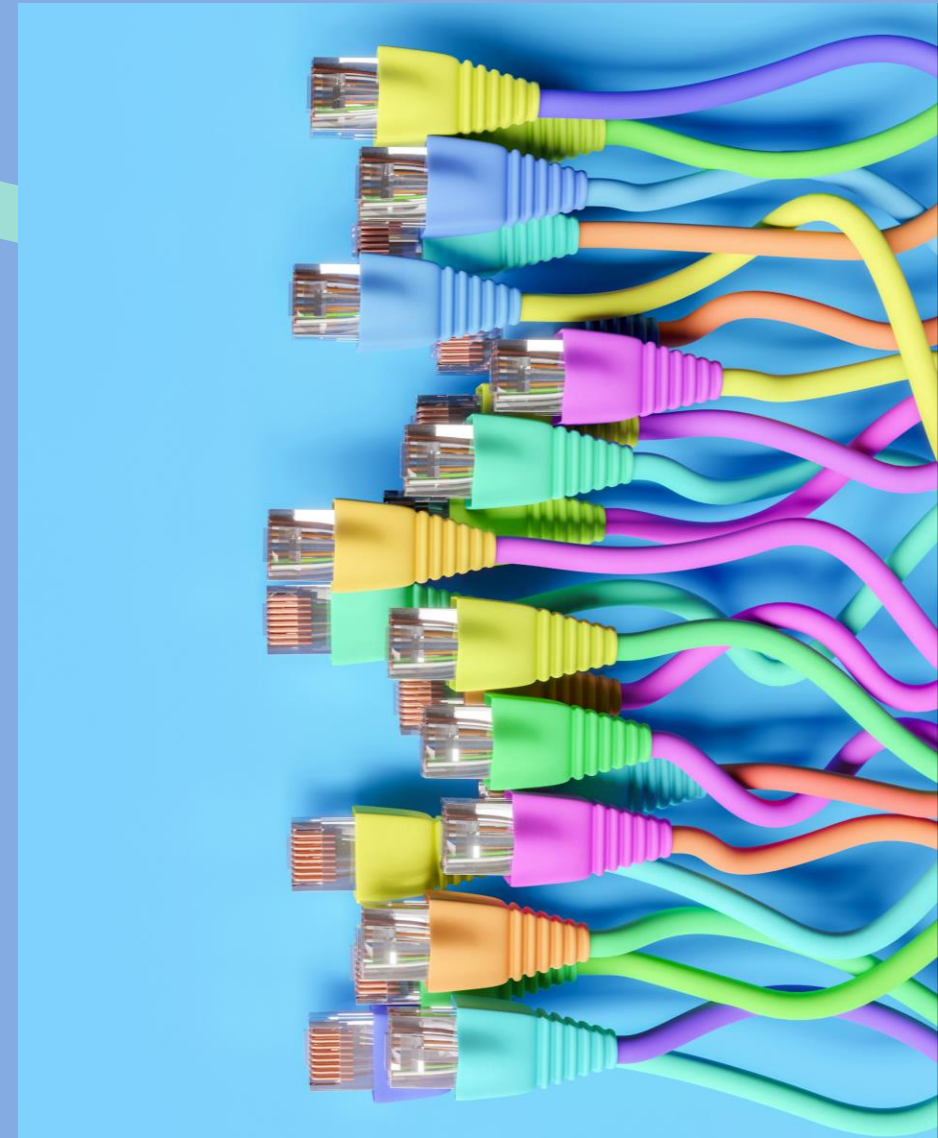


Bird & Bird

Pixels in the Inbox - The Emerging European Regulations of Tracking Pixels in Email

Bird & Bird & ArentFox Shiff



Introductions



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Agenda

1

What are tracking pixels in email, and why do they matter?

2

The Regulatory Landscape in Europe

3

Complying in Practice

4

Q&A

An opportunity at the end to raise any outstanding questions.



