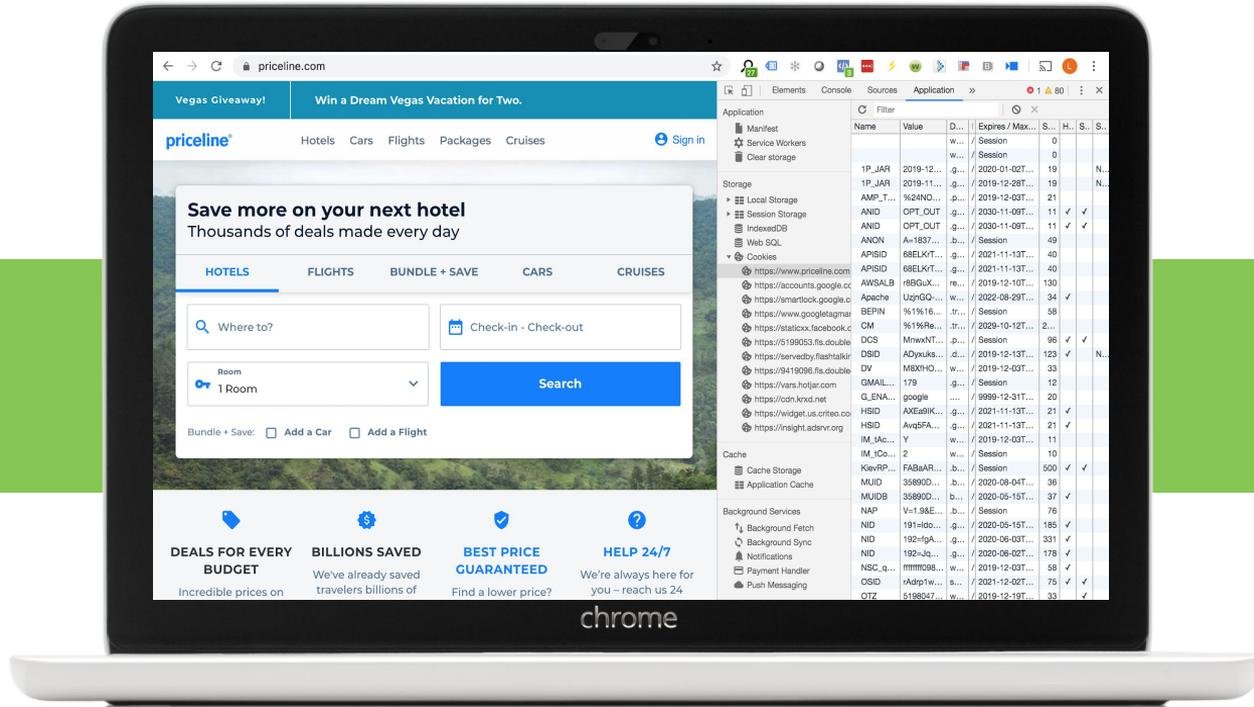
Tags vs. Cookies



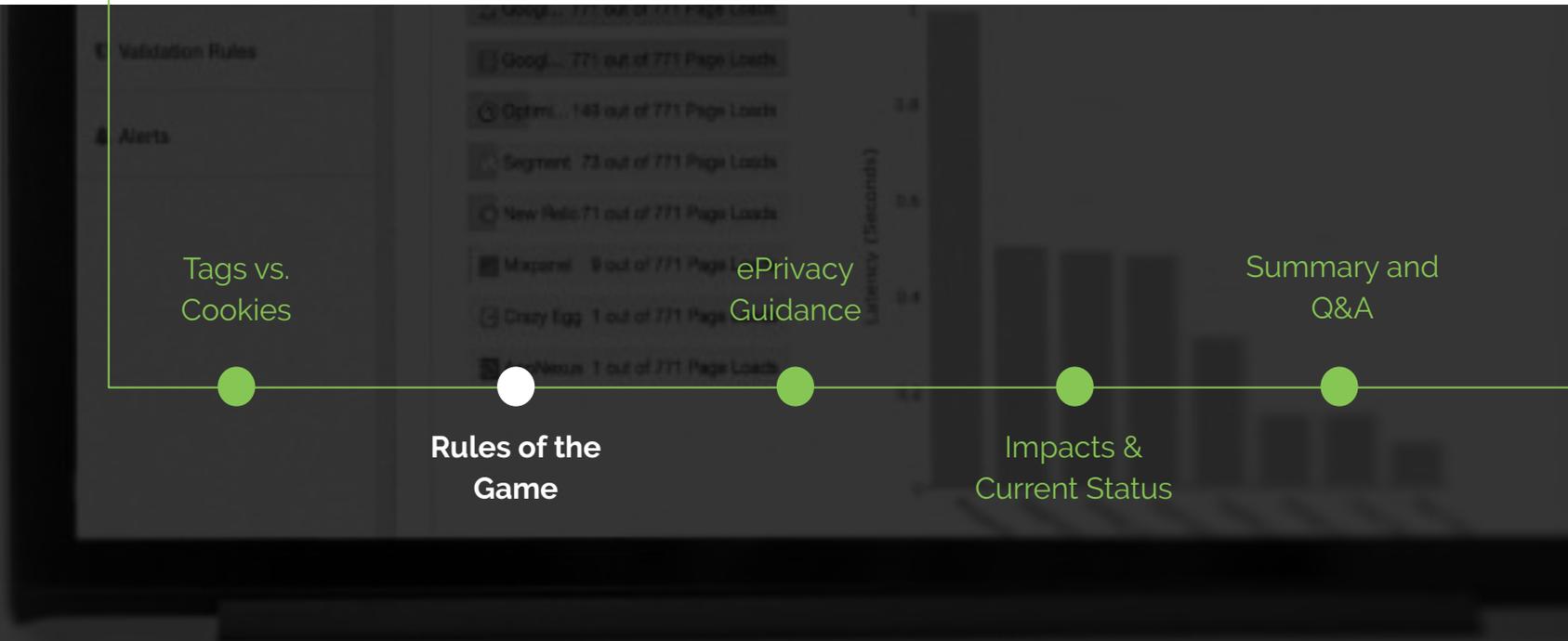
Tags vs. Cookies



Tags vs. Cookies



Agenda



Tags vs.
Cookies

Rules of the
Game

ePrivacy
Guidance

Impacts &
Current Status

Summary and
Q&A

Rules of the Game

- **California Consumer Privacy Act (CCPA)**
 - Goes into effect January 1, 2020 ; Enforcement begins July 1, 2020
- **General Data Protection Regulation (GDPR) (EU)**
 - Currently in effect
- **ePrivacy Directives (“Cookie Laws”) (EU)**
 - Currently in effect
- **Technology initiatives**
 - Apple **ITP** initiative mainly
 - Firefox ETP
 - Chrome (February 2020)
- Industry specific laws & regulations



California Consumer Privacy Act (CCPA)

1. The Right of Californians to know what personal information is being collected about them
2. The right of Californians to know whether their personal information is sold or disclosed and to whom
3. The right of Californians to say no to the sale of personal information
4. The right of Californians to access their personal information
5. The right of Californians to equal service and price, even if they exercise their privacy rights



GDPR

Rights for Individuals

1. Right to be informed
2. Right of access
3. Right to rectification
4. Right to erasure
5. Right to restrict processing
6. Right to data portability
7. Right to object
8. Rights in relation to automated decision making and profiling



ePrivacy Directives

“Cookie Laws”

- “...it is therefore of paramount importance that users be provided with clear and comprehensive information when engaging in any activity which could result in such storage or gaining of access. The methods of providing information and offering the right to refuse should be as user-friendly as possible...”
- “...The enforcement of these requirements should be made more effective by way of enhanced powers granted to the relevant national authorities.”



ePrivacy

Country Requirement Examples

- **UK** - "consent must be freely given, specific, and informed" ; "Unambiguous positive action" ; Recent clarification and guidance ties consent requirements to those outlined in GDPR for the use of any cookie not "strictly necessary"
- **Germany** - Consent only necessary for non-pseudonymised personal data ; users must be given the ability to opt-out or refuse cookies ; detailed cookie policy page must be available
- **Spain** - Consent to cookies can be implied when a user has been informed about the use of cookies and the ability to delete them, and they have to be given a method of opting-out of cookies
- **Sweden** - Consent can be communicated through browser settings ; information requirement still exists so users must be aware that cookies are being used
- **France** - Free, specific, informed consent must be given to set cookies. Must be a positive indication with the ability to not grant consent. Must have ability to opt-out.
 - Exception for anonymous analytics tracking - as long as anonymous and aggregate until a user grants consent



