

Cookies with Bite: CJEU Rules that Cookies Require Active Consent

Europe's highest Court has found that a pre-selected cookies checkbox does not constitute valid consent for cookies to be placed on a website user's browser.

An important decision handed down by Europe's highest Court, the Court of Justice of the European Union ("**CJEU**") on 1 October 2019, ends a growing debate about the type and quality of consent which website owners must obtain before they can place cookies on the web browsers of website users. In *Case C-673/17 Bundesverband der Verbraucherzentralen und Verbraucherverbände Verbraucherzentrale Bundesverband eV v Planet49 GmbH*, the CJEU determined that Directive 2002/58 (the "**ePrivacy Directive**"), read in conjunction with Regulation 2016/679 ("**GDPR**") and Directive 95/46 (the "**Data Protection Directive**", now repealed and replaced by the GDPR), must be interpreted as meaning that consent to cookies is only validly constituted if the website user has given her or his consent actively and "*consent given in the form of a preselected tick in a checkbox does not imply active behaviour on the part of the website user*".

What are cookies again?

For those that can't remember (or would rather forget), cookies are small text files that are placed in a web browser on a PC, smartphone, tablet or other device which helps the website to "remember" actions or preferences over time. There is an array of different types of cookies. Cookies which are:

- a. used for the sole purpose of carrying out the transmission of a communication; or
- b. strictly necessary in order for the website service provider to provide its service to the website user;

fall outside of the remit of this week's CJEU judgment and do not require the consent of the website user to be placed on the user's browser. Examples of strictly necessary cookies include user input cookies, authentication cookies and multimedia content player cookies such as flash player cookies.

This week's judgment concerns all other types of cookies, i.e. non-necessary cookies, which include advertising or tracking cookies that allow website operators to analyse a user's behaviour and gather information on the user in order to optimise its advertising. Cookies which fall under this "non-essential" category include any type of advertising cookie, social media cookies and analytical cookies.

Background to the Case

On its website www.dein-macbook.de, Planet49 GmbH organised a promotional lottery in which participants submitted their names and postcodes, and were presented with two checkboxes. The first checkbox was not pre-ticked, and asked users to consent to receiving marketing messages from various third parties. The Court noted that *“participation in the lottery was possible only if at least the first checkbox was ticked”*. The second checkbox was **pre-ticked** and asked for users’ consent to the **use of cookies for advertising purposes**, along with a link to a description of the cookies and information about how to delete cookies. Website users could still participate in the promotional lottery without ticking the second checkbox.

The Bundesverband der Verbraucherzentralen und Verbraucherverbände Verbraucherzentrale Bundesverband eV (**“German Consumer Protection Agency”**) sought an injunction against Planet49 GmbH asserting that the first and second checkboxes did not satisfy, amongst other domestic legislative requirements, valid consent for the purposes of the ePrivacy Directive, in light of the Data Protection Directive and the GDPR. The matter went through the German courts until a preliminary reference was sent to the CJEU from the Federal Court of Justice, Germany.

Important Takeaways from the Judgment – What do Website Operators Need to do for Compliance?

1. Active consent is required if you want to use non-essential cookies

The CJEU made it clear that *“action is required on the part of the user in order to give his or her consent”*. The Court summarised that *“active, rather than passive, behaviour”* on the part of the website user is required and that 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”*.

The key takeaway for website operators is that, when installing non-essential cookies on a website browser:

- a. pre-selected / pre-ticked boxes for non-essential cookies cannot be relied upon as a means of obtaining consent; and
- b. cookie banners should necessitate *“active behaviour”* on the part of the website user – the CJEU did not elaborate as to what this might look like, but the website user should be actively choosing to consent (e.g. by ticking a box) before any non-essential cookies are deployed on its browser. Although not specifically discussed, some commonly used approaches to obtain a website user’s consent (e.g. consenting purely by using a service, remaining or scrolling down a webpage) are confirmed as being insufficient in light of this judgment.

2. The consent requirements apply irrespective of whether the website provider is collecting personal or non-personal data

The Court pointed out that its decision is unaffected irrespective of whether the information stored or accessed on the user’s equipment is personal data. EU law aims to protect the user from any interference within his or her *“private sphere”*, in particular, from the risk that hidden identifiers and other similar devices enter those users’ terminal equipment without their knowledge. This means any data collected in the form of non-essential cookies requires the active consent of the website user.

3. Cookies policies must set out how long the non-essential cookie will be on a browser and whether third parties will have access to the data collected

The CJEU noted that this information must be regarded in this case as “meeting the requirement of fair data processing” which links to the enhanced transparency requirements set out in Article 13 of the GDPR.

Conclusion

The judgment does not come as a surprise as it follows the opinion of the Advocate General delivered 21 March 2019 and mirrors recent guidance issued by a number of EU data protection authorities. Nevertheless, this judgment is a significant milestone as it sees the CJEU taking a definitive stance as to appropriate standard and quality of consent needed for non-essential cookies. Website operators should be left in no doubt as to next actions – review website cookie materials as soon as possible or run the risk of fines.

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