What is a tracking pixel?



An invisible 1 × 1 pixel image

Embedded in the body of an email, it loads from a remote server when the message is opened.

Its name contains an identifier unique to the recipient: the sender therefore knows, person by person, who opened the message.

WHAT THE PIXEL REVEALS

- ✓ The opening of the email (and repeat opens)
- 🕒 The date and time of reading
- 📍 Approximate location (via the IP address)



Why are Authorities taking action ?

- 1 A rapidly growing practice**
Personalisation, audience measurement, deliverability... an increasingly systematic practice.
- 2 Email is a private space**
The mailbox is used to view personal content: tracking there is particularly intrusive.
- 3 A surge in complaints**
The French authority has for example announced audits on this topic in the coming months.

**What are the
applicable European
laws for Tracking
Pixels?**



The European Legal Landscape

Instrument	What it governs	Relevance to tracking pixels
GDPR Regulation 2016/679	EU-wide rules on the processing of personal data.	Sets the legal basis, data minimisation, retention limits and individuals' rights for any data the pixel collects.
ePrivacy Directive Directive 2002/58/EC	Applies to any storage of, or access to, information on a user's terminal equipment	Article 5(3) requires in principle that consent is collected prior to any storage of, or access to, information on a user's terminal equipment unless exemptions applies.
National implementations PECR (UK), Art. 82 LIL (France)	Member-State laws transposing the ePrivacy Directive.	Set the binding consent rules actually applied and enforced in each country.
EDPB guidelines e.g. Guidelines 2/2023	Common interpretation across the EU.	Clarify how Art. 5(3) ePrivacy applies to tracking techniques, including email pixels.
Authority guidance e.g. CNIL, ICO, Garante	National regulators' recommendations and decisions.	Practical expectations and the basis for audits and enforcement actions.

The Consent regime applies to tracking pixels



Art. 5(3) ePrivacy

Principle: prior consent

Unless exempt, reading or writing information on the device requires the person's consent (exactly as for a cookie).



EDPB – European Data Protection Board) Guidelines 2/2023

Technical scope of tracking

The remotely loaded pixel falls within the « storage / access » scope covered by the ePrivacy Directive.



GDPR (GDPR – Regulation 2016/679)

« Personal data » layer

Beyond storage: legal basis for processing, data minimisation, retention period, information and individuals' rights.

CNIL Recommendation: who is in scope?

Actor	Role under the data protection rules
Email sender	Controller: determines the purposes and means of the pixel's use. Remains responsible even when outsourcing to third parties such as emailing service providers.
Email service provider (ESP)	Processor: generally acts on behalf of, and on the instructions of, the controller.
Mailing-list / rental provider	Processor or joint controller: a processor when acting for the customer, but a joint controller where it uses pixels for its own purposes (e.g. improving mailing-list relevance).
Tracking-technology supplier	Processor or joint controller: a processor when acting exclusively for the sender; a joint controller where it also uses the data for its own ends, e.g. to improve its solution.
Inbox / email service provider	Neither: a technical intermediary only; it does not use the pixel data, so is neither processor nor controller.

CNIL: What Purpose Needs Consent?



Prior consent required

- ✗ Analysis of the email opening rate to measure and optimise the performance of campaigns
- ✗ Content personalisation based on behaviour
- ✗ Detection and analysis of suspected fraud,
- ✗ Deliverability measurement outside the strict exemption framework

B2B is covered as soon as a personal address is involved (firstname.lastname@company).



Strictly defined exemptions



« **Transactional** » **emails:** Service requested by the recipient: order confirmation, invoice, parcel tracking, password reset, security alert...