ITP

Considerations

- Apple's "Intelligent Tracking Prevention" initiative in Safari browsers on Mobile and Desktop
- **2.1**
 - Removes partitioned cookies altogether
 - If a domain classified as having cross-site tracking capabilities needs access to its cookies in a third-party context it must use the Storage Access API
 - New restrictions placed on first-party cookies set with client-side JavaScript
 - Sets a 7 day expiry on first-party cookies (all JavaScript cookies)
- **2.2**
 - As of ITP 2.2, persistent cookies set through document.cookie are capped to one day of storage when both of the following conditions are met:
 - A domain classified with cross-site tracking capabilities was responsible for navigating the user to the current webpage.
 - The final URL of the navigation mentioned above has a query string and/or a fragment identifier.

Practical Requirements

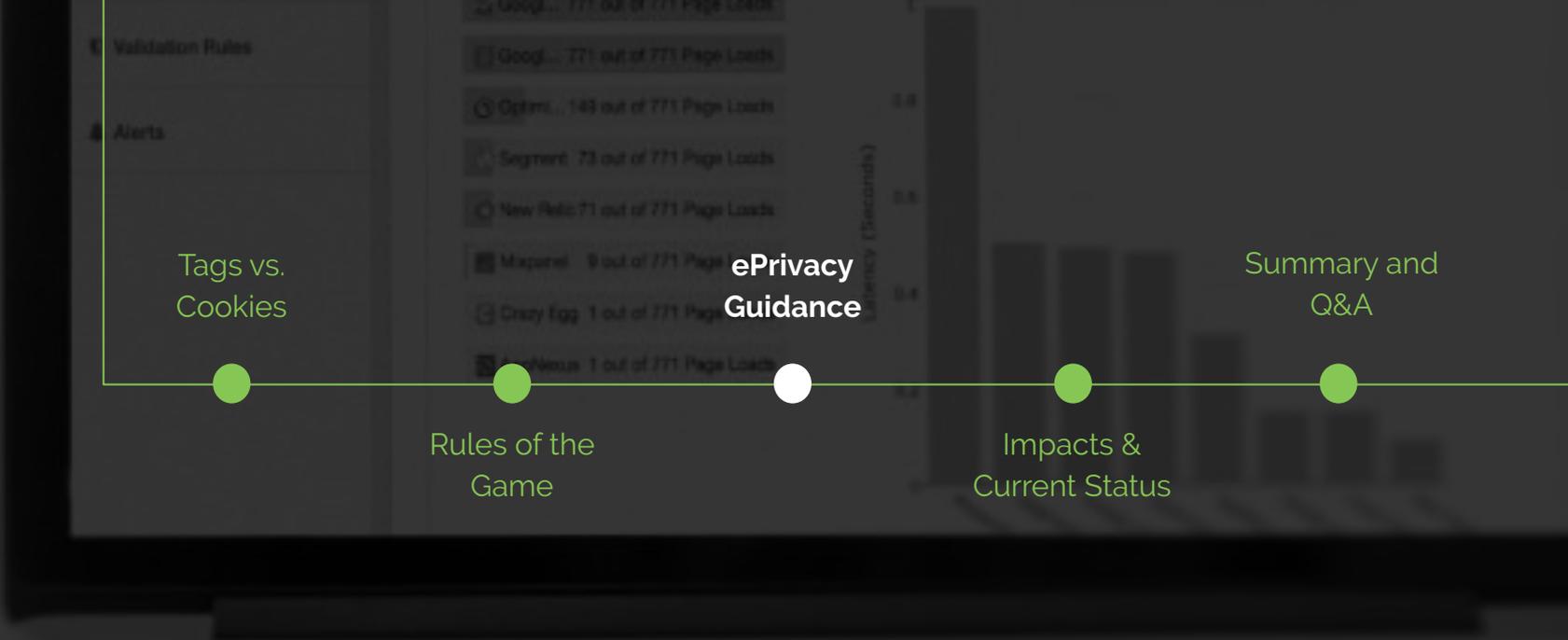
Three Core Principles

1. Transparency & Disclosure
 - a. At the point of collection
 - b. Reflected in Privacy Policy/Notice
2. Access rights
 - a. Direct requests from users
 - b. Data portability
3. Refusal/objection of processing
 - a. All processing activities (GDPR)
 - b. Refusal of sale of Personal Information (CCPA)
 - c. Consent for use of cookies (ePrivacy)
 - d. Technical limitations (ITP)