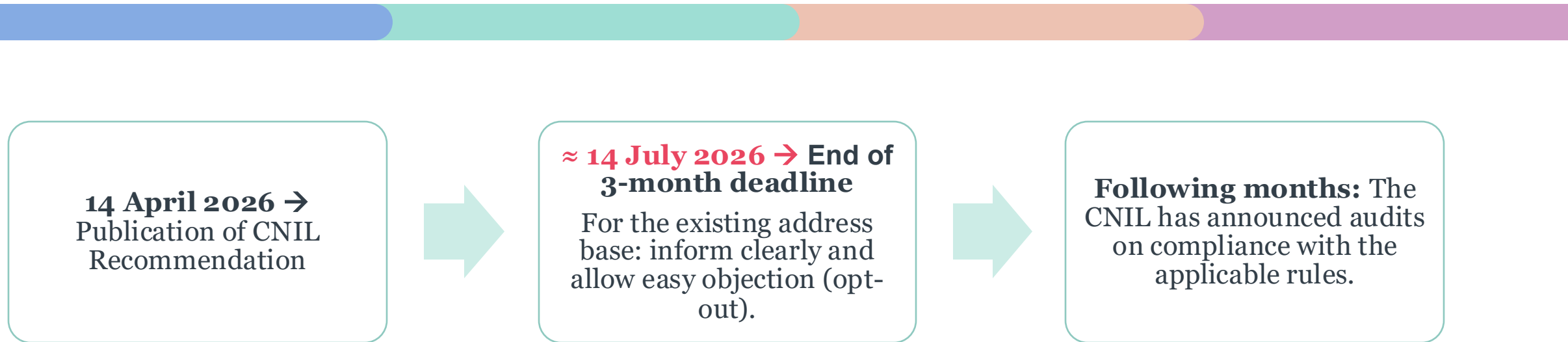


Individual deliverability measurement: Identify inactive recipients to remove them from lists and preserve sending reputation, with data limited to what is strictly necessary (in principle only the date of the last known opening of the email overwritten at each new opening with deletion of the previous one)



Security / Authentication: The implementation of security measures involved in user authentication

CNIL Pixel Recommendation Timeline



Italy's Approach

In April 2026 the Italian Data Protection Authority (the “Garante”) has adopted New Guidelines on the use of “tracking pixels” in email communications

	Italy - Garante
Who is covered	All entities using pixels in email communications: ISPs, online services, email providers, mass mailing platforms
Consent	Art 122 Italian privacy code: general prohibition on the use of tracking pixels in emails without consent of individuals, subject to three exceptions: • processing necessary for electronic communication transmission, • processing necessary to provide a requested online communication service, or • prior informed and unambiguous user consent
Transparency	Clear role definitions for each actor; layered information recommended
Consent withdrawal	Documented procedures for collecting, withdrawing and evidencing consent
Effectiveness	6 months compliance deadline from publication (i.e. by ~17 October 2026)

New tracking pixels guidance

Side by Side Comparison

	France - CNIL	Italy - Garante
Who is covered	All entities deploying tracking pixels, including third-party data brokers in the pixel chain	All entities using pixels in email communications: ISPs, online services, email providers, mass mailing platforms
Legal basis	Consent required unless purpose falls within a recognised exemption (e.g. mailing list clean-up)	Art 122 Italian privacy code: general prohibition on the use of tracking pixels in emails, subject to three exceptions (processing necessary for electronic communication transmission, processing necessary to provide a requested online communication service, or prior informed and unambiguous user consent), with consent being the mandatory legal basis in all cases where neither of the other exceptions applies.
Transparency	Clear role definitions for each actor; layered information recommended	Clear role definitions for each actor; layered information recommended
Consent withdrawal	Documented procedures for collecting, withdrawing and evidencing consent	Documented procedures for collecting, withdrawing and evidencing consent
Effectiveness	Recommendations published following public consultation	6 months compliance deadline from publication (i.e. by ~17 October 2026)

The United Kingdom's Position

ICO Guidance

- On 29 April 2026, the ICO finalised its **guidance** on the use of storage and access technologies following two consultations.
- PECR applies to tracking pixels, and the default position is that unless an exemption applies: "you must tell the subscriber or user what the technologies are; explain what they do; and obtain prior consent for their use".

PECR (Post-Data Use and Access Act)

Five exceptions to the requirement of needing consent:

- for the sole purpose of **the transmission of a communication**;
- **strictly necessary** to provide the service the subscriber or user requests
- for the sole purpose of collecting **statistical information** about visitors to your service, with a view to improving it
- for the sole purpose **of improving or adapting the appearance or functionality** of the service to the subscriber's or user's preference
- for the sole purpose **of identifying the location** of a subscriber or user who requires **emergency assistance**

**How to collect
Consent in
compliance with the
relevant laws?**



Consent in Practice - Collection



Valid consent

Freely given, specific, informed and unambiguous.
Collected **BEFORE** any pixel is placed, through a clear affirmative action: never pre-ticked boxes, never consent « bundled » with anything else.



Clear information

Explain what the pixel is, the identity of the controller, each purpose pursued and any third-party recipients, at the right time and in understandable terms.



Withdrawal just as easy

Withdrawing consent must be **as easy as giving it**, at any time, and effective (genuinely stopping the tracking of future emails).



Proof retained

The controller must be able to **demonstrate**, at any time, that consent was validly collected (traceability, timestamping, banner version).

When Consent Can or Cannot Be Bundled Into One Single Tick Box

Separate consent is required where processing serves different purposes. A single consent may be used where several processing activities support the same purpose.



Cannot Be Bundled

- Consent tied to Terms & Conditions
- “Take it or leave it” consent walls service access conditioned on accepting all purposes at once
- Asymmetric choices: “Accept all” in one click vs. “Manage preferences” requiring multiple steps
- Cookie banners bundling tracking, analytics and advertising into one acceptance with no granular options



Can Be Bundled (Limited)

- Closely linked, inseparable purposes: activities so intrinsically linked that one cannot meaningfully exist without the other (a narrow, genuinely justified exception)
- Single, clearly defined purpose
- Layered consent: a bundled “Accept all” is permissible only alongside equally accessible granular toggles per purpose (the model most DPAs require)

Practical Examples from the CNIL (1/4)

Recommended approach at the time of email collection: distinct consent for each purpose:

Créer mon compte

Mes informations

Adresse email

☐ I agree that my email address is used to send me product recommendations

☐ I agree that company XXX analyses the open rates of emails to **measure and optimise the performance of campaigns** and **to better target other content**. We use trackers (pixels) in our emails. To find out more about these trackers, please consult our privacy policy.

Purpose 1: to measure and optimise the performance of campaigns by personalising the content of messages or by adapting the frequency of sending or the communication channel.

Purpose 2: The creation of profiles of recipients based on the preferences and interests expressed in order to target them in other contexts than emails (on websites, mobile applications or via other channels of communication).