Consent Requirements

1. GDPR
 - a. Must have **Legal Basis for Processing** “Personal Data”
 - b. DOES NOT NECESSARILY MEAN “CONSENT”
 - c. User right to opt-out of **processing**
2. CCPA
 - a. User right to opt-out of **the sale** of “Personal Information”
3. ePrivacy
 - a. Requires **consent** for the use of cookies
 - b. What constitutes consent currently varies by country

Agenda



ePrivacy Guidance

ePrivacy Regulation Draft (Oct. 4, 2019)

- Consent for use of Cookies must be a GDPR-consent
 - Article 4(11) of GDPR: "'consent' of the data subject means any freely given, specific, informed and unambiguous indication of the data subject's wishes by which he or she, by a statement or by a clear affirmative action, signifies agreement to the processing of personal data relating to him or her."
- The draft explicitly indicates that consent can be obtained by "appropriate" technical settings of software.
- Recital 21 - addresses the issue of cookie walls (e., subjecting a service to consent for cookies used for advertising purposes).
 - The current draft suggests that this is indeed possible and that the required consent should not be considered invalid when the processing for advertising is "necessary" for the performance of the service.

ePrivacy Guidance

ICO UK

- **According to the ICO - “PECR requires that users or subscribers consent to cookies being placed or used on their device. There is no definition of consent given in PECR or in the ePrivacy Directive; instead, the GDPR definition of consent applies”**
- In respect of cookies, this means that:
 - The user must take a clear and positive action to give their consent to non-essential cookies – continuing to use your website does not constitute valid consent;
 - You must clearly inform users about what your cookies are and what they do before they consent to them being set;
 - If you use any third party cookies, you must clearly and specifically name who the third parties are and explain what they will do with the information;
 - You cannot use any pre-ticked boxes (or equivalents such as 'on' sliders) for non-essential cookies;
 - You must provide users with controls over any non-essential cookies, and still allow users access to your website if they don't consent to these cookies; and
 - You must ensure that any non-essential cookies are not placed on your landing page (and similarly that any non-essential scripts or other technologies do not run until the user has given their consent).

ePrivacy Guidance

Planet49 Case

- Planet49, a company registered in Germany, hosted a lottery on its website.
 - Name and address were required to register
 - Below name & address two conditions were listed:
 - First was un-ticked checkbox for consent to be contacted by sponsors
 - Second was pre-ticked for consent to the use of cookies
 - Participation only required the checking of the first checkbox/option
 - Case referred to the validity of consent for the use of cookies given the pre-ticked checkbox
- Advanced to the Court of Justice of the European Union - opinion made on October 1, 2019

ePrivacy Guidance

Planet49 Case

- Core court findings:
 - pre-ticked boxes do not amount to valid consent,
 - expiration date of cookies and third party sharing should be disclosed to users when obtaining consent,
 - different purposes should not be bundled under the same consent ask,
 - in order for consent to be valid 'an active behaviour with a clear view' of consenting should be obtained and,
 - these rules apply to cookies regardless of whether the data accessed is personal or not.
- **Paragraph 54** "In particular, Article 7(a) of Directive 95/46 provides that the data subject's consent may make such processing lawful provided that the data subject has given his or her consent 'unambiguously'. Only active behaviour on the part of the data subject with a view to giving his or her consent may fulfil that requirement."
- **Paragraph 55** "In that regard, it would appear impossible in practice to ascertain objectively whether a website user had actually given his or her consent to the processing of his or her personal data by not deselecting a pre-ticked checkbox nor, in any event, whether that consent had been informed. It is not inconceivable that a user would not have read the information accompanying the preselected checkbox, or even would not have noticed that checkbox, before continuing with his or her activity on the website visited."

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Impact & Implications

Consent considerations

Consent management systems

“Cookie-less” data collection

Tag management policy & process

Accountability

Ongoing monitoring



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