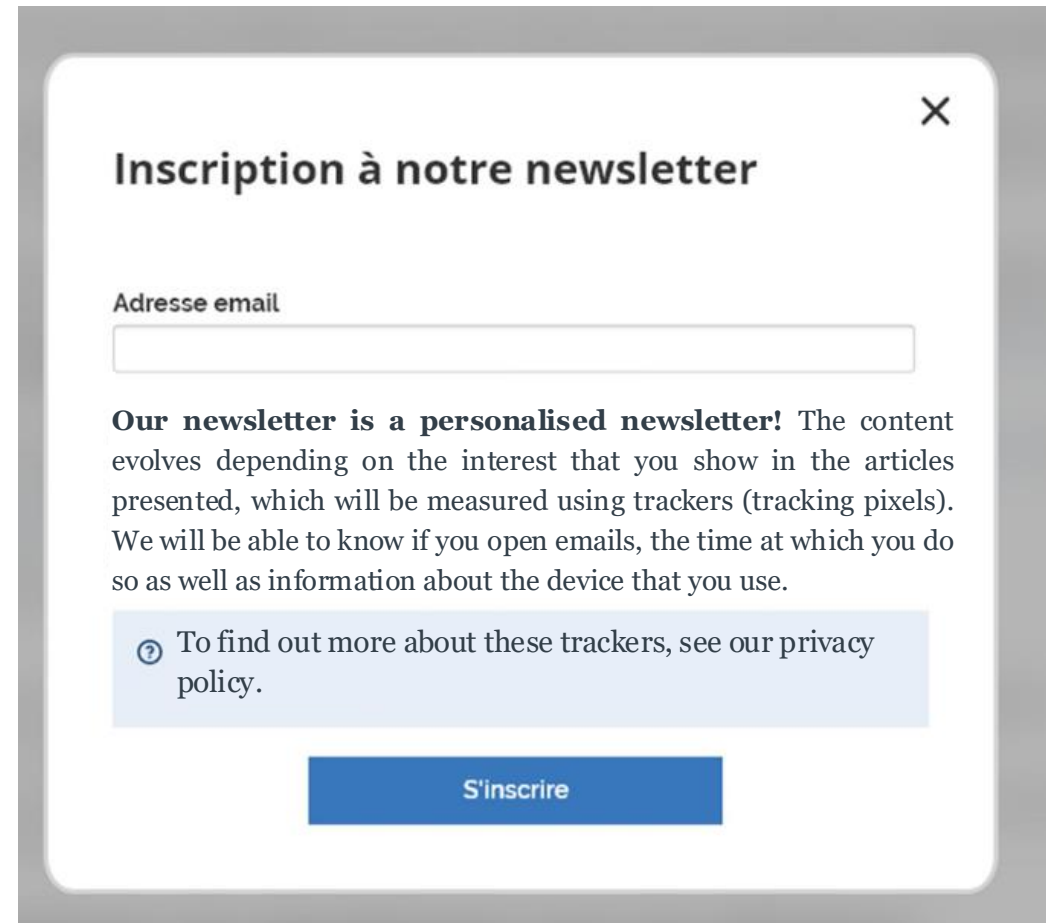
Practical Examples from the CNIL (2/4)

Single Consent Approach → possible only if the purposes are connected.

Example:

- Where direct marketing is expressly presented as personalised, consent to such marketing and the use of tracking pixels directly contributing to such personalisation (e.g. for personalising content or adapting the sending frequency) may be covered by a single consent.

The CNIL points out that advertising, personalised or contextual, **displayed in online advertising banners** (also known as display advertising) and **commercial prospecting** are two separate purposes.



Inscription à notre newsletter

Adresse email

Our newsletter is a personalised newsletter! The content evolves depending on the interest that you show in the articles presented, which will be measured using trackers (tracking pixels). We will be able to know if you open emails, the time at which you do so as well as information about the device that you use.

[To find out more about these trackers, see our privacy policy.](#)

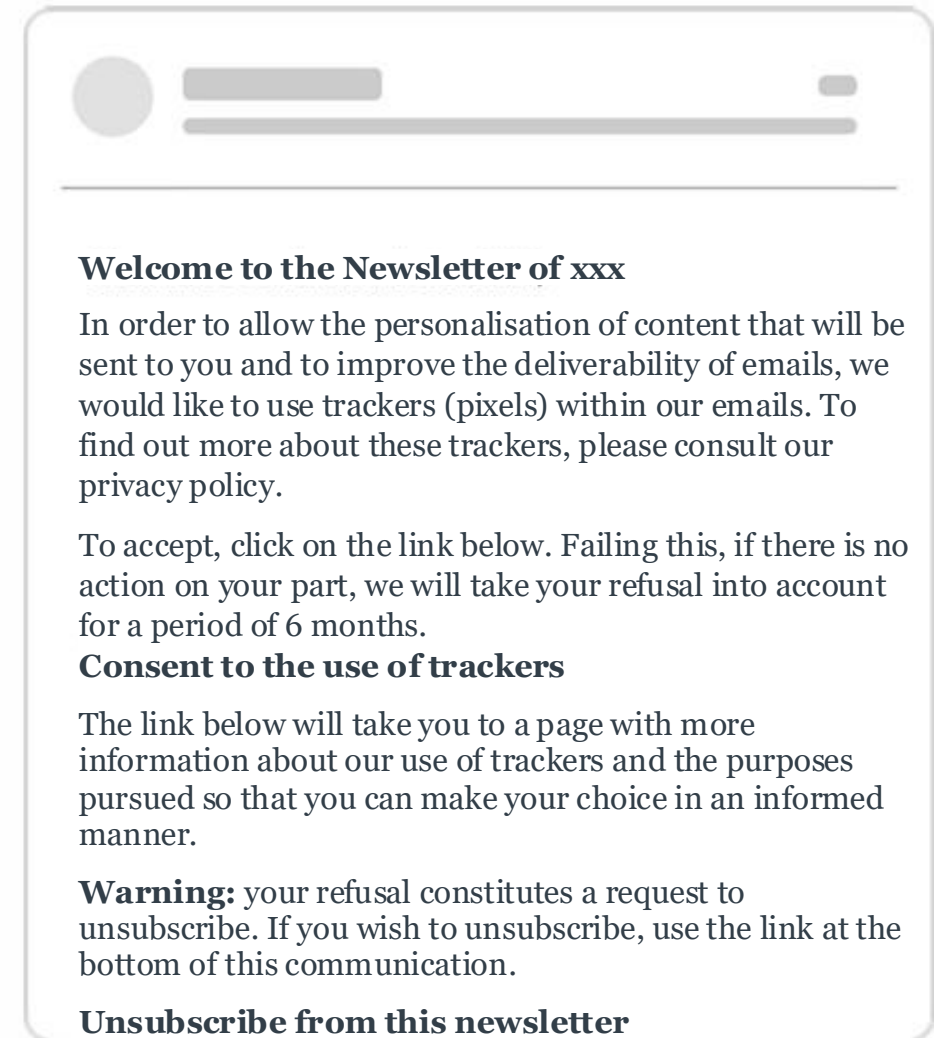
S'inscrire

Practical Examples from the CNIL (3/4)

Collect consent later via a link embedded in an email without a tracking pixel.

The use of this method of collection is appropriate in the following situations:

- To be able to use pixels subject to consent in emails sent to an email address, where that consent was not collected at the time of collection.
- Where the email address is collected by a third party without providing proof of consent for tracking pixels.
- When the email address is collected under conditions that make it difficult to obtain valid consent for tracking pixels (e.g. when the address is collected orally).



Practical Examples from the CNIL (4/4)

Collecting consent to pixels via a consent management platform (CMP)

Problem 1 : Consent Disconnected From the Email Address:

The collection of consent to pixels takes place, in certain cases, in a decorrelated manner from the collection of the email address.

Problem 2 : Difficulty for the User in Understanding the Scope of Consent

The 'informed' nature of consent presupposes, in particular, that the person easily understands the scope of their consent.

Best Practice Examples (1/2)

← ↻ 🏠 🔒 https://commande.dominos.fr/checkout



<

Nou
Vous

Se connecter

Livraison, Maint
2 Rue d'Alleray 750

Mes information
Champ obligatoire

Instructions de li

Conditions géné

En poursuivant ma co
générales de vente et
de la notice données

Mes informations

✕

Email

Enter your email address (required)

☐ Enregistrer mes coordonnées pour les commandes futures

 CLUB VIP
Bénéficiez d'offres exclusives et de bonnes affaires

☐ J'accepte de recevoir des offres personnalisées de Domino's par email et sur les plateformes en ligne dont les réseaux sociaux. J'accepte que Domino's puisse suivre mes interactions avec ces messages (comme leur ouverture et les clics) afin de personnaliser les communications en fonction de mes centres d'intérêt. Je peux me désinscrire à tout moment via le lien présent en fin d'email.

☐ J'accepte de recevoir des offres personnalisées de Domino's par SMS. Je peux me désinscrire à tout moment

Confirmer

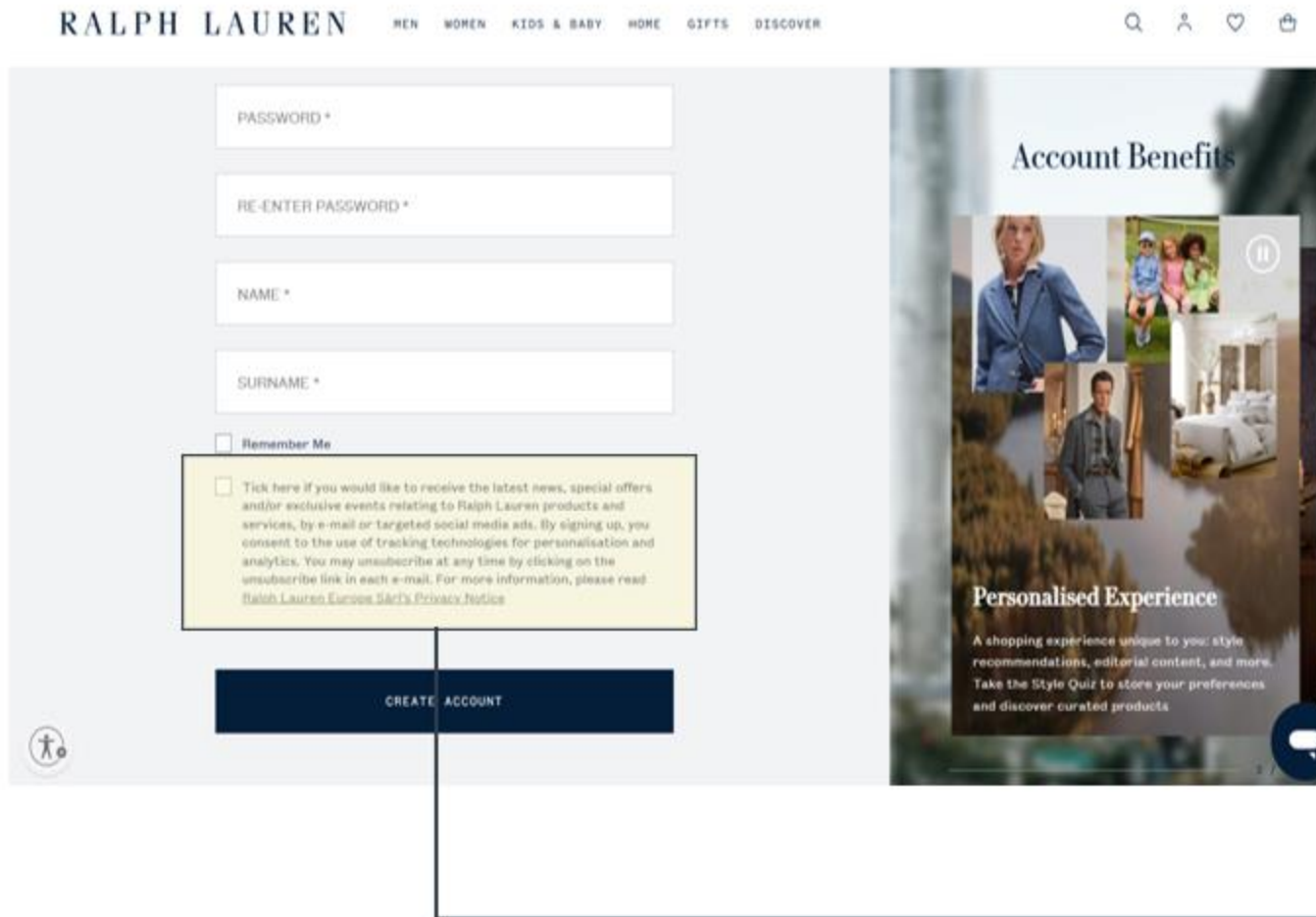
"VIP CLUB

Benefit from exclusive offers and great deals

☐ *I agree to receive personalised offers from Domino's by email and on online platforms, including social media. I agree that Domino's may track my interactions with these messages (such as opens and clicks) in order to personalise communications based on my interests. I can unsubscribe at any time via the link included at the end of each email.*

☐ *I agree to receive personalised offers from Domino's by SMS. I can unsubscribe at any time."*

Best Practice Examples (2/2)



The image shows a screenshot of the Ralph Lauren website's account creation page. The top navigation bar includes the brand name 'RALPH LAUREN' and links for 'MEN', 'WOMEN', 'KIDS & BABY', 'HOME', 'GIFTS', and 'DISCOVER'. To the right are icons for search, user profile, heart, and shopping bag. The main form area on the left contains input fields for 'PASSWORD *', 'RE-ENTER PASSWORD *', 'NAME *', and 'SURNAME *'. Below these is a 'Remember Me' checkbox and a consent box with a checkbox and text about receiving news and offers, and consenting to tracking technologies. A 'CREATE ACCOUNT' button is at the bottom. To the right is a vertical banner titled 'Account Benefits' and 'Personalised Experience' with images of clothing and a bed. A line connects the consent checkbox to the text on the right.

RALPH LAUREN

MEN WOMEN KIDS & BABY HOME GIFTS DISCOVER

PASSWORD *

RE-ENTER PASSWORD *

NAME *

SURNAME *

☐ Remember Me

☐ Tick here if you would like to receive the latest news, special offers and/or exclusive events relating to Ralph Lauren products and services, by e-mail or targeted social media ads. By signing up, you consent to the use of tracking technologies for personalisation and analytics. You may unsubscribe at any time by clicking on the unsubscribe link in each e-mail. For more information, please read [Ralph Lauren Europe Sàrl's Privacy Notice](#)

CREATE ACCOUNT

Account Benefits

Personalised Experience

A shopping experience unique to you: style recommendations, editorial content, and more. Take the Style Quiz to store your preferences and discover curated products

"Tick here if you would like to receive the latest news, special offers and/or exclusive events relating to Ralph Lauren products and services, by e-mail or targeted social media ads. By signing up, you consent to the use of tracking technologies for personalisation and analytics. You may unsubscribe at any time by clicking on the unsubscribe link in each e-mail. For more information, please read Ralph Lauren Europe Sàrl's Privacy Notice"

Your roadmap in 6 steps



1. Map

Identify every pixel: your own and those of third parties; confirm the purpose(s) of each



2. Classify

Is the purpose exempt or does it require? Document analysis



3. Build consent tooling

Set up granular, freely given and unambiguous collection, and equally simple withdrawal, purpose by purpose.



4. Update the information

Privacy policy and notices: nature of the pixel, purposes, recipients, retention periods.



5. Handle the existing base

Inform existing databases and offer easy objection (opt-out).



6. Keep the proof

Log and timestamp consents; archive banner versions and records to respond to an audit.

Q & A





Thank you

twobirds.com

● *Abu Dhabi* ● *Amsterdam* ● *Beijing* ● *Bratislava* ● *Brussels* ● *Budapest* ● *Casablanca* ● *Copenhagen* ● *Dubai* ● *Dusseldorf* ● *Frankfurt* ● *The Hague*
● *Hamburg* ● *Helsinki* ● *Hong Kong* ● *London* ● *Luxembourg* ● *Lyon* ● *Madrid* ● *Milan* ● *Munich* ● *Paris* ● *Prague* ● *Rome* ● *San Francisco* ● *Shanghai*
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